State of Orissa Vs. Industry and Commerce Enterprisers (P.) Ltd. and anr.

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Court : Orissa

Decided On : Dec-11-1970

Reported in : [1971]28STC665(Orissa)

Judge : G.K. Misra, C.J. and ;B.K. Patra, J.

Appeal No. : O.J.C. No. 778 of 1970

Appellant : State of Orissa

Respondent : industry and Commerce Enterprisers (P.) Ltd. and anr.

Advocate for Def. : B. Kr. Mohanty, Adv. for opposite party No. 1

Advocate for Pet/Ap. : Standing Counsel (Sales Tax)

Disposition : Application allowed

Judgement :

G.K. Misra, C.J.

1. Facts may be stated in short as the case turns on a pure question of law having no bearing on the merits of the case. Opposite party No. 1 is a dealer in iron and steel goods and Godrej furniture. His returns for fifteen quarters ending with 31st March, 1958, 30th June, 1958, and 31st March, 1959, to 31st March, 1962, were not accepted by the assessing authority on the finding that the turnovers were suppressed. The turnovers were accordingly enhanced and penalty was imposed.

In first appeal the Assistant Commissioner of Sales Tax (A.C.S.T) struck down the enhancements and the penalties. Against the orders of the A.C.S.T. fifteen second appeals were filed before the Sales Tax Tribunal. The Advocate for opposite party No. 1 raised two preliminary objections before the Tribunal that the appeals were barred by limitation and that Sri L.C. Sahu, the then State Representative who had signed and verified the memoranda of appeals, had no authority to file the appeals on behalf of the State of Orissa, and as such the appeals were not maintainable. The learned Member, Tribunal, rejected the objection regarding limitation and the same has not been canvassed before us. That matter would, therefore, be taken to have been concluded. He, however, held that Sri L.C. Sahu had no authority to sign and verify the memoranda of appeals and as such the second appeals before him were incompetent.

He further held that in these cases the Commissioner had passed no orders directing the filing of the second appeals and it is the State Representative who filed the appeals on his own responsibility without any orders from the Commissioner. This, according to him, affected the competency of the appeals. Factually, this statement made by the learned Member, Tribunal, is not correct. In paragraph 6 of the writ application an averment has been made to the following effect on affidavit by Sri Jagannath Pradhan, Additional State Representative functioning in the office of the Commissioner of Sales Tax, on the basis of official record :

That on receipt of the orders in appeal, the matter was placed before the Commissioner of Sales Tax to get orders in the departmental file in respect of agitating the matter in second appeal and the Commissioner by his order dated 29th November, 1963, approved the suggestion for preferring second appeals against the order of the Assistant Commissioner and the second appeals were accordingly filed on 2nd December, 1963.

This assertion was not challenged in the counter-affidavit filed on behalf of opposite party No. 1 and accordingly we did not find any necessity of calling for the record to verify the truth of the averment. We are satisfied that it is under the orders of the Commissioner that the second appeals were filed before the Tribunal and the finding of the Tribunal that the appeals were filed on the responsibility of the State Representative is an error of record.

2. The learned Standing Counsel contends that the view of the learned Member, Tribunal, that the State Representative was not competent to sign and verify the memoranda of appeals is contrary to law.

Mr. Mohanty for opposite party No. 1 besides supporting the conclusion of the Tribunal contends that as the State of Orissa has resorted to the alternative remedy of filing Reference Applications Nos. 31 to 45 of 1970-71 before the Tribunal arising out of orders passed in second appeals, the writ application is not maintainable.

These contentions require careful examination.

3. The following Sections and rules require examination to determine the question whether the State Representative was competent to sign and verify the memoranda of appeals under the authority of the Commissioner of Sales Tax. For purpose of convenience they may be extracted at one place :

Section 3. Taxing Authorities.--(1) The State Government may appoint' any person to be the Commissioner of Sales Tax, Orissa, and he shall exercise such powers and discharge such functions as are or may be conferred or imposed by or under the provisions of this Act.

(2) A person who is or has been a member of the superior judicial service or is eligible for appointment to such service shall be appointed by the State Government to be the Sales Tax Tribunal for the purpose of exercising such judicial powers as are or may be conferred by or under the provisions of this Act:

Provided that the State Government may at any time as the occasion may require appoint an Additional Sales Tax Tribunal of the same qualification for disposing of such matters as may be entrusted to him by rules made by the State Government under this Act. (3) The State Government may appoint such other persons under any prescribed designation including an Additional Commissioner and a Deputy Commissioner to assist the Commissioner and they shall exercise such powers and perform such duties as may be conferred or imposed by or under the provisions of this Act within such local area as may be assigned to them by the Commissioner.

Section 17. Delegation of Commissioner's functions.--Subject to such conditions and restrictions as the State Government may, by general or special order, impose, the Commissioner may, by order in writing, delegate any of his powers and duties under this Act or the rules made thereunder to any person appointed under Section 3 to assist him.

Section 23. (3)(a) Any dealer or, as the case may be, the State Government dissatisfied with an appellate order made under Sub-section (2) may within sixty days from the date of receipt of such order prefer an appeal in the prescribed manner to the Tribunal or Additional Tribunal, as the case may be, against such order:

Provided that an appeal under this clause may be admitted after the aforesaid period of limitation if the Tribunal or the Additional Tribunal is satisfied that the appellant had sufficient cause for not preferring the appeal within such period. (b) The dealer or the State Government, as the case may be, on receipt of notice that an appeal has been preferred under Clause (a) may, notwithstanding that the said dealer or the State Government may not have appealed against such order or any part thereof, within thirty days of the service of the notice file a memorandum of cross-objections and such memorandum shall be disposed of by the Tribunal or Additional Tribunal, as the case may be, as if it were an appeal presented within time under Clause (a).

Section 29. Power to make rules.--(1) The State Government may, subject to the condition of previous publication, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may prescribe--

* * *(r) the manner in which, and the authority to which, appeals against assessment or penalty or both may be preferred under Section 23.

Rule 2. Definitions.--In these rules, unless there is anything repugnant in the subject or context,--

(a) 'agent' means--

* * *(ii) in the case of the State Government, the State Representative appointed in this behalf.

* * *.(III) 'State Representative' means an officer or Pleader appointed by the State Government to appear and act on their behalf in any proceedings before Tribunal, and includes Additional State Representative, Assistant State Representative or any other officer or Pleader appointed to act in his absence or along with him.

Rule 52. Second appeal under Sub-section (3) of Section 23.--(1)(a) * * (b) A memorandum of appeal or a memorandum of cross-objections to be filed before the Sales Tax Tribunal for and on behalf of the State Government shall be signed and verified by the Commissioner of Sales Tax or such other officer who may be authorised in this behalf by the Commissioner of Sales Tax.

4. Before examining the question of law, it would be proper to clarify the nature of the post which a State Representative holds. The gazetted officers working in the Commercial Tax Department are members of the Orissa Finance Service. The State Representative holds a Selection Grade post in the supertime scale of pay of that service. He functions under the administrative control of the Commissioner of Commercial Taxes (hereinafter to be referred to as the Commissioner) who is the head of the department. The post of the State Representative is equivalent to that of the Additional Commissioner of Commercial Taxes. He can be transferred to anyone of the six posts constituting the Selection Grade post (see pages 686-87 of the Orissa Civil List corrected up to 31st August, 1968). The State Representative is therefore not a stranger to the Sales Tax Department.

5. Section 23(3)(a) provides that the State Government, if dissatisfied with an appellate order passed by an A.C.S.T., may prefer an appeal in the prescribed

manner to the Tribunal. Section 29(2)(r) confers power on the State Government to frame rules to prescribe the manner in which and the authority to which appeals against assessment or penalty or both may be preferred under Section 23. In accordance with this power the State Government has framed Rule 52(1)(b) whereunder a memorandum of appeal can be filed before the Tribunal by the Commissioner on behalf of the State Government. Either the Commissioner himself would sign and verify the memorandum or he may authorise any other officer. The expression 'such other officer' as used in the rule is quite wide and not restrictive. When the power is conferred upon the Commissioner to authorise an officer to sign and verify the memorandum of appeal, it necessarily follows that he must authorise an officer under his administrative control. He cannot give the authority to any outsider for obvious reasons and such officer might refuse to carry out the orders of the Commissioner with impunity. The expression must therefore refer to officers of the Sales Tax Department who are under the administrative control of the Commissioner. As has already been stated, the State Representative is under the administrative control of the Commissioner and must come within the ambit of the expression 'such other officer'. This conclusion is irresistible on a plain reading of Rule 52(1)(b).

6. But for Rule 52(1)(b) the State Representative could sign and verify a memorandum of appeal suo motu on behalf of the State Government. Rule 2(a)(ii) defines an agent to mean, in the case of the State Government, the State Representative appointed in this behalf. Rule 2(111) defines a State Representative to mean an officer or Pleader appointed by the State Government to appear and act on their behalf in any proceedings before the Tribunal. Thus the State Representative is an agent of the State Government and as such agent could fully act on behalf of the principal on his own responsibility.

The definition in the rules, however, would not be repugnant to anything in the subject or context. By Rule 52(1)(b) the power of the State Representative to suo motu file an appeal had been taken away. He can sign and verify only if he is so authorised by the Commissioner. Thus Rule 2(a)(ii), Rule 2(111) and Rule 52(1)(b) read together lead to the irresistible conclusion that the State Representative who is one of the officers of the Commercial Tax Department under the administrative control of the Commissioner is entitled to sign and verify the memorandum of appeal provided he is so authorised by the Commissioner.

In this case the authority has been given by the Commissioner by Notification No. 6204-CT-SM-13/63-C.T. dated the 2nd April, 1963, which runs thus:

In exercise of the powers conferred by Sub-rule (b) of Rule 52 of the Orissa Sales Tax Rules, 1947, and in supersession of this Department notification No. 8593-I. ST-26/57-C.T., dated the 5th June, 1958, I, Shri S. M. H. Burney, I.A.S., Commissioner of Sales Tax, Orissa, do hereby authorise the State Representative, Commercial Tax Department, to sign and verify the memoranda of appeals or the memoranda of cross-objections to be filed before the Sales Tax Tribunal, Orissa, under Sub-section (3) of Section 23 of the Orissa Sales Tax Act, 1947, on behalf of the State Government.

The State Representative therefore by virtue of this authority was competent to sign and verify the memoranda of appeals.

7. The learned Member, Tribunal, has however come to a different conclusion on the basis of Section 17 read with Section 3. Section 17 speaks of delegation of Commissioner's functions. The Commissioner may, by order in writing, delegate any of his powers and duties under the Act or the rules made thereunder to any person appointed under Section 3 to assist him. Sub-section (3) of Section 3 enumerates the taxing authorities who can assist the Commissioner. The sub-section does not include the State Representative. The learned Member accordingly concluded that the expression 'such other officer' in Rule 52(1)(b) must be from amongst the class of taxing authorities enumerated in Section 3(3).

After giving our careful consideration to the reasoning of the learned Member and to the arguments advanced by Mr. Mohanty in support thereof, we are of opinion that the aforesaid reasoning has not given due weight to the expression 'subject to such conditions and restrictions as the State Government may, by general or special order, impose' as used in Section 17.

Section 17 was part of the statute and Rule 52 was framed subsequently under the rule-making power of the State Government to prescribe the manner in which second appeals are to be filed. The delegation of the power by the Commissioner under Section 17 is subject to conditions and restrictions to be imposed by the State Government by general or special order. By Rule 52 a general provision was made with regard to the manner of filing appeals. Such general or special provision must prevail over the delegation that the Commissioner has to do in respect of matters relating to assessment to the taxing authorities enumerated in Section 3(3). Though the State Representative is not a taxing authority under Section 3(3), it is open to the Commissioner to authorise him to file appeal as prescribed in Rule 52.

Even assuming that Rule 52 does not come within the ambit of general or special order imposed by the State Government as envisaged in Section 17, the rule must have full force as being a special provision in the matter of filing an appeal. There is no justification to limit the meaning of the expression 'such other officer' by confining to only officers who are taxing authorities.

8. On the aforesaid analysis we are clearly of opinion that the State Representative was competent to sign and verify the memoranda of appeals and the fifteen second appeals before the Tribunal were maintainable.

9. It was next contended by Mr. Mohanty that as the petitioner has resorted to the alternative remedy of filing reference applications under Section 24(1) of the Orissa Sales Tax Act, this Court should not interfere with the order of the Tribunal in dismissing the appeals in exercise of its jurisdiction under articles 226 and 227 of the Constitution. It is too elementary that existence of an alternative remedy does not bar the jurisdiction of this Court for interference under articles 226 and 227. It merely affects the question of discretion. In appropriate cases even if there is an alternative remedy the court can exercise its jurisdiction. Cause of justice should be furthered by avoiding protracted litigation. In this case the Tribunal clearly committed an error of law apparent on the face of the record as a result of which it did not exercise its jurisdiction to hear the appeals on merits. If the writ application is dismissed and we wait for the disposal of the reference applications

still pending before the Tribunal, it would take a long time for disposal of the appeals on merits. As in our view the conclusion of the Tribunal is erroneous in law it is in the interest of all that the appeals pending before the Tribunal should be quickly disposed of. We accordingly overrule the preliminary objection.

10. In the result, the impugned order of the Tribunal dated 8th June, 1970, is quashed. All the fifteen second appeals shall be deemed to be pending before it. The Tribunal is directed to dispose of those appeals within three months from today. The writ application is allowed ; but in the circumstances, parties to bear their own costs.

Patra, J.

I agree.