
(2008) 09 OHC CK 0050
In the Orissa High Court

B.P. Enterprises

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 11-09-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 21
ORISSA VALUE ADDED TAX ACT, 2004 — Section 33, 42, 77

Citation : (2008) 18 VST 405

Hon'ble Judges : B.S. Chauhan, C.J.;B.N. Mahapatra, J

Bench : Division Bench

Final Decision : Allowed

Judgement

B.S. Chauhan, C.J.—This writ petition has been filed challenging the order of assessment dated July 3, 2008 passed by the assessing authority (Sales Tax Officer, Cuttack-II Circle, Cuttack) under the provisions of the Orissa Value Added Tax Act, 2004 (hereinafter called "the OVAT Act") and Orissa Value Added Tax Rules, 2005 (hereinafter called "the Rules, 2005")

2. The facts and circumstances giving rise to the case are that the petitioner is a registered dealer under the provisions of the OVAT Act and has also been allotted a TIN number. It carries on business of manufacturing of aluminium utensils for sale. It submitted the return before the Sales Tax Officer, Cuttack-II Circle, Cuttack (hereinafter referred to as "the assessing authority") as per the provisions u/s 33 of the OVAT Act read with proviso to Rule 34(8) of the Rules, 2005 for the tax period April 1, 2005 to November 30, 2006. The petitioner's business has been audited under the OVAT Act on November 22, 2006 and it was reported with the detection of suppression of purchase and sale of Rs. 16,71,847 resulting from verification of physical stock of the items taken on November 22, 2006 with its books of account and finding discrepancies on various items. The petitioner was served with the notice dated June 16, 2007 (annexure 1) to appear for hearing for the purpose of assessment on the basis of audit report. The petitioner was heard. However, the said assessing authority passed the order

impugned dated July 3, 2007 on the basis of audit report and held that the assessee was liable to tax and penalty together to the tune of Rs. 7,68,114 and after making the adjustment of the amount already deposited by it, it was directed to make the payment of the balance amount of Rs. 6,83,789 as per the terms and conditions of the demand notice of the same date (annexure 2). Hence this writ petition.

3. Shri J. Sahoo, learned counsel for the petitioner, has raised a large number of issues beyond the assessment order and the issue of jurisdiction as per the scheme of the OVAT Act. The sheet anchor of his argument is that an officer has no competence to make the assessment and pass the order unless he has specifically been empowered/authorized to deal with the assessee by a specific notification issued by the Commissioner of Sales Tax. In the instant case the assessing authority which has assessed the dealer was not competent to do so as the only competent authority is the assessing authority of the range as per Rule 34(12)(b) of the Rules, 2005. Thus, the order being nullity and without jurisdiction cannot be given effect to and is liable to be set aside.

4. On the contrary, Shri R.P. Kar, learned counsel appearing for the Revenue, has submitted that Rule 49(3) of the Rules, 2005 provides that a dealer, if so desires, must raise objections before the authority assessing it, in all respects and produce such other evidence and document in support of his claim. In the instant case, as the dealer has not raised any objection, but submitted to his jurisdiction and invited the assessment order, it cannot be permitted to agitate this issue any further. Moreso, the authority was bound to assess and pass the assessment order as the maximum period of six months is prescribed u/s 42(6) of the OVAT Act and in exceptional circumstances the period can be extended for further six months by the Commissioner only. In case the order so passed is set aside and is remanded to the competent authority for adjudication afresh, period of limitation would not apply and that is the reason for which the assessee did not take the objection to the issue of jurisdiction. In the meantime they get sufficient period to utilize the public fund. Moreso, order is appealable, but to avoid the pre-deposit condition of 20 per cent as required u/s 77 of the OVAT Act, instead of filing the appeal this writ petition has been filed. Therefore, the petitioner cannot be permitted to take the benefit of its own mistake. Moreover, no prejudice has been caused to the assessee by the order of the said assessing authority. The petition is liable to be dismissed.

5. We have considered the rival submissions made by the learned counsel for the parties and perused the record. The admitted facts of the case remain that notice dated June 16, 2007 was served upon the petitioner. It did not challenge the same either filing the writ petition before this court that the notice had been issued by the authority having no competence or filing any objection under Rule 49(3) of Rules, 2005 before the said assessing authority that he was not competent to proceed with his assessment. Had the petitioner raised such an issue, proceedings could have been transferred to the competent authority. Even

the statutory provisions of Rule 49(4) of Rules, 2005 mandatorily provide for determination of the objections, by the assessing authority, if any raised by the dealer/assessee first before passing the assessment order. The petitioner participated in the assessment proceedings and invited assessment order.

6. Therefore, the question does arise as to whether in such fact-situation, the petitioner can be permitted to take advantage of his own mistake. No explanation has been furnished by Mr. Sahoo, learned counsel for the petitioner as to why such objection has not been raised at the first instance either by filing objection before the said assessing authority or by filing the writ petition before this court. Had the assessment order of refund been passed by the same officer, we are very much doubtful that the petitioner could have challenged this assessment order though in these circumstances it remained without jurisdiction.

7. There can be no dispute regarding the settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior court and if the court passes a decree having no jurisdiction over the matter, it would amount to nullity as the issue of jurisdiction goes to the roots of the cause. In such eventuality jurisdictional issue can be raised even at a belated stage in execution. The finding of a court or Tribunal becomes irrelevant and unenforceable/inexecutable once the forum is found to have no jurisdiction. Acquiescence of party equally should not be permitted to perpetuate and perpetrate, defeating the legislative animation.

8. The court cannot derive jurisdiction apart from the statute. Vide *The United Commercial Bank Ltd. Vs. Their Workmen*, , *Smt. Nai Bahu Vs. Lala Ramnarayan and Others*, , *Natraj Studios (P) Ltd. v. Navrang Studio* AIR 1981 SC 537, *Sardar Hasan Siddiqui and Others Vs. State Transport Appellate Tribunal, U.P., Lucknow and Others*, , *A.R. Antulay Vs. R.S. Nayak and Another*, , *Union of India v. Deoki Nandan Aggarwal* AIR 1992 SC 96, *Karnal Improvement Trust, Karnal Vs. Parkash Wanti (Smt) (Dead) and Another*, , *U.P. Rajkiya Nirman Nigam Ltd. Vs. Indure Pvt. Ltd. and others*, , *State of Gujarat Vs. Rajesh Kumar Chimanlal Barot and another*, , *Kesar Singh and Others Vs. Sadhu*, , *Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and Others*, and *Collector of Central Excise, Kanpur Vs. Flock (India) Pvt. Ltd.* C-7, *Panki Industrial Area, Kanpur*, .

9. In *Sushil Kumar Mehta Vs. Gobind Ram Bohra (Dead) through his Lrs.*, , the Supreme Court, after placing reliance upon large number of its earlier judgments and of the English Courts, particularly in *The Premier Automobiles Ltd. Vs. Kamlekar Shantaram Wadke of Bombay and Others*, , *Barraclough v. Brown* 1897 AC 615, *Doed. Rochaster (P) v. Bridges* 109 ER 1001, *Ledgard v. Bull* [1886] 11 AC 648, *Barton v. Fincham* [1921] 2 KB 291 and *Chandrika Misir and Another Vs. Bhaiya Lal*, , held, that a decree without jurisdiction is a nullity; when a special statute gave a right and also provides for a forum for adjudication of rights, remedy has to be sought only under the provisions of that Act and the Common Law Court has no jurisdiction; where an Act creates an obligation and enforces

the performance in a specified manner, "performance cannot be forced in any other manner".

10. Nearly a Constitution Bench of the Supreme Court in *Kiran Singh and Others Vs. Chaman Paswan and Others*, , considering the issue of jurisdiction on the basis of valuation of the suit held that it is a fundamental principle.

...It is a fundamental principle well-established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties. If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the district court of Monghyr was "coram non iudice", and that its judgment and decree would be nullities....

11. The Constitution Bench in *Seth Hiralal Patni Vs. Sri Kali Nath*, held that:

It is well-settled that the objection as to local jurisdiction of a court does not stand on the same footing as an objection to the competence of a court to try a case. Competence of a court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand, an objection as to the local jurisdiction of a court can be waived and this principle has been given a statutory recognition by enactments like Section 21 of the Code of Civil Procedure.

The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seized of the case because the subject-matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject-matter of the suit or over the parties to it.

12. In *The Bahrein Petroleum Co. Ltd. Vs. P.J. Pappu and Another*, , the apex court has taken the same view observing that a defendant may waive the objection regarding the territorial jurisdiction of the court and once he waives it, he has to be subsequently precluded from taking the said objection. Moreover, the party must satisfy, that because of the jurisdictional issue there has been failure of justice. Moreover, the issue cannot be taken after the disposal of the matter. Therefore, the party has to satisfy itself as to why the objection has not been taken at the preliminary stage of the proceedings.

13. In *Deepak Agro Foods Vs. State of Rajasthan and Others*, a similar issue has been examined by the apex court and it has been held that assessment orders are not in the nature of judicial proceeding. Irregular assessment orders are

curable but assessment orders passed without jurisdiction are null and void. The Supreme Court observed as under:

All irregular or erroneous or even illegal orders cannot be held to be null and void, as there is a fine distinction between orders which are null and void and orders which are irregular, wrong or illegal. Where an authority makes an order which lacks inherent jurisdiction, such an order would be without jurisdiction, null and void ab initio, as the defect of jurisdiction of such authority goes to the root of the matter and strikes at his very authority to pass any order and such a defect cannot be cured even by consent of the parties.

...

However, exercise of jurisdiction in a wrongful manner cannot result in a nullity-it is an illegality capable of being cured in duly constituted legal proceedings.

Proceedings for assessment under a fiscal statute are not in the nature of judicial proceedings, like proceedings in a suit, inasmuch as the assessing officer does not adjudicate on a lis between an assessee and the State, and, therefore, the law on the issue laid down under the civil law may not *stricto sensu* apply to assessment proceedings.

14. While deciding the said case, a very heavy reliance has been placed by the Supreme Court on its earlier judgment in *Rafique Bibi (D) by Lrs. Vs. Sayed Waliuddin (D) by Lrs. and Others*, , explaining the distinction between "null and void decree" and "illegal decree".

15. It has been held therein that a decree can be said to be without jurisdiction, and hence a nullity, if the court passing the decree has usurped a jurisdiction which it did not have; a mere wrong exercise of jurisdiction does not result in a nullity. The lack of jurisdiction in the court passing the decree must be patent on its face in order to enable the executing court to take cognizance of such a nullity based on want of jurisdiction. A distinction exists between a decree passed by a court having no jurisdiction and consequently being a nullity and not executable and a decree of the court which is merely illegal or not passed in accordance with the procedure laid down by law. A decree suffering from illegality or irregularity of procedure, cannot be termed inexecutable.

16. In *Commissioner of Sales Tax, U.P. v. Sarjoo Prasad Ram Kumar* [1976] 37 STC 533, the apex court dealt with the jurisdiction of the Sales Tax Officer and held that (i) the rule-making authority had empowered the Commissioner to allocate separate areas for separate Assistant Sales Tax Officers. When such an allocation was made, the jurisdiction of each officer was confined to the area allotted to him; (ii) that unless there was some provision either in the Act or in the Rules framed which precluded the assessee from raising the objection as to jurisdiction, if the same was not raised before the assessing authority, the assessee could not be precluded from raising that objection at a later stage.

17. The court observed as under:

...Unless there is some provision either in the Act or in the Rules framed which precludes the assessee from raising any objection as to jurisdiction, if the same is not raised before the assessing authority, the assessee cannot be precluded from raising that objection at a latter stage....

18. In *State Bank of India Vs. Ram Das and Another*, , the honourable Supreme Court held that where a party despite knowledge of the defect in the jurisdiction participated in the proceedings without any objection, by its conduct it disentitles itself from raising such a question in the subsequent proceedings. In case despite numerous opportunities, which are available to a party, a defect is not pointed out to the authority concerned, the party cannot be permitted to raise question of jurisdiction before the court.

19. In *Central Bank of India Vs. C. Bernard*, , the apex court decided a similar issue observing that had the objection been raised at the earliest possible opportunity before the authority concerned the authority could have taken steps to remedy the situation by appointing or transferring the case to a competent officer. However, the fact remain that the order passed by the authority lacking patent jurisdiction is liable to be quashed.

20. In *Rattan Lal Sharma Vs. Managing Committee, Dr. Hari Ram (Co-education) Higher Secondary School and others*, , the apex court held that though the plea might have not been raised before the authority, it goes to the root of the question and is based on admitted and uncontroverted facts and does not require any further investigation into a question of fact. The party should be permitted to raise such an issue in subsequent proceedings to do justice which is the paramount consideration of the court and it is always desirable that the litigant should not be shut out from raising such plea which goes to the root of the lis involved.

21. In *H.V. Nirmala v. Karnataka State Financial Corporation* [2008] 7 SCC 639, the apex court rejected the contention that the appellant therein was entitled to agitate the jurisdictional issue which she had not taken before the enquiry officer pointing out that as she had participated in the proceeding without any protest, she could not be permitted to raise such a contention. The court further held that in such case prejudice doctrine may also be applied and the party must satisfy the court as what prejudice has been caused to it, by passing of an order by an officer no having competence.

22. Therefore, the law emerges that in case the authority is found to lack inherent/patent jurisdiction, the order becomes a nullity. However, in case there has been any illegality in following the procedure prescribed by law, the order remains merely illegal and would be curable.

23. The instant case is required to be examined on the aforesaid settled legal propositions.

24. Rule 49(3) of the Rules, 2005 provides that if an application on the part of

the assessee is moved raising issue of jurisdiction before the assessing authority, in view of the provisions of Rule 49(4) of the Rules, 2005 the assessing authority is bound to deal with the objection before proceeding for assessment. However, for the reasons best known to the assessee-petitioner, neither he considered it proper to challenge the notice dated June 16, 2007 nor he filed any objection under Rule 49(3) of the Rules, 2005 before the authority.

25. In such a fact-situation, as writ is a discretionary relief and should not be granted in favour of a person, like the petitioner who just wants to buy time and withhold the public money adopting such dilatory methods, the petitioner has disentitled itself for any equitable relief. Mr. Sahoo is not able to point out as to how the cause of the assessee has been prejudiced by such assessment order. But considering the fact that the assessment order had been passed by an officer lacking inherent jurisdiction, it cannot be sustained in the eyes of law. Therefore, the petition deserves to be allowed.

26. In the fitness of the case, petitioner ought to have approached the appellate forum. However, in order to avoid the pre-deposit condition of 20 per cent of the assessed amount, he approached this court directly. Thus, to meet the ends of justice, it is desirable that the petitioner be asked to deposit 20 per cent of the assessed tax and interest before the assessing authority, Range, Cuttack within a period of four weeks from today. The assessing authority, range shall issue a fresh notice for making a fresh audit assessment and shall complete all proceedings within a period of three months from the date of issuance of notice. However, it is clarified that any observation made herein shall not prejudice the case of either side.

27. Petition succeeds and allowed and the order of assessment dated June 16, 2007 is set aside. The aforesaid direction shall be carried out.

28. Before parting with the case, we would like to point out that every day we are facing the assessment orders, in respect of the TIN dealers, passed by the assessing authority, circle, though such assessment orders are in violation of the statutory provisions as can be passed only by assessing authority, range. Even if the dealer does not take any objection in this regard, it becomes the duty of the assessing authority himself to keep the jurisdictional issue in mind.

29. A copy of the judgment be sent through Mr. R.P. Kar, learned counsel for the Revenue, to the learned Commissioner of Sales Tax for appropriate action

B.N. Mahapatra J.

30. I agree.