Commissioner Of Income Tax, Madras vs S. Chenniappa Mudaliar, Madurai on 24 February, 1969

Equivalent citations: 1969 AIR 1068, 1969 SCR (3) 818, AIR 1969 SUPREME COURT 1068

Author: A.N. Grover

Bench: A.N. Grover, J.C. Shah, V. Ramaswami

PETITIONER:
COMMISSIONER OF INCOME TAX, MADRAS

Vs.

RESPONDENT:
S. CHENNIAPPA MUDALIAR, MADURAI

DATE OF JUDGMENT:
24/02/1969

BENCH:
GROVER, A.N.
BENCH:
GROVER, A.N.
SHAH, J.C.
RAMASWAMI, V.

CITATION:
1969 AIR 1068 1969 SCR (3) 818
1969 SCC (1) 591
CITATOR INFO :
RF 1977 SC1348 (4)

ACT:
Income Tax Act 1922, section 33(4)-Appellate Tribunal Rules 1946; Rule 24-If Appellate Tribunal has powers to dismiss appeal for default in appearance-Whether Tribunal bound to pass orders on merits-If rule 24 ultra vires section 33(4).

HEADNOTE:
The respondent's appeal against an order of assessment was rejected by the Appellate Assistant Commissioner and he, thereafter appealed to the Appellate Tribunal. The Tribunal, after having granted some adjournments, dismissed the appeal for default in appearance On a day fixed for the

hearing, purporting to do so under rule 24 of the Appellate Tribunal Rules, 1946. The High Court directed the Tribunal to refer two questions to itself one relating to the merits and the other to the effect whether rule 24 of the Appellate Tribunal Rules, 1946, in so far as it enables the Tribunal to dismiss an appeal in default in appearance, is ultra vires. A special bench of the High Court took the view that under section 3 3 (4) the Tribunal was bound to dispose of the appeal on the merits, whether the appellant was present or not.

On appeal to this Court,

HELD : It follows from the language of s. 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 had failed to appear. [824 C-D]

The provisions contained in s. 66 about making a 'reference on questions of law to the High Court would be rendered nugatory if a power is attributed to the Appellate Tribunal by which it can dismiss an appeal, which has otherwise been properly filed, for default, without making an order thereon in accordance with s. 33(4). 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 a proper order under s. 33(4). [824 E-H]

Rule 24 clearly comes into conflict with section 33(4) and in the event ,of repugnancy between the substantive provisions of the Act and a rule, it is the rule which must give way to the provisions of the Act. [825 H]

Shri Bhagwan Radha Kishen v. Commissioner of Income tax, U.P. 22 I.T.R. 104; Ruvula Subba Rao & Ors. v. Commissioner of Income tax Madras, 27 I.T.R. 164; Mangat Ram Kuthiala & Ors. v. Commissioner of Income tax, Punjab, 38 I.T.R. 1; Hukumchand Mills Ltd. v. Commissioner of Income tax, Central Bombay, 63 I.T.R. 232; Commissioner of Income

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tax Madras v. Mtt. Ar. S. Ar. Arunachalam Chettiar, 23 I.T.R. 180 and Commissioner of Income tax, Bombay v. Scindia Stearn Navigation Co. Ltd. 42 I.T.R. 589, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1015 1968. Appeal from the judgment and Order dated April 30, 1964 of the Madras High Court in T.C. No. 194 of 1961 (Reference No. 74 of

1961).

D.Narsaraju, R. H. Dhebar, R. N. Sachthey and B. D. Sharma, for the appellant.

R.Gopalkrishnan and R. Balasubramaniam, for the respondent.

The Judgment of the Court was delivered by Grover, J. This is an appeal by certificate from a judgment of the Special Bench of the Madras High Court in which the sole question that has to be determined is whether Rule 24 of the Appellate Tribunal Rules, 1946, insofar as it enables the Tribunal to dismiss an appeal for default of appearance was ultra vires the provisions of s. 33 of the Income tax Act, 1922, hereinafter called the "Act". The facts which gave rise to the reference which was made to the High Court by the Appellate Tribunal lie within a narrow compass. The assessee owned 1674 shares in Asher Textiles Ltd. and 9 out of 20 shares in Textile Corporation (Private) Ltd. at Tiruppur. The latter company was the managing agents of the Asher Textiles Ltd. The assessee was a Joint Managing Director of the Textile Corporation (Private) Ltd. along with one P. D. Asher. The assessee sold on December 21, 1954 his entire holding in two companies to Asher and some of his relations. These sales resulted in a profit of Rs. 72,515/- and Rs. 3,14,100/- respectively. The Income tax Officer assessed these amounts to tax for the assesment year 1956-57 under s. 10(5A) of the Act as compensation earned for parting with the effective power of management. The assessment was upheld by the Appellate Assistant Commis- sioner. The assessee appealed to the Appellate Tribunal. After some adjournments the appeal was finally fixed for hearing on August 26, 1958. On that date no one was present on behalf of the assessee nor was there any application for an adjournment. On August 28, 1958 the Tribunal dismissed the appeal for default of appearance. This the Tribunal purported to do under Rule 24 of the Appellate Tribunal Rules, 1946 as amended by notification dated January.26, 1948. Five weeks after the disposal of the appeal the assessee filed a petition before the Appellate Tribunal praying for its restoration. It was stated, inter alia, in that petition 11 Sup CI/69-3 that it was owing to some misapprehension on the part of the assessees auditors at Coimbatore that the date of the hearing of the appeal was not intimated to the counsel at Madras who was convalescing there after a surgical operation. The Tribunal did not consider that there was sufficient cause for restoration and rejected the petition. The: assessee applied for a reference under S. 66(1) of the Act on two questions of law but that application was rejected by the Tribunal. The assessee approached the High Court under S. 66(2) of the Act and on April 5, 1960 the High Court directed the Tribunal to state the case on two questions. The matter was first heard by a division bench but owing to the validity of Rule 24 having been canvassed a special bench consisting of the Chief Justice and two judges was constituted. The special bench reframed the first question thus :

> "Whether rule 24 of the Appellate Tribunal Rules, 1946 in so far as it enables the tribunal to dismiss an appeal for default of appearance, is ultra vires."

The second question was "Whether on the facts and in the circumstances of the case the two sums of Rs. 72,515 and Rs. 3,14,100 were assessable to tax under s. 10(5A) of the Income tax Act ?"

> Rule 24 was framed under sub-s. (8) of s. 5A of the Act. This provision confers power on the Appellate Tribunal to frame Rules regulating its own procedure. Section 5A(8) reads :
>
> "Subject to the provisions of this Act, the appellate tribunal shall have power to regulate its own procedure and the procedure of Benches of the Tribunal in all matters arising out of the discharge of its functions, including the places at which the Benches shall hold their sittings."

The Appellate Tribunal first made certain Rules which were published by means of a notification dated Feburary 1, 1941. Rule 36 provided that the Tribunal shall determine the appeal 'on merits notwithstanding the fact that the appellant did not choose to appear. The Tribunal was also empowered to restore an appeal which had been disposed of without hearing the appellant. The Rules made in 1941 were substituted by the Appellate Tribunal Rules, 1946 which were promulgated by means of Income-tax Appellate Tribunal Notification, dated October 31, 1946. Rule 24 was in the following terms Where on the day fixed for hearing or any other day to which the hearing may be adjourned, the appel-

lant does not appear when the appeal is called on for hearing, the Tribunal may, in its discretion, either dismiss the appeal for defau lt or may hear it ex parte."

This Rule was amended by means of a notification dated January 26, 1948 and it took the following shape "Where on the day fixed for hearing or any other day to which the hearing may be adjourned,, the appellant does not appear when the appeal is called on for hearing, the tribunal may dismiss the appeal for default." The Rule contained no provision for restoring an appeal dismissed for default.

The Special Bench of the High Court noticed the previous history of Rule 24 as also the terms in which it came to be framed after the passing of the Income tax Act, 1961 which enables the Tribunal, in its discretion, either to dismiss the appeal for default or to hear it ex parte in case of non-appearance of the parties and further enables the Tribunal to set aside the dismissal on sufficient cause being shown for non-appearance. After referring to various decided cases and examining the relevant provisions of the Act, the Special Bench summed up the position thus "To sum up the position, the Appellate Tribunal is the appointed machinery under the Act for finally deciding questions of fact in relation to, assessment of income-tax,. Its composition, consisting as it does of qualified persons in law and accountancy, makes it peculiarly qualified to deal with all questions raised in a case, whether there be assistance from the party or his counsel or not. Section 33(4) obliges it to decide an appeal, after giving an opportunity to the parties to put forward their case' The giving of the opportunity only emphasises the character of the quasi-judicial function performed by the Appellate Tribunal. The fact that that opportunity is not availed of in 'a 'particular case, will not entitle the Tribunal not to decide the case. There can be no decision of the case on its merits if the matter is to be disposed of for default of appearance of the parties. Further, an adjudication on the merits of the case is essential to enable the High Court to perform its statutory duty and for the Supreme Court to hear an appeal filed under section 66-A Section 33 (4) itself indicates by the use of the word "thereon, that the decision should relate to the subject matter of the

appeal. Rule 24, therefore, to be consistent with s. 3 3 (4) could only empower the Tribunal to dispose of the appeal on its merits, whether there be an appearance of the party before it or not. This was indeed the rule when it was first promulgated in the year 1941. The rule in its present form, as amended in the year 1948, in so far as it enables the dismissal of an appeal before the Income tax Appellate Tribunal for default of appearance of the appellant, Wm, therefore, be ultra vires, as being in conflict 'with the provisions of Section 3 3 (4) of the Act." On behalf of the appellant it was urged that the powers of the Appellate Tribunal relating to an appeal are derived from s. 3 3 (4) as also from S. 5A(8) and the Rules made thereunder and when Rule 24 cannot be said to be ultra vires the latter provision it cannot be impugned as being repugnant to S. 33(4). There is nothing, either express or implied, in the language of S. 33(4) from which it could be held that the order of the Tribunal in an appeal must always be made on the merits. The decisions of the Allahabad, Madras and Punjab High Courts in Shri Bhagwan Radha Kishen v. Commissioner of Income tax, U.P., (1) Ruvula Subba Rao & Ors. v. Commissioner of Income tax, Madras (2) and Mangat Ram Kuthiala & Ors. v. Commissioner of Income tax, Punjab (3) have also been pressed in support of the appellants contention. Now S. 5A of the Act appears in Chapter 2A relating to the Appellate Tribunal. Sub-ss. (1) to (4) provide for the constitution of the Tribunal and the appointment of its President and Members. Sub-sections (5) to (7) provide for the manner in which the benches of the Tribunal have to function. Sub-section (8) is to this effect "Subject to the provisions of this Act the Appellate Tribunal shall have the power to regulate its own procedure and the procedure of benches of the Tribunal in all matters arising out of the discharge of its functions including the places at which the bench shall hold their sittings."

The powers, functions and duties of the Appellate Tribunal are set out in ss. 28, 33, 35, 37,48 and 66. For Our purpose reference may be made only to ss. 33 and 66. Sub- sections (1) and (2) of S. 33 give a right to the assessee and the Commissioner to appeal to the Appellate Tribunal against the order passed by the Appellate Assistant Commissioner within sixty days of the cornmunication of his order. Under sub.'s. (2A) the Tribunal can admit an appeal after the expiry of sixty days if it is, satisfied that there was sufficient cause for not presenting it within that period. Sub-section (3) lays down the formalities in the matter of the filing of an appeal. Sub-s. (4) is to the effect that the Appellate (1) 22 I.T.R. 104.

(3) 38 I.T.R. 1.

(2) 27 I.T.R. 164.

Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit and shall communicate any such orders to the assessee and "to the Commissioner. Sub-s. (5) deals with the changes lo be made in the assessment as a result of the orders of the Appellate Tribunal Sub-section (6) makes the orders of the Tribunal on appeal final,, the only saving being with reference to the provisions of s. 66. Under that section the assessee or the Commissioner can require the Appellate Tribunal to refer to the High, Court any question. of law arising out of the order of the Appellate Tribunal and if the Tribunal refuses to state the case on the ground that no question of law arises the assessee or the Commissioner can, within the prescribed period, apply to the High Court and the High Court can direct the Appellate Tribunal to state the

case and make a reference. It is unnecessary to refer to all the previsions of s. 66 except to notice the power of the High Court to decide the question of law which decision has to be implemented by the Appellate Tribunal.

Now Rule 24 cannot be said to be ultra vires sub-s. (8) of s. 5A but what has to be essentially seen is whether it is repugnant to the provisions of s. 3 3 (4). The reasoning which prevailed with the Special Bench of the High Court, in the present case, was that under s. 3 3 (4) the Tribunal is bound to dispose of the- appeal on the merits, no matter whether the appellant is absent or not. Reference in particular was made to the remedies, namely, the provisions contained in s. 66 relating to reference on question of law and the further right of appeal to this Court under s. 66A if the case is certified to be fit one for appeal. The Special Bench found it difficult to accept that by exercising the power to dismiss an appeal for default of appearance under Rule 24, these remedies which were open to an aggrieved party could be defeated or ren- dered infructuous. The fact that there was no provision in Rule 24 or any other Rule for restoring an appeal once it was dismissed for default was also considered weighty in the matter. The cases in which the validity of Rule 24 has been upheld may now be considered. In Shri Bhagwan Radha Kishen v. Commissioner of Income tax, U.P.(1) the discussion on the question of validity of the rule is somewhat meagre. It was no doubt said that Rule 24 did not in any way come into conflict with s. 33(4) but hardly any reasons were given in respect of that view. It was recognoised' that there was no specific rule empowering the Tribunal to restore an appeal dismissed for default of appearance but it was observed that the Tribunal would have inherent jurisdiction to set aside such an order if satisfied with regard to the existence of a sufficient cause. According to Ravula Subba Rao & Ors. v. Commissioner of Income tax, kadras(2) a very- wide power was given to (1) 22 I.T.R. 104.

(2) 27 I.T.R. 164.

the Appellate Tribunal by s. 33(4) and it could pass any order which the circumstances of the one required. it was immaterial whether the opportunity of being heard had be en availed of by the party or not. This provision, it was held, did not make it obligatory for the Appellate Tribunal to dispose of the appeal on merits. In this case again there, was hardly much discussion and the Allahabad decision was simply followed. In Mangat Ram Kuthiala & Ors. v. Commissioner of Income tax, Punjab(1), the points raised were different and arose in a petition filed under Arts. 226 and 227 of the Constitution. It does not appear that the validity of Rule 24 was canvassed.

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 s. 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. v. Commissioner of Income tax, Central Bombay (2) the word "thereon" in s. 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 S. 31 of the Act. The provisions contained in s. 66 about making a reference on question 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 S. 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 s. 66. So far as the questions of fact are concerned the decision of the Tribunal is final and refe- rence 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 under s. 33(4). It follows from all this that the Appellate Tribunal is bound to give approper decision on questions of fact as well as law which can only be done,if the appeal is disposed of on the merits (1) 38 I.T.R. 1.

(2) 63 I.T.R. 232.

8 25 and not dismissed owing to the absence of the appellant. It was laid down as far back as the year 953 by S. R. Das, J. (as he then was) in Commissioner of Income tax,-Madras v.. Mtt. Ar. S. Ar. Arunahalam Chettiar(1) that the jurisdiction of the Tribunal and of the High Court is conditional on there being an order by die Appellate Tribunal which may be said to be one under 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 v. Scindia Steam Navigation Co. Ltd. (2) 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 under 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.

Now although Rule 24 provides for dismissal of an appeal for the failure of appellant to appear, the Rules at the material time did not contain any provision for restoration of the appeal.- Owing to this difficulty some of the High Courts had tried to find an inherent power in the Tribunal to set aside the order of dismissal [vide Shri Bhagwan Radha Kishen v. Commissioner of Income tax, U.P.(3) and Mangat Ram Kuthiala & Ors. v. Commissioner of Income tax, Punjab(4)]. There is a conflict of opinion among the High Courts whether there is any inherent power to restore fin appeal dismissed for default under the Civil Procedure. Code. (Mulla, Civil. Procedure Code, Vol. II, pp. 1583, 1584). It is unnecessary to resolve that conflict in the present case. It is true that the Tribunal's powers in dealing with appeals are of the widest amplitude and have, in some cases, been held similar to- and identical with the power of an appellate court under the Civil Procedure Code. Assuming that for the aforesaid reasons the Appellate Tribunal is competent to set aside an order dismissing an appeal for default in exercise of its inherent power there are serious difficulties in upholding the validity of

Rule 24. It clearly comes into conflict with sub.-s. (4) of s. 33 and in the event of repugnancy between the substantive provisions of the Act and a rule it is (1) 23 I.T.R. 180. (2) 42 I.T.R. 589.

(3) 22 I.T.R. 104. (4) 38 I.T.R. 1.

the rule which must give way to the provisions of the Act. We would accordingly affirm the decision of the Special Beach of the High Court and hold that the answer to the question which was referred was rightly given in the affirmative.

The appeal fails and it is dismissed with costs.

R.K.P.S. Appeal dismissed.