

CALCUTTA HIGH COURT

Gour Mohan Mullick

Vs.

Agricultural Income-tax

Income-tax Ref. No. 55 of 1951

(Chakravarti and Bachawat, JJ.)

06.05.1952

JUDGMENT

Chakravarti, J.

1. The question raised by this reference has often arisen under the Income-tax Act and has been answered by different High Courts, other than this Court, in different ways. So far as this Court to concerned, it does not appear that the question came up on any previous occasion, either under the Income-tax Act or under the Bengal Agricultural Income-tax Act under which it has now arisen.

2. The present reference is by the Agricultural Income-tax Appellate Tribunal and arises out of the following simple facts. In respect of his agricultural income for the accounting year, 1943-44, an assessment order was made on the assessee, Gour Mohan Mullick, on 5-1-1949. The notice of demand was received by him on the 1st of February next, but he did not prefer an appeal to the Assistant Commissioner till 30-5-1949. Since under Section 34(2) the period of limitation for filing an appeal is 'ordinarily' thirty days from the receipt of the notice of demand, the Assistant Commissioner issued a notice to the assessee to show cause why the petition of appeal should not be rejected as time-barred.

Cause was shown but as the Assistant Commissioner did not consider it satisfactory, he passed an order on 27-6-1949, concluding with the following words :

"The delay is therefore not condoned. The appeal petition was not entertained under Section 34(2). Inform appellant."

3. I may interrupt myself for a moment to point out that in the statement of the case submitted by the Tribunal, the date of presentation of the appeal has been wrongly given as 27-6-1949. The order sheet of the Assistant Commissioner which is set out at page 15 of the paper-book makes it perfectly clear that the appeal was filed on the 30th May. It is regrettable that such an inaccuracy should have occurred in the Statement of the Case, particularly when the question is one of limitation.

4. To revert to the facts of the case, the assessee next preferred an appeal to the Appellate Tribunal against the order of the Assistant Commissioner. By an order passed on 15-2-1951, the Appellate Tribunal held that the appeal was not competent, inasmuch as the order appealed from was not an order under Section 35 of the Act but an order under Section 34(2) which was not appealable under Section 36(1). The reasons of the Tribunal were given not in the order passed in the present case, but in the order passed in a connected appeal to which reference was made.

5. Thereafter, the assessee made an application to the Tribunal for a reference to this Court of the question relating to the maintainability of the appeal and the Tribunal has referred the following question of law :

"Whether an order, purporting to have been made under Section 34(2) of the Bengal Agricultural Income-tax Act, refusing to admit an appeal on the ground that it was not presented within the period of limitation, there being, in the opinion of the Assistant Commissioner, no sufficient cause for not presenting the appeal within that period, is an order passed in appeal under section 35 of the Act and as such appealable to the Appellate Tribunal ?"

6. It will be noticed that the question has been framed as a pure question of law without reference to any particular facts. The order contemplated by the question is an order by which no disputed question of limitation was decided but simply an order by which the Assistant Commissioner refused to condone the delay in filing the petition of appeal, the delay being assumed and apparently admitted.

7. The provisions of law which are relevant to the question referred are Sections 34, 35 and 36 of the Bengal Agricultural Income-tax Act. Section 34(1) provides for an appeal from, 'inter alia', an order of assessment made under Section 25 and Sub-Section (2) of the section prescribes the period of limitation for filing such an appeal. The latter provision is to the effect that-

"The appeal shall ordinarily be presented within thirty days of receipt of the notice of demand relating to the assessment.....but the Assistant Commissioner may admit an appeal after the expiration of the period if he is satisfied that the appellant had sufficient cause for not presenting it within that period."

The hearing of the appeal is provided for by Section 35. Sub-Section (1) of that section provides that the Assistant Commissioner shall fix a day and place for the hearing of the appeal, while Sub-Section (2) empowers the Assistant Commissioner to make such further enquiry as he thinks fit before disposing of any appeal.

The actual disposition of the appeal is dealt with by Sub-Section (4) of the section which, so far as material, is in the following words :

"(4) In disposing of an appeal, the Assistant Commissioner may -
(a) in the case of an order of assessment -
(i) confirm, reduce, enhance or annul the assessment."

The rest of the sub-section is not material.

8. A further appeal to the Appellate Tribunal is provided for by Section 36(1). That section is in the following terms :

"Any assessee objecting to an order passed by the Assistant Commissioner under Section 32 or Section 35 may appeal to the Appellate Tribunal within sixty days of the date on which such order is communicated to him."

9. It will be noticed that Section 36(1) does not mention any order made under Section 34(2). Section 32 which Section 36(1) mentions is not relevant for the present purpose.

The only section which remains is Section 35 and if an assessee is to establish a right of appeal from a particular order of the Assistant Commissioner, he must bring the order under that section. In other words, the question in the present case is whether the order of the Assistant Commissioner refusing to condone the delay and refusing to entertain the petition of appeal was an order under Section 35 of the Act and as such appealable.

10. The Indian Income-tax Act contains provisions practically identical with Sections 34, 35 and 36 of the Bengal Act. Those sections are Sections 30, 31 and 33. Under the Indian Income-tax Act, it has been held by the High Court of Madras 'that an appeal would lie even from an order rejecting a time-barred petition of appeal upon a refusal to condone the delay in filing it. *'Commissioner of Income-tax v. Shahzadi Begum¹*', The Bombay High Court has taken the view that such an order would not be appealable, but an order rejecting a petition of appeal on the ground that it is time-barred would be and if there was an order by which the Assistant Commissioner first held that the petition of appeal was time-barred and then rejected it upon refusing to condone the delay, an appeal would lie from the first part of the order, but none would lie from the second part. (*'K.K. Porbunderwalla v. Commissioner of Income-tax, Bombay City²*', The Allahabad High Court has held that where a petition of appeal is rejected in limine in the view that it is time-barred and upon a refusal to condone the delay, no appeal would lie from such an order (*'Municipal Board, Agra v. Commissioner of Income-tax, U.P.³*.'). Previously, the Allahabad High Court had occasion to glance at the question in one or two cases but as it did not come to any definite decision, it is not necessary to refer to them. The Patna High Court does not appear to have decided the exact question, but it has held that an order rejecting a petition of appeal on the ground that it is not in the prescribed form, which also is a matter dealt with in Section 30 of the Indian Income-tax Act, would be appealable. (*Gyan Manjari Kuari v. Commissioner of Income-tax, B. and O.⁴*.').

11. Unfortunately, the light which these and other decisions could throw upon the present question is greatly obscured by the fact that in several cases the exact order sought to be appealed from cannot be ascertained from the report. I may also add with respect, that all the implications of the particular view taken do not seem to have received attention in all those cases. For that reason and also for the reason that there is no decision of this Court, I shall try to arrive at a conclusion of my own from an examination of the sections of the Bengal Act.

12. I think it will make for clarity if I try to visualise at this stage all the different kinds of orders

that can possibly be made when an Assistant Commissioner has before him a

¹ AIR 1952 Mad 232

³ AIR 1952 All 249

² AIR 1952 Bom 157

⁴ AIR 1944 Pat 112

petition of appeal presented for the first time. The form for an appeal from an order of assessment is Form No. 12 which requires the appellant to state in an appropriate column the date on which he received the notice of demand. The date of the presentation of the appeal and the date of the receipt of the notice of demand by reference to which the question of limitation is to be judged, will, therefore, be both before the Assistant Commissioner. In dealing with the petition of appeal the Assistant Commissioner, therefore, -

- (a) may wrongly think that it is barred by limitation and reject the petition;
- (b) may overlook the fact that it is barred by limitation and wrongly admit it;
- (c) may notice the defect and issue a notice to the appellant to show cause why the petition of appeal should not be rejected and may, upon considering such cause as may be shown, reject the petition;
- (d) may notice the defect and reject the petition of appeal from a mere comparison of the dates without issuing a notice to the appellant;
- (e) may have the effect brought to his notice by the appellant himself who files an application for condonation of the delay along with the petition of appeal and may, after considering the application, reject the petition;
- (f) may consider the cause shown to be sufficient and admit the petition; and
- (g) may consider the appeal time-barred, overrule the assessee who protests that it is within time and then reject the petition either straightaway or after rejecting an application for condonation of the delay, if there be any.

13. It appears to me that, strictly speaking, in all these cases the order passed belongs to a stage prior to the stage of the hearing of the appeal which is contemplated by Section 35. If, therefore, the fact that, so far as the sequence of the various stages of a proceeding of appeal is concerned, an order appertains to the stage prior to the stage indicated by Section 35 is sufficient to make it non-appealable, no appeal should lie from any of these orders. I can see no reason for making a distinction between cases where the petition of appeal is rejected on the ground that it is barred by limitation and cases where there is further a consideration of an application for extension of time and the petition of appeal is ultimately rejected. Nor can I see, as I shall presently explain, any distinction of substance between rejecting an appeal on the ground that it is barred by limitation and refusing to condone the delay.

14. Cases in which it has been held that no appeal would lie from an order refusing to condone the delay and to entertain the petition of appeal, proceed on the view that such an order does not, by itself, confirm the assessment; or that the order deals with a matter specifically provided for in Section 20(2) of the Indian Income-tax Act, corresponding to Section 34(2) of the Bengal Act and that therefore it cannot be an order under Section 31 or 35, or, again, that till an appeal is admitted, there is no appeal at all and, therefore, rejection of a petition of appeal on the ground of limitation cannot possibly be a matter within Section 35. On the other hand, cases which have held that an appeal would lie even from an order rejecting a petition of appeal after refusing to condone the delay, proceed on the view that a time-barred appeal is nonetheless an appeal

because it is time-barred; or that an order rejecting the intention of appeal is virtually an order confirming the assessment and therefore an order under Section 31 of the Indian Act or Section 35 of the Bengal Act; or, again, that if the law is to be applied according to its letter, then no power would be found within the four corners of Section 30 of the Indian Act or Section 34 of the Bengal Act to reject a petition of appeal and, therefore, any order of rejection must be referred to Section 31 of the Indian Act or Section 35 of the Bengal Act. If I may say so with respect, the reasons given in favour of the former of these views appear to me to be open to objection and those in favour of the latter do not go far enough to reach the real point.

15. The true position appears to me to be that when an Assistant Commissioner has before him a petition of appeal, he has to make an order in respect of it, either admitting the appeal or rejecting the petition. It has been observed by the Bombay High Court that in cases where a petition of appeal is time-barred and an application is made for condonation of the delay, the Act interposes a special chapter between the presentation of the appeal and its final hearing, if any and that, therefore, any order rejecting the appeal would belong not to the stage of the hearing of the appeal but to the intermediate special chapter.

I am afraid I cannot see the distinction sought to be made between the case where an appeal is not barred by limitation and it is admitted and an appeal which is barred by limitation and it is admitted after condonation of the delay. In each case, there must be something in the nature of a consideration of the appeal with a view to ascertaining whether it is in form and in time and whether the ultimate order be one of admission or rejection, it appears to me that there is an intermediate chapter in all cases.

16. As I was going to say, the true position appears to me to be that when an Assistant Commissioner has before him a petition of appeal and has to make an order either admitting or rejecting it, he must consider two matters before he can make the final order. Those two matters are whether the petition of appeal is time-barred and if it is time-barred, whether he will condone the delay. These two matters appear to me matters, which, in themselves, do not form the subject-matter of any final order. They are merely matters, the findings on which are the grounds or reasons for the final order which must be an order, either admitting the appeal or rejecting it. In other words, the order which can be appealed from and which must always be sought to be appealed from is the final order, either admitting the appeal or rejecting it. Where the appeal is found to be barred by limitation and the petition of appeal is rejected, the final order is still an order rejecting the petition of appeal and the decision on the question of limitation is merely a finding on which the final order is based. Equally, where the delay is not condoned, the ultimate order is the order rejecting the petition of appeal and the decision on the question of extension of time is merely another finding on which the ultimate order is based. I can, therefore, see no reason for holding, as the Bombay High Court appears to have done, that an appeal would lie from that part of the order which deals with the question of limitation, but none would be from the other part which deals with the question of extension of time. So to hold seems to me to amount to holding that whereas an appeal would lie from the final order rejecting the petition of appeal, the incorrectness of the finding of the Assistant Commissioner that the appeal is barred can be urged as a ground but the incorrectness of his finding that time ought not to be extended cannot be so urged. The effect of the distinction made, therefore, seems to me to be not that an appeal would lie in one case and would not lie in the other, but rather that, in the appeal, one of the grounds of the decision of the Assistant Commissioner can be challenged, whereas the other cannot be. As I have said before, I can see no reason for making a distinction of that kind.

17. In my view, it is the ultimate order which must be considered in deciding whether an appeal would lie or not and not the grounds of that order. In other words, where the petition of appeal has been rejected the matter for consideration is whether from an order rejecting the petition of appeal, whatever the ground of such rejection may be, an appeal would lie. Similarly, where the petition of appeal has been admitted, the matter for consideration would be whether from an order admitting an appeal, although prima facie time-barred or not in the prescribed form, an appeal would lie and not the grounds of such an order.

18. The question, therefore, boils down to this is an order, rejecting the petition of appeal an order appealable under Section 36(1) ? To narrow it down still further, the question is - can such an order be properly regarded as an order under Section 35 ? It is necessary to put the question in the latter form, because Section 36(1) mentions only section 35 and not also Section 34. On that question I see no difficulty in holding that an order rejecting the petition of appeal as time-barred is virtually an order confirming the assessment and consequently may rightly be treated as an order under Section 35. It seems to me that it is also possible to hold that Section 34 merely enumerates or specifies some of the matters which have to be considered in the course of the proceedings relating to the appeal, but the disposal of all such matters properly belongs to Section 35 which deals with the disposal of appeals.

19. If, as has been held by the Bombay and the Allahabad High Courts, matters falling under Section 30 of the Indian Income-tax Act cannot be appealable, because Section 30 is not mentioned in Section 33. I cannot see how it can, at the same time, be held an order rejecting a petition of appeal as time-barred is, nevertheless, appealable. As I have sought to point out, even such an order would belong to a stage prior to the stage of the final hearing of the appeal. I am leaving aside the case where the appeal is admitted as within time and on the question of limitation being raised at the final hearing, it is then decided that the appeal is, in reality time-barred. Such a case does not require consideration on the present occasion. But even if the question is raised at the inception and at the stage when the admission of the appeal is to be considered, it seems to me that there is no escape on the reasoning of the Bombay and the Allahabad High Courts, from the conclusion that the order rejecting an appeal would belong to the stage prior to the hearing and as such would not be appealable. The Bombay view that nonetheless such an order would be appealable, so far as it is a decision on the question of limitation, does not seem to me to be consistent with the reasons given for holding that the further part of the order refusing to condone the delay would not be appealable. The Allahabad view that no part of such an order is appealable is at least more consistent.

20. I concede that there is some artificiality in holding that an order rejecting a petition of appeal is virtually an order confirming the assessment and will be appealable on that basis. So far at least as this High Court is concerned, it has been held that an order rejecting a memorandum of appeal on the ground that it is barred by limitation, is not a decree and, therefore, not appealable. Still, however, the consequence of taking a similar view in cases under the Income-tax Acts would be that even if the Assistant Commissioner were to be perverse or wrong-headed or ignorant enough to think a petition of appeal, obviously in time, to be time-barred, the assessee would have no remedy whatsoever. Under the Income-tax Acts, we are not troubled or embarrassed by the definition of a 'decree'. As the language of Section 35 does not altogether exclude the view which I have indicated, I think it should be so construed as to provide to the assessee a right of appeal. In any event, by the order rejecting the petition of appeal, the appeal is

disposed of or concluded.

21. This view, however, raises a converse question. Supposing the Assistant Commissioner condones the delay in an equally wrong-headed way in a case of gross negligence and admits the petition of appeal, is the Commissioner of Income-tax without remedy? It is to be noticed that while it is possible to spell out, in the case of a rejection of the petition of appeal, an order confirming the assessment or disposing of the appeal and thus to bring it under Section 35, no such or similar construction is possible in the case of an order admitting the appeal. Such an order is specifically mentioned in Section 34(2) to which it must be held to appertain and by it the appeal is not disposed of. One solution of this difficulty might be that although the Commissioner of Income-tax would not have an immediate right of appeal still, if he found it necessary to appeal from the final order of the Assistant Commissioner, he would be entitled to urge in such appeal the ground that the assessee's appeal had been wrongly admitted and the delay had been wrongly condoned. Whether such a ground would be open to the Commissioner of Income-tax in an appeal from the final order passed by the Assistant Commissioner is a matter which does not call for decision in the present case and I prefer not to express any opinion thereon.

22. I may point out, however, that cases are not unknown where an order rejecting a particular prayer is appealable whereas an order granting it is not. An apt illustration is an order passed under Order 9 Rule 13, Civil Procedure Code. An order refusing to set aside an ex parte decree is appealable, but an order setting aside an ex parte decree is not.

It has also been held that in an appeal from the final decree that may be passed, the ground that the ex, parte decree was wrongly set aside would not be available to the plaintiff-appellant. Another illustration of the converse case that comes to my mind is an order under S. 5 of the Partition Act. An order directing a sale under that section is appealable whereas an order refusing to direct a sale is not. It is thus not always that all possible orders that can be passed under a particular section are appealable. Consequently, even if the position be that the Department is not entitled to appeal from an order condoning the delay and admitting the petition of appeal, that would not be a sufficient ground for holding that the assessee also would have no right of appeal from an order rejecting his petition of appeal upon declining to condone the delay.

23. Reverting to the question of limitation, it is by no means clear what Section 34(3) really means. I have already set out the terms of the section and the phraseology in which the section is expressed is curious in the extreme. It speaks of a period within which an appeal should "ordinarily" be presented and then it gives power in the Assistant Commissioner to extend the time if he considers that there was sufficient cause for the delay. In one sense, it seems to be a combination of a provision of the nature of an Article in the Limitation Act and Section 5 of that Act. In another sense, it seems to imply that the period of thirty days is not really a fixed period of limitation the period of limitation is thirty days or such further period as the Assistant Commissioner may allow, if so, a decision not to allow an extension, of time is equally a decision on the question of limitation and not a decision on an ancillary or subsidiary matter and, therefore, on the reasoning of the Bombay High Court, an appeal would lie even from an order refusing to condone the delay which would be in effect an order holding that the appeal is barred by limitation.

24. In the typical or representative cases decided by other High Courts to which I referred when I

began this judgment, the position was not uniform.

In the Madras case, the assessee did not dispute that his appeal was barred by limitation, but only prayed for condonation of the delay which was refused. In the Bombay case, the assessee did raise a dispute, but on the Assistant Commissioner holding against him, he made a prayer for extension, of time which was not granted. The position was the same in the Allahabad case. In the Patna case, it was contended that, in the circumstances of the case, the prescribed form could not possibly be conformed to.

25. In the present case, it was not disputed that the appeal was not filed within thirty days from the receipt of the notice of demand. There was thus no decision on any disputed question of limitation. The only question was whether the Assistant Commissioner was right in declining to condone the delay and in rejecting the petition of appeal as time-barred. Even so, however, I am prepared to hold that the order was appealable under Section 34(2) and Section 35, read together along with Section 36(1). I would base that view on the ground that the order, in effect, confirmed the assessment or, at any rate, disposed of the appeal and was thus an order under Section 35, because what that section really contemplates is a disposal or conclusion of the appeal and the forms of orders specified in it are not exhaustive. An appellate order may not, directly and by itself, confirm or reduce or enhance or annul an assessment and may yet dispose of the appeal. If it does so, it is immaterial whether the ground is a finding that the appeal is barred by limitation or a finding that the case is not a fit one for extension of time or both.

26. The matter undoubtedly is not free from difficulty. But as I have said, since the view which provides for an appeal is a possible view, I think it is proper to take it.

27. For the reasons given above, the answer to the question referred must, in my opinion, be in the affirmative.

28. In view of the difficulty of the point and the view that has been generally taken under the Indian Income-tax Act, I think the proper order for costs to make is that each party will bear its own costs.

Bachawat, J.

29. The answer to the question referred depends upon the true construction of Sections 34, 35 and 36 of the Bengal Agricultural Income Tax Act. Sub-Section 1 of Section 34 of the Bengal Act gives to the assessee a right of appeal to the Assistant Commissioner from certain orders and acts of the Income Tax Officer, Under sub-Section 2 of that section the appeal must be presented within 30 days of the service of the relevant notice or intimation, but it may be admitted after that period if the Assistant Commissioner is satisfied that there is sufficient cause for not presenting the appeal within that period. Sub-Section 3 of that section provides that the appeal shall be in prescribed form and verified in prescribed manner. Under Sub-Section 1 of Section 35 of the Bengal Act the Assistant Commissioner shall fix a day and place for the hearing of the appeal. Sub-Sections 2 and 3 of that section gives him the power of further enquiry and the power to allow the appellant to urge new points at the hearing of the appeal. Sub-Section 4 of that section provides that the Assistant Commissioner 'in disposing of an appeal' can exercise certain powers and inter alia may 'confirm, reduce, enhance or annul the assessment' and may 'confirm, cancel

and vary' certain orders. Sub-Section 5 of that section provides for the communication of the order to the parties interested. Section 36 of the Bengal Act provides that an assessee objecting to an order of the Assistant Commissioner under Section 35 may appeal to the Appellate Tribunal.

30. Sections 34, 35 and 36 of the Bengal Agricultural Income tax Act correspond to Sections 30, 31 and 33 of the Indian Income Tax Act. On the question under consideration there is no material difference in the wording of the Bengal Act and the Indian Act.

31. Sections 34 and 35 of the Bengal Act corresponding to Sections 30 and 31 of the Indian Act do not expressly define the powers and duties of the Assistant Commissioner at the preliminary stage when the appeal is presented. There is however no doubt that he has the power to see and determine at that stage whether or not the provisions of Section 34 of the Bengal Act corresponding to Section 31 of the Indian Act have been complied with. If he finds that these provisions have been complied with, it is his duty to admit the appeal. The power of the Assistant Commissioner to admit an appeal in all cases is implicit in Section 34 of the Bengal Act corresponding to Section 31 of the Indian Act though it is expressly conferred in the case of condonation of the delay in the presentation of appeal.

32. The Statute makes no explicit provision on the course to be adopted by the Assistant Commissioner when he finds that the provision of Section 34 of the Bengal Act corresponding to Section 30 of the Indian Act have not been complied with. It is reasonably clear, however, that he need not then finally decide the point and he may formally admit the appeal and leave the point to be argued at the final hearing of the appeal. It is also reasonably clear that he may finally decide the point against the appellant then and there and may refuse to admit the appeal.

33. It must be remembered that the sections under consideration are not charging sections. Those sections provide the machinery for appeal and must receive a reasonable and practical construction so as to make that machinery effective.

34. The Assistant Commissioner has to see whether the provisions of Sub-Sections 2 and 3 of Section 34 of the Bengal Act corresponding to Sub-Sections 2 and 3 of Section 30 of the Indian Act have been complied with by the appellant. He has to see that as provided for by Sub-Section 2 the appeal is in a prescribed form and is properly verified. He has also to see that the appeal has been presented in proper time in accordance with Sub-Section 3 which provides that "the appeal shall ordinarily be presented within 30 days" of the relevant starting point

"but the Assistant Commissioner may admit the appeal after the expiration of the period if he is satisfied that the appellant had sufficient cause for not presenting it within that period."

It is to be observed that the sub-section does not, in terms, prescribe a cut and dried period of limitation for presenting the appeal. The appeal has to be presented within a certain period of time or in extraordinary case within such further time as the Assistant Commissioner may allow. The Assistant Commissioner has to judge each case on its own merits and find out if it is an ordinary or an extraordinary case. If he is satisfied that there is sufficient cause for the delay in the presentation, of the appeal it is an extraordinary case and the appeal may be admitted in spite of the delay. Otherwise, it is an ordinary case and the Assistant Commissioner may refuse to

admit the appeal. His finding that there is no sufficient cause for the delay in presentation of the appeal is the ground for the refusal to admit the appeal.

35. By refusing to admit the appeal, the Assistant Commissioner finally disposes of the appeal and thereby confirms the assessment appealed from. The power of "disposing of the appeal" is given by Section 35 of the Bengal Act corresponding to Section 31 of the Indian Act and not by Section 34 of the Bengal Act corresponding to section 30 of the Indian Act. The latter section furnishes certain grounds for disposing of an appeal but it does not confer the actual power of its disposal. Refusal to admit the appeal at the preliminary stage is therefore an exercise of power under Section 35 of the Bengal Act corresponding to Section 31 of the Indian Act and is therefore made under that section and is therefore appealable under Section 36 of the Bengal Act corresponding to Section 33 of the Indian Act.

36. There are conflicting decisions under the Indian Act.

37. It has been held that an appeal lies to the Appellate Tribunal from an order of the Assistant Commissioner refusing to admit the appeal at the preliminary stage by the Patna High Court in - 'AIR 1944 Patna 112', where the ground of refusal was that the appeal was not in prescribed form and by the Madras High Court in - 'AIR 1952 Madras 232', where the ground of refusal was that the appeal was not presented within 30 days and there was no sufficient cause for the condonation of the delay.

38. On the other hand, it has been held that no appeal lies from an order refusing to admit the appeal on the ground that it was not presented within time and that there was no sufficient cause for the condonation of the delay by the Allahabad High Court in - '*Shivnath Prasad v. Commissioner of Income Tax, Central and United Provinces*⁵', - '*Special Manager, Court of Wards v. Commissioner of Income Tax, U.P.*⁶. - ' ' and by the Bombay High Court in - '*Commissioner of Income Tax v. Mysore Iron and Steel Works*⁷', With great respect, I am unable to agree with these decisions. Several contentions have been advanced in those decisions in support of the conclusion arrived at.

These contentions and their refutations are shortly summarized as follows :

⁵ AIR 1935 All 572

⁷ AIR 1949 Bom 400 and - ' AIR 1952 Bom157

⁶(1950) 18 ITR 204 (All) (F) AIR 1952 All 249

1. It is said that the Assistant Commissioner exercises his powers under Section 31 of the Indian Act only after the appeal is admitted and a date and place is fixed for the hearing of the appeal. It is true that notice of the hearing of the preliminary point with regard to the admission of the appeal is not usually given to the respondent but in my view the Assistant Commissioner is bound to fix a day and place for the hearing of the appeal on the preliminary point so far as the appellant is concerned and the preliminary point must be decided in his presence and after hearing him. 'In re, Bhagwati Prasad', AIR 1932 Allahabad 390. The operation of Section 31 of the Indian Act is not in terms confined to admitted appeals. A decision finally disposing of the appeal is nonetheless so because it is at the preliminary stage and such decision can be given only under Section 31 of the Indian Act.

2 : It is said a simple rejection of the appeal is not an order confirming the assessment.

The rejection of the appeal however finally disposes it of and in substance confirms the assessment. Both such final disposal and confirmation can only be under Section 31 of the Indian Act.

3. It is said that there is an intermediate stage of admission of appeal between its presentation and its hearing when the appeal is presented after delay with a prayer for the condonation of the delay and that in case of refusal to admit the appeal there are in fact two orders viz., an order under Section 31 of the Indian Act refusing to admit the appeal and a separate and distinct order of refusal to condone the delay under Section 30(2) of the Indian Act. In my view there is always an intermediate stage of an admission of the appeal between its presentation and its hearing.

In all cases the appeal must either be admitted or rejected. When the appeal is presented, the Assistant Commissioner should, in all cases, find that it is presented within the specified period and if not whether there is sufficient cause for not presenting it within, that period. He should admit the appeal where he finds that it is presented within that period or where he finds that though it is not so presented there is sufficient cause for excusing the delay. But he may reject the appeal where he finds that the appeal is not presented within that period and there is no sufficient excuse to the delay in presentation. The finding that there is or is not sufficient cause for the delay is not a separate order. There is only one order either of admission or rejection based upon that finding.

4. It is next said that Section 31 of the Indian Act confers power on the Assistant Commissioner only to deal with appeals which are competent and have complied with the provisions of Section 30 of the Indian Act. If this contention were correct, the Assistant Commissioner could not dispose of an incompetent appeal even at the final hearing under Section 31.

It has however been held in - '*Md. Naim Md. Alam v. Commissioner of Income Tax, U.P.*⁸', and - '*RamaNarayan v. Income Tax Commissioner*⁹', that an order of dismissal of the appeal by the Assistant Commissioner at the final hearing on the ground that the appeal does not comply with the provisions of Section 30 and therefore incompetent is an order under Section 31. In my view, these decisions are clearly right though I do not agree

⁸ AIR 1952 All 143

⁹ AIR 1950 Ori 205

with some of their reasoning. Section 31 relates to all appeals whether competent or incompetent. The Assistant Commissioner has to find out whether the appeal is competent or incompetent having regard to the provisions of Section 30 and to dispose of the appeal on the basis of that finding. Section 30 provides the grounds for finding that the appeal is incompetent but the power to determine that such grounds exist and that the appeal is incompetent and to dispose of the incompetent appeal on the basis of such determination is given by Section 31.

39. The question whether an appeal lies from, an order admitting an appeal after condonation of the delay does not strictly arise in this case but it should be borne in mind that the question of the condonation of the delay and admission of the appeal is usually considered ex parte in the absence of the respondent. On general principles it appears that such ex parte order is open to

reconsideration at the hearing of the appeal at the instance of the respondent who is prejudicially affected thereby.

In - '*Krishnasami v. Ramasami*¹⁰', the Judicial Committee held that an ex parte order of admission of a civil appeal after condonation of the delay under Section 5 of the Indian Limitation Act may be reconsidered by the appeal court at the final hearing of the appeal and in the appeal before the Judicial Committee the entire matter including the propriety of the condonation of the delay was reviewed. Similarly, at the final disposal of the appeal and in passing orders under Section 31 of the Indian Act corresponding to Section 35 of the Bengal Act, the propriety of an ex parte admission of the appeal after condonation of delay may be reconsidered by the Assistant Commissioner and in the appeal from that order to the Appellate Tribunal under Section 33 of the Indian Act corresponding to Section 36 of the Bengal Act the correctness of the entire order appealed from may be challenged. But as the point does not directly arise in this case, it is not necessary to give a final opinion on this question.

40. My conclusion therefore is that an appeal to the Appellate Tribunal under Section 32 of the Indian Act lies from an order of the Assistant Commissioner refusing to admit an appeal to him on the ground that it is not presented within 30 days from the relevant date and that there is no sufficient cause for condoning the delay. Similarly, in my opinion, an appeal to the Appellate Tribunal under Section 36 of the Bengal Agricultural Income Tax lies from an order of the Assistant Commissioner refusing to admit an appeal to him on the same ground.

41. In the present case, an appeal to the Assistant Commissioner from the assessment order was presented after the expiry of 30 days from the service of the notice of demand. As it appeared that there was delay in presentation of the appeal the Assistant Commissioner asked the appellant to show cause by 27-6-1949 why the appeal should not be rejected. On 27-6-1949 the appellant showed cause and filed an affidavit purporting to explain the delay. The Assistant Commissioner was not satisfied that there was sufficient cause for not presenting the appeal within the period of 30 days from the service of the relevant notice and he passed the following order;

"The delay is therefore not condoned. The appeal petition is not entertained under Section 34(2). Inform the appellant."

¹⁰ AIR 1917 PC 179

By this order the Assistant Commissioner refused to admit the appeal and finally disposed of it. This power can be exercised only under Section 35 of the Bengal Act. The order was therefore an order under Section 35 of the Bengal Act and an appeal therefore lay to the Appellate Tribunal under Section 35 of the Bengal Act. It is true that the order does not expressly refer to Section 35 of the Bengal Act but as it can only be justified by that section it is an order under that section (See - *Commissioner of Income Tax v. Khem Chand BamDas*¹¹, The Appellate Tribunal therefore should have held that the appeal to them was competent and should have decided it on the merits. It will be for the Appellate Tribunal to consider whether there is any merit in the Appeal.

42. I, therefore, answer the question referred in the affirmative.

Question answered in affirmative.

¹¹ AIR 1938 PC 175