

(1995) 08 MAD CK 0092
In the Madras High Court
Case No : T.C. No. 1483 of 1992

State of Tamilnadu

APPELLANT

Vs

E.P. Nawab Marakkadai

RESPONDENT

Date of Decision : 16-08-1995

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 31(1)
Tamil Nadu General Sales Tax Rules, 1959 — Rule 27

Citation : (1996) 1 CTC 95

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

Bench : Full Bench

Advocate : Chitra Venkataraman, Additional Government Pleader Taxes, for the Appellant; V. Sundareswaran, K.J. Chandran and K.R. Krishnan, for the Respondent

Judgement

Kanakaraj, J.—The above tax (revision) cases came up before a Division Bench presided over by the honourable Chief Justice and the Division Bench passed the following order making a reference of all the tax cases to be considered by a Full Bench of three honourable Judges. The order of reference is as follows:

"The correctness of the decision in State of Tamil Nadu v. J. Madanraj 1992 (1) MTCR 16 and State of Tamil Nadu v. Jayamurugan Metal Mart 1992 (2) MTCR 320 is put in issue in the light of a decision of the Supreme Court in Lalta Prasad Khinni Lal Vs. The Asstt. Commissioner (Judl.) Sales Tax, Kanpur and Another, . Since the decision of the Supreme Court which is earlier in point of time has not been considered in any of the aforesaid two decisions, we consider that the matter requires consideration by a large Bench and therefore, these case are referred to a Full Bench of three Judges.:

"The order of reference by the Division Bench in the above tax cases correctly puts the issue for decision by this Full Bench.

2. To appreciate the question for decision we must first be conversant with the

facts of the case. In all the tax (revision) cases taken out by the Revenue, the facts are more or less common and to avoid repetition we will set out the facts in T.C.No.509 of 1995 and give the corresponding dates in respect of other tax cases in the form of a tabular column. In T.C.No,509 of 1995 relating to an assessment for the year 1986-87 under the Tamil Nadu General Sales Tax Act, 1959 (hereinafter called "the Act"), the total turnover of the respondent/assessee was fixed at Rs. 13,52,590 by the assessing authority by an order dated December 30, 1988, rejecting the return of the assessee and placing reliance on the inspection made by the enforcement wing officials on August 28, 1986. The order of assessment contained a note that an appeal against the order could be preferred before the Appellate Assistant Commissioner within 30 days of the order. The total tax payable was determined at Rs. 67,651 and a penalty of Rs. 18,652 was also levied u/s 12(3) of the Act. There was also a levy of surcharge and levy of additional sales tax under the Tamil Nadu Sales Tax (Surcharge) Act, 1971 and the Tamil Nadu Additional Sales Tax Act, 1970 respectively. Though the note prescribed the period of limitation as 30 days from the date of the order, section 31 of the Act only says that the period of limitation is 30 days from the date on which the order was served on the assessee in the manner prescribed. The respondent/assessee was served with the order dated December 30, 1988 only on February 1, 1989. Therefore, the appeal before the Appellate Assistant Commissioner should have been filed on or before March 3, 1989, after paying the admitted tax. While the respondent filed the appeal on March 1, 1989, they paid the admitted tax only on March 30, 1989. Under the first proviso to section 31 of the Act, as it stood at the relevant time, the appellate authority had power to excuse the delay for sufficient reasons only up to 15 days beyond the last date for filing the appeal. The respondent/assessee therefore, filed a miscellaneous petition to condone the delay in filing the appeal. In the instant case, there was a delay of 28 days in payment of the admitted tax, which was construed by the appellate authority as the delay in filing the appeal itself. Since he had no power to excuse the delay beyond 15 days and since the delay in this case was 28 days, the appellate authority refused to condone the delay and dismissed the petition seeking such condonation.

3. The said order of the appellate authority was passed on May 3, 1989 and the respondent/assessee challenged the same in appeal before the Sales Tax Appellate Tribunal in Appeal No. 448 of 1989. The Revenue filed a Petition No. 254 of 1989 to defer the appeal till a Tax Case No. 361 of 1988 pending on the file of the High Court is disposed of. However, by an order dated November 19, 1990, the Tribunal allowed the appeal and remanded the case back to the Appellate Assistant Commissioner holding that there was no delay in the filing of the appeal and the payment of the admitted tax beyond the period of limitation is of no consequence. The present tax case, T.C.No.509 of 1995 is directed against the Tribunal's order dated November 19, 1990.

4. The facts and circumstances leading to the other tax (revision) cases filed by the Revenue follow the same pattern except for the dates of filing the appeal and

the dates of payment of admitted tax. We have set out below a tabular column giving the necessary dates in respect of each of the tax (revision) cases, except T.C. Nos. 1483 and 1484 of 1992.

_____ Tax Case No.	Date of Last Actual	Actual date No.	of receipt	date for date of payment	days of of the filing	filing of the delay in assess-	the of	the admitted the pay-	ment appeal Appeal tax ment of	order admitted tax	_____																																																											
_____ 509 & 510/1995	1.2.89	3.3.89	1.3.88	30.3.88	28	1380	of 1992	17.12.87	16.1.88	14.1.88	15.2.88	44	1464	of 1992	27.12.86	26.1.87	23.1.87	Tax on 22.1.87	32	AST & SC on 27.2.87	1470	of 1992	29.12.88	28.1.89	2.2.89	20.2.89	23	1482	of 1992	15.4.87	14.5.87	1.6.87	19.10.87	154	1566	of 1992	6.10.88	5.11.88	28.10.88	20.12.88	46	521	of 1993	28.2.89	30.3.89	27.3.89	24.4.89	25	605 & 606	of 93	15.4.89	14.5.89	14.5.89	16.6.89	32	1036	of 1993	18.2.87	20.3.87	6.3.87	16.4.87	27	1089 & 1090	of 93	15.10.88	14.11.88	15.11.88	1.12.88	17	_____

5. In a series of decisions, a view was taken by a Division Bench of this Court that the presentation of an appeal u/s 31(1) of the Act, within a period of 30 days and the entertainment of the appeal as provided in the second proviso to Section 31(1) cannot be confused with each other. In other words, the decision of the Tribunal referred to by us earlier was confirmed and the tax cases preferred by the Revenue were being uniformly rejected. In fact, one of us (either Kanakaraj, J. or Raju, J.) was a party to the above judgments of the Division Bench. In *State of Tamil Nadu v. J. Madanraj* (1992) 1 MTCR 16 a Division Bench construed the second proviso to Section 31(1) of the Act as follows:

"....This proviso would come into play where the appeal is to be "entertained" and the default in the payment of the admitted tax is not correlatable to the first part. This view had already been taken by this Court in T.C. No. 199 of 1991 decided on April 25, 1991, wherein it was held that the two provisos to Section 31(1) of the Act deal with separate matters and cannot be read into one another."

In *State of Tamil Nadu v. Jayamurugan Metal Mart* (1992) 2 MTCR 320 another Division Bench followed the above case in *State of Tamil Nadu v. J. Madanraj* (1992) 1 MTCR 16 and dismissed the tax case filed by the Revenue. Reference can also be made to a decision in *State of Tamil Nadu v. K. Devarajan* (1993) 3 MTCR 246.

6. Sub-section (1) of Section 31 of the Act is as follows:

"31. Appeal to the Appellate Assistant Commissioner.-(1) Any person objecting to an order passed by the appropriate authority u/s 4-A, Section 12, Section 12-A, Section 14, Section 15, Sub-sections (1) and (2) of Section 16, Section 18, Sub-section (2) of Section 22, Section 23 or Section 27 (other than an order passed

by an Assistant Commissioner (Assessment) may, within a period of thirty days from the date on which the order was served on him in the manner prescribed, appeal against such order to the Appellate Assistant Commissioner (having jurisdiction):

Provided that the Appellate Assistant Commissioner may, within a further period of thirty days admit an appeal presented after the expiration of the first mentioned period of thirty days if he is satisfied that the appellant had sufficient cause for not presenting the appeal within the first mentioned period:

Provided further that in the case of an order u/s 15, Section 12-A, Section 14, Section 15 or Sub-sections (1) and (2) of Section 16, no appeal shall be entertained under this sub-section unless it is accompanied by satisfactory proof of the payment of the tax admitted by the appellant to be due or of such instalments thereof as might have become payable, as the case may be."

7. It has to be remembered that it was only by the Tamil Nadu Act 76 of 1986 that the first proviso was amended to prescribe an outer maximum period of 15 days up to which the delay could be condoned, by the appellate authority if sufficient cause is shown by the appellant for not preferring the appeal within 30 days from the date of receipt of the order against which appeal is filed. Before that any length of delay could be excused if sufficient cause was shown. Apparently, with a view to avoid indiscriminate resort to such a power and abuse of the same, the Legislature introduced an outer limit of 15 days, finding that the outer limit was too short, the Legislature again, by the Tamil Nadu Act 18 of 1989, enlarged the outer limit to 30 days. In all the tax cases before us, it is not disputed that the assesseees were only entitled to 15 days as outer limit, beyond the first 30 days.

8. The contention on behalf of the Revenue is that the above line of cases interpreting the second proviso to section 31(1) of the Act as applying to the post presentation stage and had nothing to do with the limitation prescribed in the first proviso to section 31(1) of the Act is contrary to the judgment of the Supreme Court in *Lalta Prasad Khinni Lal v. Assistant Commissioner* [1972] 29 STC 201. While projecting the above case of the Revenue, Mrs. Chitra Vcnkataraman, learned Additional Government Pleader (Taxes), has taken us through certain other decisions including an earlier judgment of the Supreme Court, which have a bearing on the issue raised before us. We would do well therefore, to consider all the cases seriatim before adverting to the trumpcard of the Revenue, namely, the judgment i *Lalta Prasad Khinni Lal Vs. The Asstt. Commissioner (Judl.) Sales Tax, Kanpur and Another*, .

9. In *Gangadharan Pillai v. Sales Tax Officer* (1965) 16 STC 578 a similar provision, section 14 of the Kerala General Sales Tax Act, came up for review by the Kerala High Court. The only difference is that in the first proviso providing for the condonation of the delay beyond a period of 30 days, there is no prescription of an outer limit like in the Tamil Nadu Act with which we are concerned now. The

Kerala High Court observed:

".....Proof of payment of tax is, therefore, one of the documents that must be filed along with the appeal memorandum. It appears to me that the mere presentation of an appeal petition without the necessary documents, will not amount to the preferring of an appeal as contemplated by section 14(1). I further think that if an appeal petition has been filed without proof of payment of tax accompanying it, that appeal can be said to be preferred only when the proof of payment of tax is furnished. Such furnishing of the proof may take place within the period prescribed for preferring the appeal or after the lapse of that period. If the proof of payment of admitted tax is furnished within the period prescribed for filing the appeal, no question of not entertaining the appeal arises. If the furnishing of proof happens to be after the expiry of the period prescribed, the question will arise as to whether the appeal should be admitted or not. In such cases the first proviso to section 14(1) will be attracted. And the question must be whether there has been sufficient cause for not preferring the appeal within the statutory period, viz., 30 days of the date of service of the assessment order."

The Kerala High Court made it clear that the correct approach is to treat the appeal as having been preferred on the date on which proof of payment was furnished and then to see whether under the proviso to section 14(1) there was sufficient cause or not to excuse the delay in preferring the appeal. They therefore, directed the assessee in that case to move a petition for condonation of delay.

10. The next important decision on which considerable reliance is placed by learned counsel for the respondent/assessee is Lakshmi Rattan Engineering Works Ltd. Vs. Asstt. Commr. Sales Tax, Kanpur and Another, . That case arose under the U.P. Sales Tax Act. The necessary facts which are relevant for our purpose are as follows:

The order of assessment and demand notice were served on the assessee on April 16, 1966. Against the said order, the assessee filed an appeal on May 16, 1966. The appeal was within the time prescribed by U.P. Act. Section 9 of the U.P. Act provided that no appeal against an assessment shall be entertained unless it is accompanied by satisfactory proof of the payment of the amount of tax admitted by the appellant to be due, or of such instalments thereof as may have become payable. There was a small balance in the payment of admitted tax, namely, Rs. 99.99 and this amount was deposited on April 26, 1966 even before the appeal was filed on May 16, 1966. The assessee only failed to present the proof for such payment. The Supreme Court proceeded on the basis that the assessee had not furnished proof of payment of the balance of admitted tax at the time of filing of the appeal on May 16, 1966. By way of abundant caution the assessee filed an application for condonation of delay under sub-section (6) of section 9 of the U.P. Act. By an order dated April 2/3, 1967, the appeal was rejected by the concerned authority on the ground that no proof had been given

along with the memorandum of appeal that the tax had been paid. The application for condonation of delay was also simultaneously dismissed. It is this order dated April 2/3, 1967, which was under challenge before the apex Court. The following sentence in the judgment of the Supreme Court eloquently emphasizes the issue before the Supreme Court. It is:

"The short question in this case is whether having made the deposit even before the appeal was filed and well within the period of limitation, the assessee could be deprived of his right of appeal u/s 9 of the Act. Alternatively, it is to be considered whether the proof of the payment of the admitted tax had to accompany the memorandum of appeal as required by Rule 66(2) and on failure to furnish such proof, the appeal itself became incompetent."

The Supreme Court then proceeded to consider the meaning of the word "entertained" and posed the following questions:

"....The question, therefore, is at what stage can the appeal be said to be entertained for the purpose of the application of the proviso ? Is it "entertained" when it is filed or is it "entertain" when it is admitted and the date is fixed for hearing or is it finally "entertained" when it is heard and disposed of?"

After considering several judgments, the Supreme Court observed:

"...For purposes of limitation and for purposes of the rules of the court it is required that a written memorandum of appeal shall be filed. When the proviso speaks of the entertainment of the appeal, it means that the appeal such as was filed will not be admitted to consideration unless there is satisfactory proof available of the making of the deposit of admitted tax."

What is more, the Supreme Court proceeded to say that Rule 66 framed under the UP. Act prescribing the mode of preferring an appeal, referring to the challan showing deposit in the treasury, of the tax admitted by the appellant as directory in nature. Observed the Supreme Court that the other modes of proof are not necessarily shut out.

11. Learned counsel for the respondent laid emphasis on the following words in the said judgment:

"...We are of opinion that by the word "entertain" here is meant the first occasion on which the court takes up the matter for consideration. It may be at the admission stage or if by the rules of that Tribunal the appeals are automatically admitted, it will be the time of hearing of the appeal."

But the very next sentence in the said judgment cuts at the very root of the respondent's contention. It is follows:

"...But on the first occasion when the court takes up the matter for consideration, satisfactory proof must be presented that the tax was paid within the period of limitation available for the appeal."

12. While on the above judgment of the Supreme Court we would now like to emphasise that the ratio of a judgment depends primarily on the facts of the case. This is precisely the reason why we have referred to the questions posed for consideration namely, that the deposit had been made well within the period of limitation and in such circumstances whether an assessee could be deprived of a right of appeal merely because proof of payment was not forthcoming in the manner prescribed by Rule 66 of the U.P. Rules. If we now examine the last portion of the Supreme Court judgment quoted by us above, the crux of the ratio of the Supreme Court will become evident. In other words, what the Supreme Court categorically says is that satisfactory proof must be presented even after the filing of the appeal when it is first taken up for consideration that the tax was paid within the period of limitation available for the appeal. (Emphasis* supplied).

We have taken pains to explain the above judgment of the Supreme Court, only because learned counsel for the respondent argued, as if the said judgment was in favour of the view taken by the earlier Division Bench judgments of this Court.

13. We now come to the subsequent judgment of the Supreme Court of India in *Lalta Prasad Khinni Lal v. Assistant Commissioner* (1972) 29 STC 201. That case also arose under the U.P. Sales Tax Act. In that case the assessee filed an appeal on October 21, 1965, well within the period of limitation. The entire admitted tax was not paid until May 27, 1966. The assessee filed an application for condonation of delay u/s 5 of the Indian Limitation Act seeking for condonation of the delay in filing the appeal. The appeal itself was rejected along with the petition to condone the delay on the ground that the admitted tax had not been paid within the period of limitation. The proviso to section 9(1) of the U.P. Act is identical to the second proviso to section 31(1) of the Act. Sub-section (6) of section 9 of the U.P. Act provided for filing a petition to condone the delay u/s 5 of the Indian Limitation Act. Here again, there was no outer limit regarding the period of limitation within which an excuse delay petition could be filed. Overruling the decision of the Allahabad High Court which purported to follow a decision in *Lakshmi Rattan Engineering Works Ltd. Vs. Asstt. Commr. Sales Tax, Kanpur and Another*, the Supreme Court observed:

"...In other words, the appeal will be deemed to have been properly filed on the date on which the amount of admitted tax is paid. If that is beyond the period of 30 days the appeal will be barred by time. Section 9(6) will immediately become applicable to that appeal and it will be open to the appellant to apply for condonation of delay under that provision."

Again the Supreme Court observed:

"....The correct approach is to treat the appeal as having been preferred on the date on which proof of payment of the tax was furnished and then to see whether under sub-section (6) of section 9 there was sufficient cause for excusing the delay in preferring the appeal. The decision of the Kerala High Court in *Gangadharan Pillai v. Sales Tax Officer (Reserve), Ernakulam* (1965) 16 STC

578, is to this effect and we entirely agree with the reasoning and the conclusion therein."

What is more, the Supreme Court has considered the earlier judgment of the Supreme Court in *Lakshmiratan Engineering Works Ltd. v. Assistant Commissioner* (1968) 21 STC 154 and observed as follows:

"It may be pointed out that the case of *Lakshmi Rattan Engineering Works Ltd. Vs. Asstt. Commr. Sales Tax, Kanpur and Another*, on which the High Court largely relied did not involve the question of the extension of the period of limitation u/s 9(6). Indeed in our judgment the word "entertain" in section 9(1) has hardly any material bearing on the point under consideration."

It was so observed because in *Lakshmi Rattan Engineering Works Ltd. Vs. Asstt. Commr. Sales Tax, Kanpur and Another*, , the admitted tax was paid well in time and only the proof for having paid the same well in time was produced later. As such, the question as to extension of the period of limitation did not arise. Therefore, in our opinion, the issue raised before us is squarely governed by the above two judgments of the Supreme Court which do not support the contention of the assessee before us.

14. Mr. K.J. Chandran has argued the case for some of the assesseees. There was no other argument on behalf of any of the other respondents. In other words, all the respondents adopted the argument of Mr. K.J. Chandran. The argument on behalf of the respondent is that no time-limit is prescribed in so far as the payment of admitted tax is concerned under the second proviso to section 31(1) of the Act. Argues Mr. K.J. Chandran, that the Revenue cannot read something into the second proviso which is really not available in the second proviso. Learned counsel sought to rely on section 24 of the Act relating to the payment and recovery of tax for the purpose of understanding the second proviso to section 31(1) of the Act. We do not think that any other provision in the Act relating to the time and manner of payment of the admitted tax has any application to the second proviso to section 31(1) of the Act. One has to look into section 31 of the Act alone for the purpose of finding out how an appeal should be preferred. There is no need at all to look into any other provision because section 31 of the Act is self-contained, clear and categorical. In other words, it is not difficult to understand the provisions of section 31 of the Act. To put it in a nutshell it says,-

(1) that an appeal can be filed within a period of 30 days from the date on which the order of the assessing authority was served on him.

(2) that an appeal can be presented after the expiration of 30 days within a further period of 15 days if the appellant had sufficient reason to explain the delay.

(3) the second proviso to section 31 places an embargo on the appeal being entertained unless it is accompanied by satisfactory proof of the payment of the

tax admitted by the appellant. Similar provisions occurring in the enactments of the other States have been interpreted by the apex Court in the above two judgments, by pointing out that, what is necessary is to see that the admitted tax is paid within the time prescribed. In other words, the proof of having paid such tax, even if it is produced when the appeal is taken up for the first time for consideration, it would be sufficient to hear the appeal. Therefore what is necessary is that the payment of admitted tax must have taken place within the time allowed by law for preferring the appeal or within the further period of 15 days or 30 days as the case may be, for condonation of delay. The proof of payment of admitted tax, within the aforesaid period can be produced when the appeal is taken up for the first time for consideration.

Thus we place the aforesaid interpretation on second proviso to section 31 of the Act. As such, the second proviso shall be understood and applied accordingly.

15. Reference is then made to a decision in Commissioner of Income Tax, Bombay Vs. Filmistan Ltd., . That case arose under the Income Tax Act. A notice of demand was issued for payment of Income Tax and super tax payable on or before July 17, 1954. At the request of the assessee payment was permitted in instalments. There was default in payment of last instalment and a penalty was imposed on March 31, 1955. The assessee preferred an appeal on April 20, 1955. The amount of the last instalment was paid only on May 16, 1955. The appeal came up for hearing on August 19, 1955. A preliminary objection was raised that the appeal was not competent because prior to the presentation of the appeal the tax had not been paid. It was held that the right of appeal was not taken away but only the remedy was barred until tax was paid. That decision was given on the basis of sub-section (1) to section 30 of the Income Tax Act which read as follows:

"Provided that no appeal shall lie against an order under Sub-section (1) of section 46 unless the tax has been paid."

The question was whether the payment of tax was a condition precedent to the presentation of the appeal or to the hearing and disposal of the appeal. The Bombay High Court held that the words "appeal shall lie" should be understood in the context of the word "presented" in sub-section(2) of the said section 30 of the Income Tax Act. We are of the opinion that the Bombay High Court was construing the words "appeal shall lie" in contrast with the words "presented" appearing in the same section. We do not think that we are confronted with such a situation in interpreting section 31(1) of the Act. We are of the view that the aforesaid Bombay decision has no application for the interpretation of section 31 of the Act as the provisions contained in section 31 of the Act and the provisions contained in section 30 of the Income Tax Act with which the Bombay High Court was concerned are not in pair materia. Added to this the aforesaid two decisions of the Supreme Court are directly on point. In such a situation, even the consideration of a decision of any High Court even if it has considered the similar provisions does not arise, as such decisions cannot prevail over the decision of

the Supreme Court on the point as under article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all the courts within the territory of India.

16. Reference is then made to a decision in *Babulal Mohanlal Kandeale v. Commissioner of Sales Tax* (1981) 47 STC 164 (MP). In that case the Madhya Pradesh High Court was concerned with the provisions of sub-sections (3) and (4) of Section 38 of the Madhya Pradesh General Sales Tax Act and Rule 58 of the Rules framed thereunder, which are totally different from Section 31(1) of the Act. Therefore, the decision has no application to the cases on hand. To understand the difference, we quote those provisions.

The relevant statutory provision is contained in Sub-sections (3) and (4) of section 38, which read as follows:

"(3) No first or second appeal against an order of assessment, with or without penalty, shall be admitted by the appellate authority unless the tax with penalty, if any, in respect of which the appeal has been preferred, has been paid:

Provided that the said authority may, if it deems fit, for reasons to be recorded in writing, entertain an appeal against such order on payment of such smaller amount which shall not be less than one-third of the amount of the tax including penalty, if any, as it may direct.

(4) Every first or second appeal shall be filed within thirty days from the date of communication of the order against which the appeal is to be filed."

A reference is also necessary to Rule 58, which, as then in force, was as follows:

"58. Summary rejection.-(1) If the memorandum of appeal or application for revision does not comply with all or any of the requirements of Rule 57 or the appellant fails to pay the tax with penalty, if any, in respect of which the appeal has been preferred or such smaller amount as the appellate authority may direct under the proviso to Sub-section (3) of Section 38, the appeal or application for revision may be summarily rejected:"

Those provisions relate to the tax and penalty in respect of which the appeal had been preferred. The Madhya Pradesh High Court observed that the above provision did not provide that the tax or penalty against which an appeal is filed should also be deposited before at the time of filing of the appeal. They also said that in that case the appeal had been filed in time and it could not be rejected as barred by limitation, simply on the ground that the amount of tax had not been deposited by the assessee. What is interesting to notice is, that they construed the Supreme Court judgments in (1968) 21 STC 154 (*Lakshmiratan Engineering Works Ltd v. Assistant Commissioner*) and (1972) 29 STC 201 (*Lalta Prasad Khinni Lal v. Assistant Commissioner*) (cited *supra*) as laying down the following proposition of law:

"....These decisions proceed on the requirement of the proviso to Section 9 of the

U.P. Act which requires that no appeal shall be entertained unless it is accompanied by satisfactory proof of payment of admitted tax. Rule 66 of the U.P. Rules also requires that challan showing deposit in the treasury of the admitted tax should accompany the memorandum of appeal. The U.P. Act and the Rules made thereunder thus clearly provide for payment of admitted tax before filing of the memorandum of appeal."

We find it difficult to agree with the decision of the Madhya Pradesh High Court.

17. The judgment in *Sadhana Enterprises Vs. Commissioner of Sales Tax*, was also based on the above provisions of the Madhya Pradesh Act and do not in any way help the respondents because the provisions are entirely different from the Tamil Nadu Act, viz., Section 31(1).

18. Considerable reliance is placed by Mr. K.J. Chandran, learned counsel for the respondents, on *Shyam Kishore and others Vs. Municipal Corporation of Delhi and another*, . The apex Court surveyed the entire provisions of the Delhi Municipal Corporation Act, 1957, before coming to Sections 169 and 170 of the said Act relating to filing of appeals. Section 169(1) reads as follows:

"169. Appeal against assessment, etc.-(1) An appeal against the levy of assessment of any tax under this Act shall lie to the court of the District Judge of Delhi.

(2) to (6)....."

Section 170 reads as follows:

"170. Conditions of right to appeal.- No appeal shall be heard or determined u/s 169 unless-

(a) the appeal is, in the case of a property tax, brought within thirty days next after the date of authentication of the assessment list u/s 124 (exclusive of the time requisite for obtaining a copy of the relevant entries therein) or, as the case may be, within thirty days of the date on which an amendment is finally made u/s 126, and, in the case of any other tax, within thirty days next after the date of the receipt of the notice of assessment or of alteration of assessment or, if no notice has been given, within thirty days after the date of the presentation of the first bill or, as the case may be, the first notice of demand in respect thereof:

Provided that an appeal may be admitted after the expiration of the period prescribed therefore by this section if the appellant satisfies the court that he had sufficient cause for not preferring the appeal within that period;

(b) the amount, if any, in dispute in the appeal has been deposited by the appellant in the office of the Corporation."

19. The Delhi High Court had taken the view that the condition of deposit of tax amount u/s 170(b) of the Delhi Municipal Corporation Act, 1957, is a condition precedent for hearing or determination of the appeal and the District Judge had

no discretion to grant stay of the disputed amount or despende with the requirement of pre-deposit of the amount in appeal, with or without conditions, in the office of the Corporation. The Supreme Court considered several decisions and in particular Lakshmi Rattan Engineering Works Ltd. Vs. Asstt. Commr. Sales Tax, Kanpur and Another, and distinguished it by saying that the words used were "entertained" whereas in the Delhi case it was "heard or determined". Further having regard to the fact that the deposit related to the "tax in dispute in the appeal", the harsh provisions of clause (b) of Section 170 of the Act have been liberally construed by the Supreme Court and it is held that the District Judge had some latitude in the matter and concluded as follows:

".....We would, therefore, read clause (b) of Section 170 only as a bar to the hearing of the appeal and its disposal on merits and not as a bar to the entertainment of the appeal itself"

But the ratio was laid down as follows:

"We, therefore, agree with the majority of the Full Bench of the High Court that Section 170(b) of the DMC Act is intra vires. The District Judge has no jurisdiction to waive the condition of deposit or stay the collection of the tax pending disposal of the appeal before him. We, however, hold that he has the power to adjourn the hearing of the appeal or pass interim orders enabling the assessee to pay up the taxes before the appeal is actually heard and determined."

20. It will thus be clear that the said judgment turned on the words "heard or determined" and will not apply to the words "entertained" used in Section 31(1) of the Act. In any event, the above mentioned ratio does not advance the case of the respondents.

21. Being unable to get out of the ratio of the judgments of the Supreme Court in (1968) 21 STC 154 (Lakshmiratan Engineering Works Ltd v. Assistant Commissioner) and (1972) 29 STC 201 (Lalta Prasad Khinni Lal v. Assistant Commissioner) (cited supra), Mr. Chandran advanced an argument that the statute gives the right of appeal and an interpretation cannot be placed on the second proviso to Section 31(1) of the Act so as to defeat or deny the appeal itself. One has to see only the judgment of the Supreme Court in Shyam Kishore and others Vs. Municipal Corporation of Delhi and another, cited by the respondents themselves, to reject this contention. The right of appeal is a creature of statute and it is governed by the conditions attached to it as long as those conditions are reasonable and valid.

22. Mr. Chandran, then raised a new plea which had not been raised before the authorities below, namely, that the meaning of the words "admitted tax" in the second proviso to Section 31(1) has not been properly understood and if so understood the amounts paid within time was sufficient to cover the admitted tax. We feel that we will not be justified in allowing this point to be canvassed in these tax cases. The reason is not far to seek. Taking up T.C. No. 509 of 1995 itself we find from the the order of the Appellate Assistant Commissioner dated

May 3, 1989 that the respondents had paid the admitted tax only after 28 days from the date of expiry of 30 days for filing the appeal, and in the affidavit filed in support of the petition to condone the delay, stated, that the delay in payment of the admitted tax was due to financial difficulties. Therefore, there was no dispute about the quantum of admitted tax in these cases.

23. Before closing we would like to point out one other important fact which militates against the argument of the assessee. When the second proviso to Section 31(1) says the appeal must be accompanied by proof of payment of admitted tax, it means that the admitted tax has no connection with the tax in dispute in the appeal. In our opinion, if this fact is kept in mind, nobody can say that the impugned condition is onerous or harsh unlike the case in *Shyam Kishore and others Vs. Municipal Corporation of Delhi* and another, .

24. Rule 27 of the Tamil Nadu General Sales Tax Rules provides for the manner in which an appeal u/s 31 should be filed. The appeal shall be in form I appended to the Rules and shall be accompanied by two copies of the order appealed against. The necessary treasury receipt for the fee prescribed under Sub-rule (2-A) shall also be appended to the memorandum of appeal. Sub-rule (4) says that if there are defects or omissions in the appeal, the same shall be returned for rectification and re- presented within 10 days from the date of receipt by the appellant. There is also a provision for excusing the delay if the re-presentation is made after a period of 10 days. These provisions regarding the filing of the appeal and the return for defects, if any, are in conformity with most of the provisions relating to an appeal in other statutes, and do not in any way take away the rigour of the second proviso to Section 31(1) of the Act. We are, therefore, firmly of the opinion that if there is no payment of the admitted tax within the period allowed for filing the appeal or within the extended period as specified in the Act for condonation of delay in preferring an appeal, no appeal can be said to have been filed. It is only when the payment of admitted tax is made that the appeal can be said to have been filed. We also make it clear that the words "no appeal shall be entertained under this sub-section unless it is accompanied by satisfactory proof of the payment of the tax admitted by the appellant to be due or of such instalments thereof as might have become payable, as the case may be", as already stated by us in para 14 supra, are interpreted to mean that the payment of the admitted tax should be made within the time or the extended time prescribed, for filing an appeal even though the satisfactory proof may be produced later before the appeal is taken up for the first time for consideration. Consequently, it follows that if the payment of admitted tax is made beyond the period of 30 days prescribed for the filing of an appeal and beyond the period of 15 days in respect of which alone the appellate authority has power to condone the delay, then the appellate authority has to necessarily reject the appeal as barred by limitation. It, no doubt, follows that there should also be a memorandum of appeal as prescribed in Rule 27 of the Rules referred to by us. In the tax cases before us, we hold that the respective orders of the Appellate Assistant Commissioner rejecting the applications to

condone the delay and consequently dismissing the appeals are perfectly in order. Only in cases where the delay is not beyond the period of 15 days which the appellate authority could excuse the same and hear the appeal. The decision of the Tribunal holding that the payment of admitted tax has no consequence so long as the memorandum of appeal is filed in time, is incorrect and liable to be set aside.

25. From what we have said above, it necessarily follows that the decisions in *State of Tamil Nadu v. J. Madanraj* (1992) 1 MTCR 16 and in *State of Tamil Nadu v. Jayamurugan Metal Mart* (1992) 2 MTCR 320 do not lay down the law correctly and they are opposed to the decisions of the Supreme Court in *Lalta Prasad Khinni Lal v. Assistant Commissioner* (1972) 29 STC 201 and in *Lakshmiratan Engineering Works Ltd v. Assistant Commissioner* (1968) 21 STC 154. Therefore, the same are overruled.

26. The facts in T.C. Nos. 1483 and 1484 of 1992 are slightly different. The respondent/assessee in both these cases are one and the same. They had filed separate appeals in respect of an assessment order dated February 29, 1988, one in so far as the "tax and penalty" under the Act and the other in respect of the Additional Sales Tax Act. The assessment order was served on the respondent/assessee on March 22, 1988. The last date for filing the appeal along with proof of payment of admitted tax was April 21, 1988. The appeal was filed on April 20, 1988. There was a dispute regarding the admitted tax and the assessee had sought for a revised assessment. To be more exact, in the order of assessment, a sum of Rs. 1,18,200 had been wrongly credited towards tax due instead of towards additional sales tax. Secondly, the total amount of additional sales tax due was only Rs. 1,30,838 whereas it had been shown as Rs. 2,30,838. After adjusting the sum of Rs. 1,18,200 paid towards additional sales tax, there was only a balance of Rs. 12,638. Correcting the mistake the assessing authority passed a revised order only on June 7, 1988. The assessee paid the said amount of Rs. 12,638 in two instalments, a sum of Rs. 9,520 on May 16, 1988 and the balance of Rs. 3,118 on June 8, 1988. The Appellate Assistant Commissioner had held that these payments were made with a delay of 25 days and 48 days respectively and therefore, could not have been condoned under the first proviso to Section 31(1) of the Act, being more than 15 days. In our opinion, this approach is totally incorrect because in respect of the assessment order dated February 29, 1988, the appeal had been filed in time along with the admitted tax on April 20, 1988. Since there was a mistake in the order of assessment and consequently some more amounts had to be paid, a revised order was passed on June 7, 1988. Calculated from June 7, 1988 the payments on May 16, 1988 and June 8, 1988 were perfectly within the time even as per section 31(1) of the Act. It cannot therefore, be said that the admitted tax had been paid after a delay of 25 days or 48 days as assumed by the Appellate Assistant Commissioner. Though the Tribunal had remanded the matters on an incorrect reasoning, we are confirming the order of remand for the reasons abovementioned and direct the Appellate Assistant Commissioner to pass fresh order on merits and in

accordance with law in the light of our observations contained in this judgment. Those two tax cases, viz, T.C. Nos. 1483 and 1484 of 1992 filed by the Revenue have to be dismissed.

27. In all these tax cases in T.C. Nos. 1483 and 1484 of 1992, the orders of the Tribunal are set aside, thus restoring the orders of the Appellate Assistant Commissioner holding that the respective appeals are barred by limitation. All the tax cases except T.C. Nos. 1483 and 1484 of 1992 are allowed. T.C. Nos. 1483 and 1484 of 1992 are dismissed. There will however, be no order as to costs.