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Court : Chennai

Decided On : Jan-21-1954

Reported in : AIR1955Mad39; [1955]27ITR164(Mad)

Judge : Satyanarayana Rao and ;Rjagopalan, JJ.

Acts : [Income Tax Act, 1922](#) - Sections 5A(8), 33(4) and 66; Income Tax Appellate Tribunal Rules, 1946 - Rule 24; [Constitution of India](#) - Article 226

Appeal No. : Writ Petn. Nos. 679, 680, 769 and 773 of 1952

Appellant : Ravula Subbarao and ors.

Respondent : Commr. I.T., Madras and ors.

Advocate for Def. : C.S. Rama Rao Sahib, Adv.

Advocate for Pet/Ap. : K. Bhimasankaram, Adv.

Disposition : Petition dismissed

Judgement :

Satyanarayana Rao, J.

1. These are applications to issue writs of certiorari to quash the proceedings of the Income-tax Appellate Tribunal. By virtue of the rule-making power vested in the Appellate - Tribunal under Section 5-A, Sub-clause (8), Rule 24 of the Income-

tax Appellate Tribunal Rules, 1946 was made; and it provides:

'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, in its discretion, either dismiss the appeal for default or may hear it ex parte.'

The point raised in these petitions is that this rule is 'ultra vires' and is opposed to Section 33, Sub-section (4), Income-tax Act. The rule-making power under Section 5-A, Sub-clause (8) is of course subject to the provisions of the Act, and the scope of the power is to regulate the procedure of the Appellate Tribunal 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. It is essentially a power to regulate the Tribunal's own procedure, but is subject to the provisions of the Act.

2. The point for decision therefore is whether the rule is in conflict with Section 33, Sub-section (4) of the Act. The sub-section runs as follows:

'The Appellate 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 order to the assessee and to the Commissioner.'

The argument is that under this sub-section, even if the party did not avail himself of the opportunity given to him of being heard and was not present on the day fixed for hearing, it was the duty of the Appellate Tribunal to dispose of the appeal on merits, and that it could not dismiss it for default. On this construction, it was contended that the rule providing for dismissal for default was in conflict with Sub-section (4) of Section 33 and was therefore ultra vires.

We are unable to place such a narrow construction on Sub-section (4) of Section 33. It requires the Appellate Tribunal to give both parties an opportunity of being heard. If that opportunity is availed of, and the Tribunal hears the appeal, it is no doubt true the Tribunal has to dispose of the appeal on merits. But if the opportunity is not availed of by the appellant the Appellate Tribunal may follow one

of two courses: notwithstanding the non-appearance of the party it may dispose of the appeal on merits, or it may dismiss the appeal for default. A very, wide power is given to the Appellate Tribunal, for the language employed is that 'it may pass such orders thereon as it thinks fit', that is, such orders according to the circumstances of the case, whether the opportunity was availed of by the party concerned or was not availed of. Sub-section (4) of Section 33 does not make it obligatory on the part of the Appellate Tribunal to dispose of the appeal on merits, when the opportunity which was given to the party concerned was not availed of, and the appeal was not argued on behalf of such party. In this view of the matter, we are unable to see any conflict between Rule 24 of the rules and Sub-section (4) of Section 33 of the Act.

Our attention was drawn in the course of the arguments to the powers of the Appellate Assistant Commissioner in hearing an appeal, provided under Section 31 of the Act. These powers bear no analogy, in our opinion, to the powers of the Appellate Tribunal hearing an appeal, as the powers of the Appellate Tribunal are not satisfied (sic stated) in the same detail as in Section 31 but the mode of disposing of the appeal is left to it, giving it a wide discretion to dispose of it as it thinks fit.

3. In these cases what happened was, the applicant Wanted to apply for an adjournment, as the point raised in the appeals was before the Supreme Court in an appeal preferred by the same assessee against the decisions of this court in -- 'Subba Rao v. Commissioner of Income-tax', : [1951]20ITR337(Mad) (A). On the day fixed for hearing of these appeals, the assessee did not appear and he did not instruct any advocate to argue the appeals on his behalf. The Appellate Tribunal therefore dismissed these appeals for default. There is nothing to show that the order of the Tribunal was without jurisdiction so as to Justify interference by this court by issuing a writ of certiorari to quash the proceedings. It may be observed that under Section 66 of the Act, it was open to the assessee to have asked for a reference raising the same question which was urged before us. We do not agree with the contention of the learned advocate that the question now agitated before us is not a question of law and that it did not arise out of the orders of the Appellate Tribunal. The very jurisdiction of the Appellate Tribunal to dismiss the

appeal for default without disposing of it on merits is the question raised before us, and we fail to see how that question is not one which did not arise out of the orders of the Appellate Tribunal. He could have therefore asked for a reference to this court; but he did not avail himself of that remedy.

We do not wish to rest our decision on this aspect of the case, as we disagree with the contentions of the learned Advocate regarding the construction of Sub-section (4) of Section 33 of the Act and Rule 24 of the Income-tax Appellate Tribunal Rules, 1946. The same view was taken by the Allahabad High Court in -- 'Bhagwan Radha Kishen v. Commissioner of Income-tax', : [1952]22ITR104(All) (B). It is no doubt true that under the Act and under the Appellate Tribunal Rules, 1946, no provision is made for restoring appeals which were dismissed for default. The Allahabad High Court, however, thinks that it is the inherent right of a Tribunal to set aside an order of dismissal for default, but we think it is unnecessary to express, any opinion on that question in this case. If it is a lacuna, it is a matter for the appropriate authority to remedy it.

4. In the result, the petitions are dismissed with costs, Rs. 250 in W. P. No. 679 of 1952.

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