

(1970) 02 OHC CK 0029
In the Orissa High Court
Case No : S.J.C. No's. 45 to 56 of 1965

Dattaram Jagannath

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 04-02-1970

Acts Referred:

Limitation Act, 1963 — Section 12, 5

Citation : (1970) 25 STC 505

Hon'ble Judges : G.K. Mishra, C.J.; S. Acharya, J

Bench : Division Bench

Advocate : D.P. Mohanty, for the Appellant; Standing Counsel (Sales Tax), for the Respondent

Judgement

G.K. Misra, C.J.—The three questions referred to this court are as follows:

1. Whether the expression "the order" in Form XVI under Rule 48 means and includes certified copy of the order.
 2. Whether the principle enunciated in the decision of the High Court of Orissa regarding Bharat Sabaigrass Ltd. v. Collector of Commercial Taxes, Orissa [1952] 3 S.T.C. 453, applies to the facts and circumstances of the case.
 3. Whether provisions of Section 12 of the Limitation Act apply in case of appeal u/s 23 of the Orissa Sales Tax Act, 1947.
2. These references relate to quarters ending 30th of June, 1959, to 31st of March, 1962. The facts leading to these references may be stated in short. The order of assessment was passed on 31st of August, 1962. A copy of that order sent by the department was received by the dealer on 5th of October, 1962. The petitioner states that this order of assessment became missing on 31st of October, 1962. On 2nd of November, 1962, an application for certified copy of the order of assessment was filed. Limitation of 30 days for filing an appeal, from the date of receipt of the copy of the order from the department, expired on 4th of November, 1962. The certified copy was obtained on 27th of February, 1963, and

the appeal was filed on 28th of February, 1963. The appeal was rejected as being barred by limitation by the Assistant Commissioner of Sales Tax on 21st of May, 1963. A second appeal against that order was dismissed by the Tribunal on 17th of June, 1964. This is how the reference has been made.

3. The moot question for consideration in this reference is whether the dealer can file an appeal on the basis of a certified copy of the order of assessment or whether he must file an appeal only on the basis of the copy of the order received from the department. The relevant provision is Section 23(1) of the Orissa Sales Tax Act (hereinafter referred to as the Act). Before construing the provision of this Section it would be desirable to notice the scheme of the Act connected with the filing of an appeal against an order of assessment. Assessment is made u/s 12(1) or (3) of the Act. Rule 31 of the Orissa Sales Tax Rules (hereinafter referred to as the Rules), as in force during the relevant period, lays down that after the order of assessment is passed, the original taxing authority shall record an order of assessment in Form IX. Under Rule 32, a notice of demand is to be sent and the notice of demand is in Form X. Clause 4 of the notice of demand runs thus:

If you are dissatisfied with my order of assessment you may present an appeal to the Additional/Deputy/Assistant Commissioner of Sales Tax ...within 30 days from the date of receipt by you of the said order.

The form is somewhat dubious; but apparently it was perhaps meant that the order is the copy of the departmental order and not certified copy of the order. We must, however, say that when the rights of parties are being affected, expressions of doubtful connotation should not have been used in the form. It should have been expressly stated that the order referred to is the copy of the order received from the department and not a certified copy of the order.

4. Section 23(1) confers a right of appeal on the assessee. He is to file the appeal within thirty days from the date of receipt of the order. Here again, the expression is "from the date of receipt of the copy of an order of assessment". It does not make clear whether the copy of the order is the departmental order or the certified copy of the order. The second proviso to that Section corresponds to Section 5 of the Limitation Act, where delay can be condoned by the appellate authority by sufficient cause being shown. This appeal is to be filed in Form XVI. In column 3 of that form the appellant-is to state "The order of the (Assistant) Sales Tax Officer/Assistant Commissioner/Commissioner of Sales Tax, attached hereto, was received by the petitioner on...." Rules 48 and 49 deal with submission of appeal petition and summary rejection of appeal. Rule 49 says that if the memorandum of appeal is not in the specified form or if all the requirements of the form are not fully complied with, the appellate court may reject the appeal summarily, after giving the appellant such opportunity as it may think fit to rectify the defects. Rule 52 deals with the procedure of filing an appeal before the Tribunal. Rule 73 speaks of supply of copies of the order of the Tribunal. It says that three copies of every order u/s 23 or u/s 24 passed by the

Tribunal shall be forwarded to the Commissioner as soon as practicable. A copy shall also be supplied free of cost and without application to the other party to the appeal or application for reference. Rule 87 lays down that if any dealer applies for certified copy he would be supplied therewith subject to payment of costs.

5. It would appear from the aforesaid enumeration of the relevant provisions of the Act and the Rules that nowhere a clear provision has been made that an appeal must be filed only on the basis of the copy of the departmental order of assessment supplied free to the dealer though the intention appears to be that on its basis the application should be filed. When rights of parties are to be fettered by statutory provisions, the language must be express and clear. Otherwise, the benefit must go to the subject.

6. That apart, serious complications will arise if such a view is taken. Take for instance, a case where the dealer comes to know of the order of assessment either being present in court on the date of its delivery or otherwise and files an appeal after obtaining a certified copy of the order of assessment within thirty days. There is no provision in the statute or in the rules to preclude the filing of such an appeal. In such a case the appellate authority cannot dismiss the appeal in limine saying that the appeal was incompetent. Take another illustration. Supposing the copy sent by the department free is lost within the prescribed period of limitation. The appellant in such a case has no other alternative but to file an appeal either without the departmental copy or with a certified copy. As the rule and the form prescribe that the memorandum of appeal must be accompanied by a copy of the order, the departmental copy being lost, in no case an appeal will be competent. Even if the appellate authority wants to condone the delay he is not to supply another free copy and there is no provision for the same in the statute or in the rule. The result, therefore, will be that no appeal can be filed the moment the departmental copy is lost. We would arrive at a very absurd conclusion if we construe the statutory provisions as meaning that the assessee is precluded from filing an appeal on the basis of a certified copy even within the period of limitation.

7. On the aforesaid analysis we hold that within thirty days of the date of receipt of the certified copy of the order an aggrieved dealer can also file an appeal.

8. The next question for consideration is whether during the relevant period when the old Limitation Act was in force the dealer was entitled to the benefit of Section 12 of the Limitation Act in excluding the period necessary for obtaining a copy, from the period of limitation. This is concluded by a decision of this court in *Bharat Sabaigrass Ltd. v. The Collector of Commercial Taxes, Orissa* AIR 1958 Ori 23. Mr. Mohapatra challenges the correctness of this decision by saying that Section 12 of the old Limitation Act had application to suits and not to other proceedings, and as such had no application to proceedings before appellate authorities under the Sales Tax Act. We cannot take a view different from the Bench decision of this court unless the matter is referred to a larger Bench. We

do not consider this to be a fit case for examination of such a question. We accordingly hold, following the decision of our own court, that Section 12 of the old Limitation Act had application.

9. To sum up :

(i) An appeal can be filed within thirty days of the date of receipt of the assessment order supplied free by the department and also within thirty days of the receipt of the certified copy of the order.

(ii) In case of certified copy, the period necessary for obtaining the copy would be excluded u/s 12 of the old Limitation Act.

(iii) The thirty days of limitation would run from the date when the assessee first receives either the free copy or the certified copy whichever is earlier.

(iv) If the certified copy is applied for after the expiry of thirty days from the date of receipt of the free copy of the order and the appeal is filed with the certified copy, the free copy being lost, the appeal would be barred by limitation.

10. On the facts already stated, there is no dispute that the petitioner filed the appeal before the first appellate authority in time if the certified copy of the order is taken into consideration.

11. We would accordingly answer the questions referred thus :

(i) The expression "order" in Form XVI includes certified copy of the order.

(ii) *Bharat Sabaigrass Ltd. v. Collector of Commercial Taxes, Orissa* [1952] 3 S.T.C. 453, is good law and applies to the facts and circumstances of this case.

(iii) Section 12 of the old Limitation Act applies to cases of certified copy of the order necessary for filing an appeal u/s 23 of the Act.

12. On the aforesaid analysis, we accept the reference. In the circumstances, however, there will be no order as to costs. The reference fee deposited in each of these references be, however, refunded to the petitioner.

S. Acharya, J.

13. I agree.