(1963) 04 OHC CK 0018

In the Orissa High Court

Case No : S.J. Cs. No''s. 24, 25 and 26 of 1962

Babulal Chhapolia APPELLANT

Vs

The State of Orissa RESPONDENT

Date of Decision : 16-04-1963

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27
Orissa Sales Tax Act, 1947 — Section 23(2)

Citation : (1963) 14 STC 880

Hon'ble Judges : R.L. Narasimham, C.J;G.K. Mishra, J

Bench : Division Bench

Advocate : R.N. Misra, for the Appellant; R.K. Ghosh, for the Respondent

Final Decision : Allowed

Judgement

R.L. Narashimham, C.J.—In these three special jurisdiction cases the following two questions have been referred to this Court for opinion by the Member, Sales Tax Tribunal.

(i) Is it correct to hold (as the Tribunal has held) that the Assistant Commissioner of Sales Tax while disposing of an appeal u/s 23(2) of the Orissa Sales Tax Act is not entitled to take into consideration revised returns and additional grounds of appeal which may be different from the grounds taken in the memorandum of appeal and whether for the first time at the hearing of appeal, such grounds may or may not be entertained?

(ii) Whether on the facts and circumstances of the case and the documents on records, pointing to the contrary, the order of the Tribunal can be maintained as valid in law?

2. The assessee was assessed to sales tax for three quarters ending on 30th June, 1954, 30th September, 1954 and 31st December, 1954. On appeal the Assistant Commissioner of Sales Tax took into consideration some additional documents filed by the assessee and reduced the assessment. When the matter

was taken up on second appeal before the Member, Sales Tax Tribunal, the learned Member set aside the order of the Assistant Commissioner for the following reasons (as stated by him):-

Coming to the question involved in the second appeals filed by the State as against the assessments for the quarters ending on 30th June, 1954 to 31st December, 1954, I have no doubt that the first appellate authority was wrong in allowing an entirely new question to be raised for the first time before him. No doubt he was as much an enquiring officer as the assessing officer. It is also permissible to him to allow new questions to be raised for the first time before him. But certainly it was not permissible for him to raise a question which would conflict with the return filed by the dealer-respondent. The return clearly shows his turnover from sales of cloth. The only claim made in these quarters was that the sales were exempted from taxation under the old Rule 64 as he did not effect the sales at the first point. Before the first appellate authority the point taken up by the respondent was that he effected no sales and the sales effected were of his principal. Thus the new plea challenges the very basis of the returns filed by the dealer-respondent and could not and should not have been allowed by the first appellate authority. Hence I allow the appeals filed by the State, set aside the order of the first appellate authority and restore the order passed by the assessing officers for these quarters.

3. The question now for consideration is whether in exercise of his appellate powers against the orders of the Assistant Commissioner, the Sales Tax Tribunal, as the second appellate authority was justified in saying that the Assistant Commissioner committed an error of law in allowing a new question to be raised for the first time which according to the Tribunal was not mentioned in the original return, at the time of assessment. The power of the first appellate authority (Assistant Commissioner) in sales tax cases is derived from Section 23(2) of the Orissa Sales Tax Act read with Rule 50 of the Orissa Sales Tax Rules. Sub-rule (2) of Rule 50 may be quoted:

(2) The appellate authority may, before disposing of any appeal make such further enquiry as it thinks fit or cause further enquiry to be made by the Assistant Sales Tax Officer or the Sales Tax Officer, as the case may be.

The first part of Sub-rule (2) applies here. It will be seen that there is no provision for controlling the exercise of discretion by the appellate authority while making such further enquiry. Before the first appellate authority there is no opposite party as he is himself the departmental authority and if while hearing appeals he considers that such further enquiry is necessary and allows the assessee-appellant to file additional papers and looks into them and then passes orders it cannot be said that he exceeded the jurisdiction conferred on him by Sub-rule (2) of Rule 50 of the Orissa Sales Tax Rules.

4. In this connection the difference between the procedures to be adopted by the Assistant Commissioner as the first appellate authority and the Sales Tax Tribunal

as the second appellate authority may be noticed. The statutory provisions dealing with the procedure to be adopted by the Sales Tax Tribunal are set out in rules 56 to 72. Before the Tribunal there are two parties and Rule 58 requires that notice should issue to the opposite party and Rule 61 imposes certain restrictions on the right of a party to adduce additional evidence on lines similar to Order 41, Rule 27, Civil Procedure Code. If therefore before the Sales Tax Tribunal additional evidence is to be taken, notice must be given to the other side and that party may have to be given a reasonable opportunity of adducing rebutting evidence. But where no such limitation is found in the procedure to be adopted by the first appellate authority as prescribed in Sub-rule (2) of Rule 50, the Member, Sales Tax Tribunal, was not justified in saying, as a proposition of law, that the first appellate authority should not have admitted an entirely new question to be raised for the first time before him. The question is ultimately one of discretion conferred on him by the rules, and no limitation can be placed on that discretion.

5. It was open to the Member, Sales Tax Tribunal, while hearing the second appeal to examine the propriety of the order of the Assistant Commissioner on the materials available and also on the additional material that he may care to admit and then to set aside that order on other grounds, if he chose, but he should not have held that the order was illegal.

6. For these reasons the questions are answered as follows:

(1) The Tribunal was not right in saying that in disposing of an appeal u/s 23(2) of the Orissa Sales Tax Act the Assistant Commissioner (first appellate authority) was not entitled to take into consideration additional grounds of appeal different from those taken in the memorandum of appeal.

(2) The order of the Tribunal could not therefore be maintained as valid in law.

There will be no order for costs in these three cases but the reference fees deposited will be refunded to the petitioner.

G.K. Mishra, J.

I agree.

