



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 6371 OF 2024

M/s. National Building Construction, Nagpur and anr.

-Vs.-

State of Maharashtra and others

Office notes, Office Memoranda of
Coram, appearances, Court's orders Court's or Judge's Orders.
or directions and Registrar's orders.

Mr. A.S.Naik, Adv. for the petitioners.
Mr. A.J.Gohokar, AGP for the respondents-State.

**CORAM : AVINASH G. GHAROTE &
SMT.M.S.JAWALKAR, JJ.**

DATE : 23RD OCTOBER, 2024

Heard Mr.Naik, learned counsel for the petitioners
and Mr.Gohokar, learned AGP for the respondents.

2. The petition questions the order dated 22/10/2019, passed by the Joint Commissioner of Sales Tax (Appeals)/ respondent No.2 in an appeal under Section 26 of the Maharashtra Value Added Tax Act, 2002, whereby the appeal filed by the present petitioners has been rejected for non-attendance, on account of which, the assessment order passed by the Deputy Commissioner of Sales Tax, Nagpur is confirmed (Pg.59).

3. Mr.Naik, learned counsel for the petitioners submits, that though Rule 36(2) of the Maharashtra Value Added Tax Rules, 2005 provides for the Appellate Authority to dismiss the appeal in case the appellant does not appear

before the Authority either in person or through an agent, the same has to be read in the context of what is stated in Section 26(5)(a) of the Maharashtra Value Added Tax Act, which enjoins upon the Appellate Authority, when an appeal is presented before it against the order of assessment, to confirm, reduce, enhance, or annul the assessment. He therefore submits, that the Rule would not override what the Statute provides and in case of a conflict, it is the Statute, which would prevail over the Rule. It is his contention, that since the Statute contemplates a particular course of action, such an action has to have primacy over the Rules. He therefore submits, that the Appellate Authority could not have dismissed the appeal for non-attendance of the petitioners and in such circumstances, ought to have decided the appeal on merits in the mode as indicated by Section 26(5)(a) of the Maharashtra Value Added Tax Act.

3. Insofar as the delay is concerned, he submits, that though the petitioners had filed and participated in the appeal, however, though the order impugned in the appeal was communicated to the authorized representative of the petitioners on 21/01/2020, the same was not communicated to the petitioners, which has resulted in the delay in filing the present petition on account of the fact that the limitation for the purpose of filing further appeal has since expired. He submits, that even otherwise, the petitioners are ready to pay costs of Rs.1,00,000/- in order to show their *bona fides* regarding the delay which has occasioned, on account of which, the delay ought not to

come in the way of the statutory mandate as reflected by section 26(5)(a) of the Maharashtra Value Added Tax Act.

4. Mr.Gohokar, learned AGP for the respondents while opposing the petition submits, that since there is a provision as contained in the Rules, which is reflected from Rule 36(2) of the Maharashtra Value Added Tax Rules, 2005, the power therefore would be there in the Appellate Authority to dismiss the appeal for non-attendance of the appellant. He also submits, that there is further appeal provided under Section 26(1)(c) of the Maharashtra Value Added Tax Act, 2002 which can be availed of by the petitioners on account of which the petition ought not to be entertained.

5. The plea of availability of an alternate remedy, cannot be construed as a Bar for exercising the powers under Article 226 of the Constitution of India. More so, in the instant case, when the challenge is, to the passing of the impugned order by the Appellate Authority in contradistinction to the mandate as provided in Section 26(5)(a) of the Maharashtra Value Added Tax Act. The plea therefore, is being turned down.

6. The provisions of Section 26(5)(a) of the Maharashtra Value Added Tax Act, 2002, read as under -

“26. Appeals

(5) Subject to such rules of procedure as may be prescribed, every appellate authority (both in the first appeal and the second appeal) shall have the following powers, namely :-

(a) in an appeal against an order of assessment, it may confirm, reduce, enhance or annual the assessment.

***Provided that,** where the appeal is filed before the Tribunal, the Tribunal may set aside the assessment and refer the case back to the assessing authority for making a fresh assessment in accordance with the direction given by it and after making such further inquiry as may be necessary; the assessing authority shall thereupon proceed to make such fresh assessment and determine, where necessary, the amount of tax payable on the basis of such fresh assessment;"*

7. It is a settled position of law, that between a Statute and a Rule, it is the Statute, which has primacy and therefore, prevails upon the Rule. In that view of the matter, while deciding the appeal, the Authority will have to be governed by the mandate of Section 26(1)(a) of the Maharashtra Value Added Tax Act and decide the appeal in the manner as indicated therein, the Rule being subservient to it. The position in this regard has been considered in **Balaji Steel Re-rolling Mills v. Commissioner of Central Excise and Customs, (2014) 16 SCC 360** in which considering similar provisions as contained in the Central Excise Act and Rule 20 of the Rules framed thereunder, which provided for dismissal of an appeal on account of the absence of the petitioner, it has been held that the substantive provisions of the Act would prevail and would be the manner in which the appeal has to be decided.

8. In that view of the matter, the impugned order is hereby quashed and set aside and the matter is remitted back to the respondent No.2 for decision afresh in the manner as indicated above. The petitioners shall appear before the respondent No.2 on 11/11/2024 at 10.30 am

without any notice being required to be issued in that regard, who shall decide the appeal within a period of 30 days there from. This however shall be subject to payment of costs of Rs.1,00,000/- as a condition precedent to Association of Friends of Astronomy, Goa, [Canara Bank A/c No.0308101047097, IFSC Code – CNRB0000308, MICR Code – 403015002]. The petition is allowed accordingly.

(SMT.M.S.JAWALKAR,J) (AVINASH G. GHAROTE, J)