

(1995) 10 MAD CK 0048
In the Madras High Court

Southern Steel Industries

APPELLANT

Vs

The Appellate Assistant Commissioner (C.T.) and Another

RESPONDENT

Date of Decision : 10-10-1995

Acts Referred:

Income Tax Act, 1922 — Section 33(4)
Tamil Nadu General Sales Tax Act, 1959 — Section 12(3)

Citation : (1996) 1 MLJ 94

Hon'ble Judges : Shivaraj Patil, J

Bench : Division Bench

Judgement

Shivaraj Patil, J.—The petitioner has sought for a writ of certiorarified mandamus to call for the records of the first respondent in his proceedings A.P. No. 7 of 1991 and quash the order dated 17.3.1994 as illegal and void, and further to direct the first respondent to rehear the appeal in accordance with the provisions of the Act after granting one more opportunity to the petitioner.

2. Briefly stated, the facts giving rise this writ petition are as under: The petitioner is a registered dealer under the provisions of the Tamil Nadu General Sales Tax Act, 1959, herein-after referred to as "the Act". The petitioner is an assessee and is engaged in the manufacture of M.S. Rounds. It is purchasing raw materials in the form of scraps and converts them into M.S. Rounds. The second respondent based on an inspection dated 30.9.1989 proposed to reject the reported turnover on the basis of the inspection made by the Enforcement Officials which revealed certain defects. Hence he issued a pre-assessment notice proposing to reject the books and the returns filed by the petitioner and to determine the taxable total turnover to the best of his judgment.

3. The petitioner filed its objections dated 10.1.1990 explaining its case, and contended that the incorrect arrival of the variations in the stocks at the time of inspection, in the absence of any purchase or sales omissions, should not be taken to the advantage of the second respondent to clutch upon the jurisdiction of best judgment assessment. The second respondent did not accept the

objections of the petitioner and confirmed the proposal by making a best judgment assessment, and by the very same order he imposed heavy penalty u/s 12(3) of the Act.

4. The petitioner, aggrieved by the said order of the second respondent dated 14.12.1990 preferred a statutory appeal before the first respondent in Appeal No. 7 of 1991. Before the first respondent, the petitioner appointed a Sales Tax Practitioner for representing it. The first respondent fixed the date of hearing and intimated it to the petitioner through the authorised representative. The appeal was posted on various dates. When there was no representation on behalf of the petitioner the appeal was dismissed for default by the first respondent on 17.3.1994. It is that order, the validity and correctness of which, is questioned in this writ petition. The petitioner has pleaded several circumstances as to how the representative of the petitioner did not inform it and so also as to how its clerk who was entrusted with the work of taking copy of the impugned order did not follow the same properly and ultimately he died. Thus the petitioner could not file further appeal within the time prescribed for such appeal.

5. Under the circumstances, this writ petition is filed contending that,

(i) The first respondent could not dismiss the appeal by passing an ex parte order contrary to the provisions of Section 31 of the Act;

(ii) The first respondent acting as a quasi-judicial authority, exercising power u/s 31 of the Act was obliged to effectively evaluate the grounds raised in the appeal and decide them on merits instead of passing an ex parte order of dismissal of appeal for default for non-appearance;

(iii) The action of the first respondent in denying the rightful opportunity to the petitioner and the non-consideration of the grounds of appeal which were before him is contrary to the well settled principles of law; and

(iv) The petitioner seeks the leave of this Court for an opportunity to canvass the grounds of appeal already filed before the first respondent. It is only because of certain events which prevented the petitioner from challenging the dismissal order before the next higher Appellate Authority, and in the absence of adequate remedy, left with no other alternative, he is before this Court for necessary relief.

6. The respondents have filed counter affidavit meeting the contentions of the petitioner raised in the writ petition, touching the facts on the merits of the case. It may not be necessary to refer to the averments in the counter affidavit in detail having regard to the points that arise for consideration in the writ petition.

7. However the statements made by the respondents relating to the power of the first respondent to dismiss the appeal for default, and the effect of the petitioner not filing further appeal are that when the petitioner was not present before the first respondent inspite of sufficient opportunity and final notice given, the impugned order was passed ex parte dismissing the appeal for default. Such an order could be passed u/s 31(3)(iii) of the Act. The said order was communicated

to the authorised representative by the registered post. Acknowledgement due which was received by him on 11.4.1994. Subsequently on 27.4.1994 the petitioner through its Accountant by name K. Hariharan sent a letter stating that the copy of order made in Appeal No. No. 7 of 1991 dated 17.3.1994 was lost while travelling. They requested for a certified copy of the appellate order. They filed a copy application on 23.5.1994. Copy of the order was issued to them on 1.6.1994. Having received the copy of the order the petitioner failed to avail the remedy of second appeal before the Tribunal u/s 36 of the Act by filing an appeal within a period of 60 days from the date of service of the order. Finding that they have lost their remedy or second appeal provided u/s 36 of the Act, the petitioner has filed this writ petition. According to the respondents the impugned order is valid and correct principles of natural justice were not violated; and so also the rule of audi alteram partem. They have also justified the impugned order even on the merits having regard to the facts of the case. Thus they have prayed for dismissal of the writ petition.

8. Mr. K. Venkatasubramaniam, the learned Counsel for the petitioner besides other contentions raised, laid much emphasis in his arguments on the contention that the first respondent had no jurisdiction and authority in law to dismiss the appeal for default and it was incumbent on his part to decide the case on merits on the basis of the grounds of appeal with reference to the materials available, on record. In short, according to him, it was not permissible to the first respondent to dismiss the appeal for default u/s 31 of the Act. He further submitted that the Appellate Authority being a creation of the Statute could and should act within the scope and authority conferred by the Statute itself on it. In support of his submissions he has placed reliance on the following decisions viz., Mohd. Amin Brothers v. State of Bihar 11 S.T.C. 63, Ramanujadas Balakrishnadas v. State of Orissa 10 S.T.C. 63 and (iii) Commissioner of Income Tax, Madras Vs. S. Chenniappa Mudaliar, .

9. Shri M.C. Govindan, the learned Government Advocate argued justifying the impugned order on merits, having regard to the facts of the case. As to the power of the Appellate Authority to dismiss the appeal for default, he states that the Appellate Authority could pass any order deemed fit including one to dismiss an appeal for default u/s 31(3)(a)(iii) of the Act.

10. In view of the rival submissions of the learned Counsel for the parties, the point that arises for consideration is Whether the first respondent i.e., the Appellate Authority had power to dismiss the appeal for default in the absence or the statute conferring such a power on him.

11. In order to appreciate the submissions of the learned Counsel for the parties, touching the above aspect, it is appropriate to reproduce Section 31(3) of the Act which reads thus:

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

12. As can be seen from the above provision in the Act, no specific power is conferred on the Appellate Authority to dismiss an appeal for default i.e., for non-appearance of parties. However the learned Government Advocate submitted that such a power is to be taken as available u/s 31(3)(a)(iii), that the Appellate Authority may pass such other order as he may think fit. In the instant case when the first respondent thought that the petitioner did not appear inspite of sufficient opportunity and final notice, it was appropriate to dismiss the appeal for default. Accordingly he has passed the impugned order.

13. In my view Section 31 (3)(a)(iii) has to be understood in proper context having regard to the nature and scope of the appeal under the scheme of the Act. The High Court of Madras in *State of Tamil Nadu v. Arul Murugan and Co.* 51 S.T.C. 381, has stated thus:

An Appellate Authority under the taxing enactments sits in appeal only in a manner of speaking. What it does, functionally, is only to adjust the assessment of the appellant in accordance with the facts on the record and in accordance with the law laid down by the legislature. An appeal is a continuation of the process of assessment, and an assessment is but another name for adjustment of the tax liability. In a tax appeal, the Appellate Authority is very much committed to the assessment process. The Appellate Authority can itself enter the arena of assessment either by pursuing further investigation or causing further investigation to be done....

14. Thus under the scheme of the Act an appeal u/s 31 is a continuation of the assessment proceedings. The Appellate Authority could re-adjust the assessment and liability confirming, setting aside, enhancing or reducing the assessment or penalty or both, or remanding the case to the assessing authority to make fresh assessment. To pass such an order it becomes necessary to the Appellate Authority to decide the appeal on merits looking to the grounds of appeal and materials brought before it. Section 31(3)(a)(iii) enabling to pass such other order as he may think fit must be read and understood in the context of Section 31(3)(a)(i) and (ii). The Appellate Authority has to decide the appeal and not to

dismiss it for default. Unless the statute authorise a quasi-judicial authority to dismiss the appeal for default expressly or by inevitable implication, it cannot be assumed that such a power is available.

15. u/s 31(3) the Appellate Assistant Commissioner in disposing of an appeal has to give the appellant a reasonable opportunity of being heard, and sufficient reasons are to be recorded in writing (*Italics is mine*). So also the appellate Tribunal u/s 36(3) has to dispose of the appeal after giving reasonable opportunity of hearing to the appellant and recording sufficient reasons in writing in disposing of an appeal. But u/s 31-A(3) of the Act, the Deputy Commissioner may dispose of an appeal after giving reasonable opportunity of hearing to the appellant. Recording of sufficient reasons in writing in disposing of an appeal is omitted.

16. As already noticed above, an appeal u/s 31 in effect is a continuation of assessment proceedings. The Appellate Authority could the assessment and liability. Rule 27(5) states that 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 3 or Sub-section (3) of Section 31-A, as the case may be Rule 27-A reads thus:

27-A (1) As soon as may be, after the registration of appeal, the Appellate Assistant Commissioner shall set a date of hearing and shall send an intimation thereof, to the Departmental Representative. A copy of the memorandum of appeal and the order appealed from, shall also be furnished to him. It shall be the duty of the Departmental Representative to obtain the records of the case from the assessing authority and transmit them to the Appellate Assistant Commissioner. (2) On the date fixed for hearing or any other date to which the hearing may be adjourned, the appellant shall ordinarily be heard first in support of his appeal. The assessing authority or the Departmental Representative shall, if necessary, be heard next and allowed to file a written statement where he considers that such a written statement is necessary and, in such cases, the appellant shall be entitled to reply.

17. A reading of Section 31 together with Rule 27(5) and Rule 27-A, having regard to the scheme of the Act and the nature of the appeal, in the absence of specific power conferred on the Appellate Authority to dismiss the appeal for default, to "pass such other orders as he may think fit" u/s 31(3)(a)(iii) must be read and understood so as to enable to pass an order not falling u/s 31 (3)(a)(i) and (ii) as a particular case may require, but it does not authorise the Appellate Authority to dismiss the appeal for default.

18. In the case of *Mohd. Amin Brothers v. The State of Bihar* 11 S.T.C. 63, it is held that where an assessee filed an appeal before the Commissioner u/s 20" of the Bihar Sales Tax Act, 1944, and the Commissioner fixed a date for hearing of the appeal under Rule 58 of the Bihar Sales Tax Rules, the order of the

Commissioner dismissing the appeal for default without deciding the question raised by the assessee in his memorandum of appeal is ultra vires and not in accordance with law.

19. The High Court of Orissa in *Ramanujadas Balakrishnadas v. The State of Orissa* and Ors. 10 S.T.C. 456, has held that when in a notice for the hearing of appeal before the Sales Tax Tribunal the appellant was informed that even if he failed to appear on the date of hearing the appeal would be disposed of on merits ex parte, the notice was not in valid, but the Tribunal could not dismiss the appeal for default.

20. Under the circumstances, and in view of the aforementioned decisions, it was incumbent on the Appellate Assistant Commissioner, exercising quasi-judicial power u/s 31 of the Act, to decide the appeal on merits dealing with the grounds of appeal with reference to the materials placed on record although there was no representation on behalf of the appellant. To put it differently, the appeal could not be dismissed for default.

21. The Supreme Court in *Commissioner of Income Tax, Madras Vs. S. Chenniappa Mudaliar*, , while dealing with Section 33(4) of the Income Tax Act, 1922 as to whether the appellate tribunal could dispose of an appeal by dismissing it for default, has stated thus:

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 grounds 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 and 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.

22. In this view, when the impugned order is one passed without jurisdiction and authority in law, all the other objections raised by the respondent cannot stand in the way of granting the relief to the petitioner. Hence, I pass the following order:

(i) The writ petition is allowed,

(ii) The impugned order dated 17.3.1994 passed in A.P. No. 7 of 1991 by the first respondent is quashed.

(iii) The case is remitted back to the first respondent and he is directed to re-hear the appeal on merits and in accordance with law in the light of the

observations made above.

(iv) All the contentions of the parties are left open to be decided by the first respondent in appeal; and

(v) No costs.