2020:KER:34381

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR. JUSTICE T.R.RAVI

MONDAY, THE 28TH DAY OF SEPTEMBER 2020 / 6TH ASWINA, 1942

WA.No.1257 OF 2020

AGAINST THE ORDER IN WP(C) 17013/2020(B) OF HIGH COURT OF KERALA dt.18.8.2020

APPELLANT/PETITIONER:

UZHUVA SERVICE CO-OPERATIVE BANK LTD NO A 305,
PATTANAKKAD P.O.CHERTHALA, ALAPPUZHA-688 531,
REPRESENTED BY ITS SECRETARY

BY ADV. SRI.BIJU GEORGE (VADASSERY)

RESPONDENTS/RESPONDENTS:

1 INCOME TAX OFFICER
WARD-4, ALAPPUZHA, ALAPPUZHA-688 011.

2 COMMISSIONER OF INCOME TAX (APPEALS),
OFFICE OF THE COMMISSIONER OF INCOME TAX,
KOTTAYAM-686 002.

3 ASSISTANT REGISTRAR OF INCOME TAX APPELLATE TRIBUNAL,
COCHIN BENCH, KAKKANAD-682 037

SRI.JOSE JOSEPH, SC, I.T

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 28.09.2020, ALONG WITH WP(C).17013/2020(B), THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

2020:KER:34381

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR. JUSTICE T.R.RAVI

MONDAY, THE 28TH DAY OF SEPTEMBER 2020 / 6TH ASWINA, 1942

WP(C).No.17013 OF 2020(B)

PETITIONER:

UZHUVA SERVICE CO OPERATIVE BANK LTD. NO. A 305 PATTANAKKAD P.O. CHERTHALA, ALAPPUZHA 688 531, REPRESENTED BY ITS SECRETARY.

BY ADV. SRI.C.A.JOJO

RESPONDENT/S:

1 **INCOME TAX OFFICER WARD-4, ALAPPUZHA, ALAPPUZHA 688 011.**

2 **COMMISSIONER OF INCOME TAX (APPEALS) OFFICE OF THE COMMISSIONER OF INCOME TAX, KOTTAYAM 686 002.**

3 **ASSISTANT REGISTRAR OF INCOME TAX, ALLEPPATE, COCHIN, BENCH, KAKKANAD 682 037.**

R1-3 BY ADV. SRI.P.K.RAVINDRANATHA MENON (SR.)
R1-3 BY SRI.JOSE JOSEPH, SC, FOR INCOME TAX

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 28.09.2020, ALONG WITH WA.1257/2020, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

"CR"

JUDGMENT

T.R.RAVI, J.

The appellant, a Co-operative Society registered under the Kerala Co-operative Societies Act, 1969, filed W.P.(C)No.17013 of 2020 praying to set aside Ext.P1 assessment order and Exts.P4 and P6 consequential orders, to restore Ext.P3 appeal and decide the same on merits and for other reliefs. Ext.P4 is the order passed on Ext.P3 appeal by the Income-tax Appellate Tribunal, dismissing the appeal for non-prosecution, on the ground that assessee failed to appear. The learned Single Judge admitted the writ petition and granted an interim stay of recovery subject to the condition that the appellant pays Rs.10.5 lakhs within one month. The direction to deposit Rs.10.5 lakhs, which according to the appellant amounts to 61% of the demand, has been challenged in the writ appeal.

2. Heard Sri Biju George, learned counsel for the appellant and Sri Jose Joseph, learned Standing Counsel for the Income-tax Department.

3. Since the writ petition itself is filed mainly on the ground

that the Income-tax Appellate Tribunal cannot, in law, pass an order dismissing an appeal for default or for non-prosecution, we deem it appropriate to call for the records of the writ petition and consider the same along with the writ appeal.

4. The counsel for the appellant relies on the decision of the Hon'ble Supreme Court in **Balaji Steel Re-rolling Mills v. Commissioner of Central Excise and Customs**, reported in **[AIR 2015 SCW 426]** in support of his contention. The Hon'ble Supreme Court considered the provisions of the Central Excise Act, 1944 and the Rules made thereunder, dealing with the powers of the Appellate Tribunal. After extracting the statutory provisions, the Hon'ble Supreme Court in paragraphs 10 to 12 held as follows:

> **"10.** From a perusal of the aforesaid provisions, we find that the Act enjoins upon the Tribunal to pass order on the appeal confirming, modifying or annulling the decision or order appealed against or may remand the matter. It does not give any power to the Tribunal to dismiss the appeal for default or for want of prosecution in case the appellant is not present when the appeal is taken up for hearing.
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> **11.**A similar question came up for consideration before this Court in *CIT* v. *S. Chenniappa Mudaliar* [*CIT* v. *S. Chenniappa Mudaliar*, (1969) 1 SCC 591] wherein this Court considered the provisions of Section 33 of the

Income Tax Act, 1922 and Rule 24 of the Appellate Tribunal Rules, 1946 which gave power to the Tribunal to dismiss the appeal for want of prosecution. For ready reference, Section 33(4) of the Income Tax Act, 1922 and Rule 24 of the Appellate Tribunal Rules, 1946 are reproduced below:

Section 33(4) of the Income Tax Act, 1922

"**33. (4)** 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 orders to the assessee and to the Commissioner."

***

Rule 24 of the Income Tax Appellate Tribunal Rules, 1946

"**24.** 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 or may hear it ex parte."

12. Considering the aforesaid provisions, this Court held as under: (*S. Chenniappa Mudaliar case* [*CIT* v. *S. Chenniappa Mudaliar*, (1969) 1 SCC 591] , SCC pp. 595-96, para 7)

"*7*. 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.* v. *CIT* [*Hukumchand Mills Ltd.* v. *CIT*, (1967) 63 ITR 232 (SC)] , 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 under Section 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 *CIT* v. *Arunachalam Chettiar* [*CIT* v. *Arunachalam Chettiar*, (1953) 23 ITR 180 (SC)] 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 under Section

> 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 *CIT* v. *Scindia Steam Navigation Co. Ltd.* [*CIT* v. *Scindia Steam Navigation Co. Ltd.*, (1961) 42 ITR 589 (SC)] 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: (ITR p. 609)
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> `… 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 Section 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."

5. It can be seen from the paragraphs extracted above that the Supreme Court considered the issue with reference to the provisions of the Income-tax Act, 1922 and the Appellate Tribunal Rules, 1946, dealing with the powers of the Income-tax Appellate

Tribunal also and held that looking at the substantive provisions of the Act, the Tribunal should not have dismissed the appeal for want of prosecution and it ought to have decided the appeal on merits, even if the appellant or its counsel was not present when the appeal was taken up for hearing. Rule 24 as it stood then provided for dismissal of the appeal for default. The Apex Court held that Section 33(4) of the Act does not permit the dismissal of an appeal by the Tribunal, for default or non-appearance. Section 254(1) and (3) of The Income Tax Act, 1961, is in pari materia with Section 33(4) of the Income Tax Act, 1922. However, Rule 24 of the Income Tax (Appellate Tribunal) Rules, 1963, has undergone considerable change from the Rule 24 which existed in the 1946 Rules. Rule 24 of the 1963 Rules reads thus:

> "Rule 24. Hearing appeal ex parte for default by the appellant.
>
> Where, on the day fixed for hearing or on any other date to which the hearing may be adjourned, the appellant does not appear in person or through an authorised representative when the appeal is called on for hearing, the Tribunal may dispose of the appeal on merits after hearing the respondent:
>
> Provided that where an appeal has been disposed of as provided above and the appellant appears afterwards and

satisfies the Tribunal that there was sufficient cause for his non-appearance when the appeal was called on for hearing, the Tribunal shall make an order seting aside the ex parte order and restoring the appeal."

6. A reading of Ext.P4 would clearly show that the Appellate Tribunal has not considered Ext.P3 appeal on merits and the only reason for dismissing it is stated to be for non-prosecution. The appellant filed Ext.P5 Miscellaneous Petition seeking to set aside the *ex parte* order for restoring the appeal back to file. But the same was also dismissed by the Tribunal as per Ext.P6 order, for the reason that the same is filed beyond time.

7. In the light of the binding judgment of the Apex Court and the provisions contained in Section 254 of the Income Tax Act, 1961 and Rule 24 of the Income Tax (Appellate Tribunal)Rules, 1963, the writ appeal and the writ petition are allowed. We hold that Ext.P4 order passed by the Appellate Tribunal is not issued in accordance with law, and the same is set aside. Since Ext.P4 order is not an order passed on merits, there is no requirement of the appellant approaching the Tribunal for setting aside the ex parte order and restoration of the appeal, as per the Proviso to Rule 24. Ext.P6 order which is consequential, is also set aside. The Tribunal

is directed to reconsider the appeal Ext.P3 on merits and dispose of the same in the manner stipulated by the Statute. The parties shall bear their respective costs.

8. We take note of the fact that the order of the First Appellate Authority was passed on 31.01.2014 and that of the Tribunal was passed on 26.06.2014, and the appellant chose to prefer an application to set aside the *ex parte* order only after five years, on 22.11.2019. Even though the appeal and the writ petition filed by the appellant is allowed, we are of the opinion that there is inordinate delay in challenging the order of the Appellate Tribunal, which all the same is to be treated as *non est*. The appeal and the writ petition is hence allowed, subject to the appellant paying a sum of Rs.5,000/- (Rupees Five Thousand only) towards costs to the Kerala State Mediation and Conciliation Centre and producing a copy of the receipt within a period of one month before the Tribunal.

Sd/-
K. VINOD CHANDRAN
JUDGE

Sd/-
T.R. RAVI
JUDGE

dsn

APPENDIX OF WP(C) 17013/2020

PETITIONER'S EXHIBITS:

EXHIBIT P1	**A TRUE COPY OF THE ASSESSMENT ORDER AY 2010-11 DATED 21.01.2013 ISSUED BY THE FIRST RESPONDENT.**
EXHIBIT P2	**A TRUE COPY OF THE APPELLATE ORDER DATED 31.01.2014 ISSUED BY THE SECOND RESPONDENT.**
EXHIBIT P3	**A TRUE COPY OF THE APPEAL FOR AY 2010-11 BEFORE THE 3RD RESPONDENT DATED 14.04.2014.**
EXHIBIT P4	**A TRUE COPY OF THE ORDER OF THE HON'BLE TRIBUNAL DATED 26.06.2014 IN ITA NO.186/COCH/2014**
EXHIBIT P5	**A TRUE COPY OF THE M.P.NO. 05/COCH/2019 WITH AFFIDAVIT DATED 22.11.2019.**
EXHIBIT P6	**A TRUE COPY OF THE ORDER OF THE TRIBUNAL DATED 13.03.2020 IN M.P. NO.05/COCH/2020 WITH POSTAL COVER.**