
(1982) 02 OHC CK 0012

In the Orissa High Court

Case No : Special Jurisdiction Case No's. 171 and 172 of 1977

Bhubaneswar Flour Mills

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 08-02-1982

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 24(2)(b)

Citation : (1982) 53 CLT 573 : (1983) 52 STC 192

Hon'ble Judges : R.N. Misra, C.J.;B.K.Behera, J

Bench : Division Bench

Advocate : A. Pasayat, D.P. Misra, B.B. Rath, S. Taritayya and D.K. Sen, for the Appellant; Standing Counsel, (C.T.), for the Respondent

Judgement

R.N. Misra, C.J.—At the instance of the assessee, this Court u/s 24(2)(b) of the Orissa Sales Tax Act, 1947, directed the Sales Tax Tribunal to state a case and refer the following question for opinion of the court:

Whether second appeals on merit lie under the provisions of the Orissa Sales Tax Act when the connected first appeals have been summarily dismissed under Rule 49 of the Orissa Sales Tax Rules?

We are concerned with two periods of assessment, being 1971-72 and 1972-73. Aggrieved by the orders of assessment, the assessee preferred appeals before the Assistant Commissioner of Sales Tax on 8th May, 1975. After certain adjournments, the appeals were dismissed on 28th July, 1975, under Rule 49 of the Orissa Sales Tax Rules for non-removal of defects. Against this summary rejection of the appeals, second appeals were filed by the assessee where exercise of power by the first appellate authority in rejecting the appeals was challenged for want of reasonable opportunity and merits of the appeals were canvassed. The Tribunal came to uphold the rejection of the first appeals by the Assistant Commissioner and further held that once the appeals had been summarily dismissed by the first appellate authority, the ambit of second appeals did not relate to examination of the merits of the assessment.

2. The real question for consideration, therefore, is as to whether when the first appeals have been dismissed not on merits but on account of procedural defects and second appeals are carried to the Tribunal, the appeals would lie on merit and are not confined to the question which has been canvassed in the first appeals.

This Court in an unreported decision, being the case of Natabar Sahoo v. State of Orissa (S.J.C. No. 102 of 1973 disposed of on 22nd September, 1975) (printed at page 194 infra) held that when the first appeals had been dismissed as barred by limitation, in second appeal the question of dismissal of the first appeal on the ground of limitation would be available for examination and the second appellate authority would not be entitled to examine the merit of the dispute raised in assessment.

The learned counsel for the assessee relies upon the famous case of the Supreme Court in Mela Ram & Sons v. Commissioner of Income Tax [1956] 290 ITR 607 as also a Bench decision of the Madhya Pradesh High Court in the case of Purshottamdas Mathuradas and Co. Pvt. Ltd. Vs. The Commissioner of Sales Tax, . The Supreme Court decision in Mela Ram and Sons Vs. The Commissioner of Income Tax Punjab, . was referred to in Natabar Sahoo's case (printed at page 194 infra). Referring to this case, the Division Bench of this Court observe :

5. The point for consideration in that case was whether upon summary rejection of a first appeal under Rule 49 of the Orissa Sales Tax Rules, a second appeal would lie to the Tribunal. Narasimham, C. J., relied upon a decision of the Supreme Court in the case of Mela Ram and Sons Vs. The Commissioner of Income Tax Punjab, , to hold that even when a first appeal was summarily dismissed, it amounted to an appellate order, and therefore, a second appeal lay. From both the decisions, we do not find any support for the contention advanced on behalf of the assessee that in second appeal before the Tribunal, the assessee would be entitled to raise contentions on merit of the matter. As already pointed out, the assessee's first appeal was thrown out as being barred by time. Though for purposes of preferring of a second appeal, such summary dismissal amounts to an appellate order, for purposes of the dispute on merit there was actually no first appeal and if we accept Mr. Pasayat's contention that even in such circumstances a second appeal on merit be tenable, it would mean that without disputing facts on merit in a first appeal, a second appeal shall be tenable . . .

It, therefore, follows that Mela Ram and Sons Vs. The Commissioner of Income Tax Punjab, was referred to and relied upon in the unreported decision (printed at page 194 infra) of this Court. Having examined the decision in Mela Ram and Sons Vs. The Commissioner of Income Tax Punjab, somewhat closely, we are inclined to reiterate the view expressed in the unreported decision (printed at page 194 infra) of this Court that there is nothing stated therein which would support the view that where the first appeal has been dismissed not on merit but for reasons otherwise, the second appeal would lie on merit.

The other case which has been cited does support the view of Mr. Pasayat for the assessee. The Madhya Pradesh High Court observed:

6. When an appeal is dismissed in default, there is thus an additional right to get the appeal readmitted for hearing provided the assessee can satisfy the appellate authority that he was prevented by any sufficient cause for appearing when the appeal was called on for hearing.

7. But this additional right does not detract from the right which the assessee has under Sub-section (1) of Section 22 read with Rule 53(4) *ibid* of going up in second appeal to the Board of Revenue; and when he does so go up, his appeal is not and cannot be restricted to the examination of the question whether the dismissal for default was proper or not. The dismissal in default cannot put the assessee in a worse position than if his appeal had been dismissed on merits, in which case he would have had a right of appeal to the Board of Revenue on the merits of his assessment . . .

These observations of the Madhya Pradesh High Court do somewhat support the petitioner's stand, but we do not see any justification to discard the view in Natabar Sahoo's case (printed at page 194 *infra*) and adopt the rule of the Madhya Pradesh case *Purshottamdas Mathuradas and Co. Pvt. Ltd. Vs. The Commissioner of Sales Tax*, . On the other hand, we are prepared to take the view that where the first appeal is dismissed without examination of merits on some technical ground of procedural defect, in second appeal the merit of the matter would not be available to be adjudicated though a second appeal lay by treating the dismissal of the first appeal as an appellate order. In these circumstances, the question formulated does not fall for answer.

No costs.

B.K. Behera, J.

I agree with my Lord, the Chief Justice.