

(2015) 06 OHC CK 0034
In the Orissa High Court
Case No : Writ Petition (C) No. 2922 of 2006

Ganapatrai Balabux

APPELLANT

Vs

The Assessing Authority and Others

RESPONDENT

Date of Decision : 22-06-2015

Acts Referred:

Constitution of India, 1950 — Article 226, 227, 32
Orissa Entry Tax Act, 1999 — Section 10, 16, 17, 18, 19

Citation : (2015) 120 CLT 790 : (2015) 2 ILR Ori 238 : (2016) 87 VST 313

Hon'ble Judges : I. Mahanty, J;Durga Prasanna Choudhury, J

Bench : Division Bench

Advocate : N. Paikray, B.P. Mohanty, A.N. Ray, K.K. Sahoo, P.K. Mishra and B. Das, for the Appellant; R.P. Kar, SC, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Dr. Durga Prasanna Choudhury, J—This writ application challenges the orders of the learned Assessing Authority and Appellate Authority of Sales Tax by raising extra demand of Rs. 1,13,178/- on the ground that reasonable opportunity was not afforded to the petitioner to adduce his evidence in support of deduction of tax while computing the same by the Assessing Authority and, similarly, the Appellate Authority, confirmed the orders of the Assessing Authority, ignoring the norms and authority of the Hon"ble Apex Court. The factual matrix leading to the case of the petitioner is that he was a registered dealer under the Orissa Sales Tax Act, 1947 (hereinafter called the "O.S.T. Act") as well as Orissa Entry Tax Act, 1999 (hereinafter called the "O.E.T. Act") and deals in mills-made and handloom clothes. During 2001-2002, he paid Rs. 1,17,008/- through the transporter to the border check gate officer, who issued the common receipt in the name of the transporter as entry tax of the check gate while the goods entered into the State of Orissa. According to the petitioner, on 18.12.1999, a circular bearing No. 25118/CT was issued by opposite party No. 3 to all concerned officers directing to issue consolidated receipt in respect of one truck of goods to the transporter, who will issue a copy of the receipt to the party while

the party will take delivery of goods from the transporter. This circular also depicts that where large number of dealers bring goods in one truck, one receipt with authenticated list of dealers with value of goods, tax component and money receipt number would be handed over to the transporter and one copy of the list would be retained, while another copy would be sent to the concerned Commercial Tax Officer for necessary action at his end. In the instant case, while the petitioner's goods were being transported, the transporter at the check gates paid tax on behalf of owners of goods, including the petitioner, and they were issued with copy of money receipt for calculation of tax as well as list of dealers with value of goods and amounts of tax paid. So, the petitioner had reason to believe that whatever payment has been made by him to the transporter, who paid the same at the check gate, would be adjusted against the tax payable under the O.E.T. Act by the learned Assessing Authority. It is further alleged, inter alia, that surprisingly on 30.03.2005, the learned Assessing Authority has raised extra demand of Rs. 1,76,552/- without making adjustment of payment of the entry tax at the check gate to the tune of Rs. 1,13,178/- and without following the provisions of law and circular issued by the Department. Against the order of the learned Assessing Authority, the petitioner preferred appeal before opposite party No. 2, who also did not afford proper opportunity to the petitioner in terms of proviso to Sub-section (4) of section 7 of the O.E.T. Act and, in the absence of notice under Form No. E-4 and without following the judgment of this Court dated 23.06.2004 passed in W.P.(C) No. 2769 of 2004 in the case of M/s. Ram Krishna Raj Kumar v. Assessing Authority Zone-1, West Circle, Cuttack. About illegality of the order, it is pointed out that no notice was issued for production of Books of Accounts regarding its correctness and completeness for the purpose of assessment. It is the case of the petitioner that the learned Appellate Authority has equally committed mistake by not following the circular of the Department and the provisions of law under the O.E.T. Act. So, the petitioner challenges both the orders passed by opposite party Nos. 1 & 2 in this writ petition to quash the same.

2. Learned counsel appearing for the petitioner challenging the orders of opposite party Nos. 1 & 2 submitted that the order passed by the learned Assessing Authority without issuance of any statutory notice to the petitioner for production of Books of Accounts for examining the correctness and completeness is illegal, as section 7(4) of the O.E.T. Act requires the petitioner to be given an opportunity to produce evidence and, in the absence of the same, the order of the learned Assessing Authority is vulnerable, void and illegal. According to him, no reasonable opportunity was afforded to the petitioner to produce evidence for which the order of the learned Assessing Authority is perverse. He further submitted that the order of opposite party No. 2 is equally bad in law because the decision in the case of M/s. Ram Krishna Raj Kumar (supra) has not been followed, which clearly states that in the absence of statutory notice being served to produce the Books of Accounts, the order of the learned Assessing Authority is wrong and illegal. It was his further submission that the order passed by

opposite party No. 2 is illegal by not following the circular issued by the Department in 1999, which speaks that the check gate officer issues money receipt to the transporter, who carries goods of a large number of dealers in one truck, and copy of list of dealers is retained while another copy is sent to the concerned C.T.O. to facilitate the adjustment of payment of tax at the entry of goods into the State of Orissa at the time of filing of returns by dealers in the concerned financial year. Submission was also advanced by him that the arbitrary order of the learned Appellate Authority in confirming the order of the Assessing Authority without following the provisions of law and circulars issued by the Department is equally vulnerable, perverse, and without any basis for which the same should be quashed.

3. On the contrary, learned counsel appearing for the opposite parties submitted that the writ petition is not maintainable when there is provision under section 17 of the O.E.T. Act read with section 23 of the O.S.T. Act to prefer appeal against the order of the First Appellate Authority. He submitted that opportunity was given by the learned Assessing Authority to the petitioner, as evident from the order of opposite party No. 1; but the petitioner has failed to produce the evidence and, as such, opposite party No. 1 has rightly passed the order. It was his further submission that the principles in the case of M/s. Ram Krishna Raj Kumar (supra) have been duly followed while disposing of the appeal. So, he supported the orders passed by the learned Assessing Authority and Appellate Authority and submitted to dismiss the writ petition.

4. After detailed discussions about the cases of the respective parties, the following points emerge for consideration:

"i) Whether the petitioner can take the benefit of copy of money receipt issued to the transporter carrying his goods by the check gate officer while assessing the tax payable by the petitioner?

ii) Whether reasonable opportunity has been given to the petitioner in accordance with law to produce evidence so as to make the impugned orders valid and legal?

iii) Whether the writ petition is at all maintainable in the eye of law?"

Point No. (i):

5. On going through the impugned orders, the petition and the documents filed by the petitioner, it is revealed that the learned Assessing Authority has passed the assessment order for the year 2001-2002 on 30.03.2005. In his order, he has maintained that the petitioner has claimed to have paid entry tax at the check gate to the tune of Rs. 1,17,008/- and produced ten original money receipts for Rs. 7,191/-, out of which four are photo copies of the original receipts involving tax of Rs. 3,361/-, which were disallowed by him, and original check gate money receipts for Rs. 3,830/- were only allowed by the Assessing Authority for deduction from the tax computed. He did not accept the other

photo copies of the consolidated receipts in the name of the transporter and other forms submitted by the petitioner, for which, as per section 7(2) of the O.E.T. Act, to the best of his judgment passed the order to pay the tax of Rs. 1,76,552/-. In his order, the learned Assessing Authority has observed that the petitioner was given opportunity to produce proof of correctness and completeness of the statement and the entry tax paid under section 7(4) of the O.E.T. Act. But, till the date of assessment, the petitioner could not produce and furnish any satisfactory payment of tax at the check gate against the photo copies of the check gate receipts furnished. The learned Appellate Authority while passing the order followed the O.S.T. Rules and O.E.T. Rules and agreed that the decision in the case of M/s. Ram Krishna Raj Kumar (supra) should be followed; but the Xerox copies submitted by the petitioner claiming adjustment were not accepted as these documents are not admissible in legal proceeding unless the same are certified by appropriate authority. He also discussed the necessary circular No. 25118/CT dated 18.12.1999 issued by the Commissioner of Sales Tax and opined that the same is meant for unregistered dealer but not for the petitioner. According to him, the petitioner is required to produce the original money receipt along with authentic documents showing value of goods, payment of tax, money receipt, its number and date of issue and, in the absence of the same, duly authenticated by the check gate officer, the petitioner has no claim.

6. It is worthwhile to go through the circular No. 25118/CT dated 18.12.1999 issued by the Commissioner of Commercial Tax, Cuttack about implementation of the Orissa Entry Tax Act, 1999. After the O.E.T. Act came into force, to mitigate the problems faced by dealers and transporters, for proper implementation of the O.E.T. Act, the said circular was issued. In para-3, it has been clearly mentioned that if there are more than one unregistered dealers get their goods transported in one truck, separate receipt should be granted by the check gate officer as far as possible. Where a large number of dealers bring goods in one truck, one receipt with authenticated list of dealers with value of goods, tax paid and money receipt number/date be handed over to the transporters. One copy of such list be retained while another copy be sent to the concerned C.T.O. So, the clause is discernible in guiding the goods transported by unregistered dealers and the dealers who are registered. There is nothing found from the circular that the original money receipt should be available to the dealers or issued to the dealers, either registered or unregistered, by the check gate officer. It is the only transporters, who will obtain the receipt and copy of such receipt must be available to the dealers so that they can make adjustment of the tax computed for that year for the sake of implementation of the O.E.T. Act and Rules made thereunder. It must be remembered that in the taxing jurisprudence, no liberal interpretation can be made, but strict interpretation of the statute should be adhered to. So, the view of opposite party Nos. 1 & 2 that Xerox copies available to the dealer are not admissible without being authenticated by the competent authority are otiose. It is true that the admissibility of documents is necessary before a quasi-judicial authority. Copies of documents as per Annexure-3 series

go to show the name of the petitioner along with other dealers, the amount of property transported, and the amount of tax paid with necessary receipt number. Similarly, copies of documents containing seal of the Sales Tax Officer cannot be said to be without proof of payment of entry tax by the transporter and the same are duly authenticated by the Sales Tax Officer, which should have been accepted for adjustment towards payment of tax in view of the circular issued in 1999 (supra) by the Department.

7. Section 7 under Chapter-III, of the O.E.T. Act has been introduced with amendment on 19.05.2005. Since incident of payment of tax relates to 2001-2002, the law prior to amendment has to be followed. Section 7(2) of the said Act has been introduced in Orissa Entry Tax Act, 2000 vide Orissa Act 5 of 2000. The erstwhile section 7(2) of the O.E.T. Act prescribes in the following manner:

"Before any dealer submits a return under Sub-section (1), he shall, in the prescribed manner, pay in advance the full amount of tax payable by him on the basis of such return as reduced by any tax already paid under Section 10, or of the composition money fixed under the proviso to Sub-section (1) of Section 3, as the case may be, and shall furnish along with the return satisfactory proof of such payment; and after the final assessment is made, the amount of tax so paid shall be deemed to have been paid towards the tax finally assessed."

8. Similarly, un-amended section 7(3) of the O.E.T. Act prescribes that if the Assessing Authority is satisfied that any return submitted under Sub-section (1) is correct and complete, he shall assess the dealer on the basis thereof. Section 7(4) of the said Act before amendment stipulates that if no return is submitted by the dealer under Sub-section (1) within the period prescribed or if the return submitted by him appears to the assessing authority to be incorrect or incomplete, he shall assess the dealer to the best of his judgment recording the reasons for such assessment. Proviso to such Sub-section speaks that before taking action under this Sub-section the dealer shall be given reasonable opportunity of providing the correctness and completeness of the return submitted by him. In the impugned order passed by the learned Assessing Authority, it is observed that he has given adequate opportunity for proving the correctness and completeness of the returns submitted by him, but nothing is found from the order that the return submitted by the petitioner is incorrect or incomplete when he has submitted the photo copies of the consolidated receipts in the name of the transporter containing the name of the petitioner. So, proviso to Sub-section (4) of section 7 of the O.E.T. Act before amendment is pre-condition to pass the best of the judgment by the learning Assessing Authority on the tax payable by the petitioner. By merely stating that opportunity was given to prove the correctness and completeness of the statement of entry tax paid, without any observation that such copies of money receipts in the name of the transporter being incomplete or incorrect, which necessitates to pass best of the judgment by the learned Assessing Authority, is wholly vulnerable one. On the

other hand, without any finding that such copies of documents are incomplete and incorrect in spite of opportunity given to prove the correct and complete document by the petitioner, the doctrine of passing the best judgment as per section 7(4) of the erstwhile O.E.T. Act, 1999 cannot be said to have been complied with. Be that as it may, the order of the learned Assessing Authority (opposite party No. 1) having not followed the provisions of the O.E.T. Act is vulnerable.

9. Similarly, the order of the learned First Appellate Authority confirming the order of the learned Assessing Authority with the observation that Xerox copies of documents are not admissible without following the procedure, as depicted under the circular of 1999 issued by the Department (supra), by interpreting the same for its applicability for the unregistered dealer is equally bad in law. The observation of opposite party No. 2 that Xerox copy of any document is inadmissible in legal proceeding unless it is certified by the appropriate authority is also equally beyond the legal principles before the quasi-judicial authority. Opposite party No. 2 has not properly evaluated the copies of documents produced by the petitioner for which his reasons for rejecting the appeal and confirming the order of the Assessing Authority is also vulnerable one. From the foregoing discussion, it must be observed by us that the observation of opposite party Nos. 1 & 2 by not accepting the copies of receipts issued to the transporter in compliance with the circular issued by the Department in 1999 (supra) is contrary to section 7(4) of the O.E.T. Act, 1999 (unamended) and, as such, the petitioner is entitled to the benefit of such adjustment. Point No. (i) is answered accordingly.

Point No. (ii):

10. It is evident from the aforesaid discussion that reasonable opportunity to produce the original Books of Accounts with original money receipt from the transporter has not been afforded to the petitioner because the impugned order does not indicate that the petitioner was given opportunity to produce the Books of Accounts and the original money receipts in support of his claim for adjustment of payment at the check gate. Mere observation of the learned Assessing Authority that the petitioner was given opportunity to produce the satisfactory proof for completeness and correctness of the document submitted is without any compliance as per law. On the other hand, we are of the opinion that reasonable opportunity has not been given to the petitioner to produce satisfactory proof of payment of tax to the transporter or incidence of payment of tax towards adjustment of tax at the check gate while submitting the return for the year 2001-2002. So, point No. (ii) is answered accordingly.

Point No. (iii):

11. With regard to maintainability of the writ petition, we may discuss the relevant provisions of law in that context. The assessment has been made under the O.E.T. Act, 1999 for the year 2001-2002. The O.E.T. Act, 1999 came into

force as Orissa Act 11 of 1999 on 01.12.1999 having been published in the Orissa Gazette, Extraordinary, No. 1509 dated 04.11.1999. Such Act in Chapter-III enshrines about the assessment, payment, recovery and collection of tax vide section 7 of the O.E.T. Act. Such provision was amended by Orissa Act 10 of 2005 w.e.f. 19.05.2005. Since the assessment year relates to 2001-2002, we can discuss unamended provisions of section 7 of the said Act. Section 7(2) of the O.E.T. Act was substituted by amendment vide Orissa Act 5 of 2000. Under such provisions, the dealer can submit the return along with the documents for payment of any tax already paid for final assessment. It is reiterated that in the erstwhile provisions of section 7(4) of the O.E.T. Act, the present impugned order of assessment has been passed. Against such order, first appeal lies under section 16 of the O.E.T. Act, 1999 to such authority as prescribed as Appellate Authority. Section 16 has also undergone changes being amended in 2005 vide Orissa Act 10 of 2005 w.e.f. 19.05.2005. It is reiterated that the assessment year being 2002-2002, the unamended provisions of section 16 will apply. So, the impugned order of the Appellate Authority has been passed as per erstwhile provisions under section 16 of the O.E.T. Act, 1999. On further scrutiny, it appears that section 17 of the O.E.T. Act, 1999, as stipulated before it was amended in 19.05.2005, deals with the appeal against the order of the Appellate Authority to the Tribunal. Similarly, the unamended provision of section 18 of the O.E.T. Act, 1999, prior to its amendment, deals with revision by the Commissioner of orders prejudicial to the interest of revenue. Section 19 of the said Act, before its amendment, w.e.f. 19.05.2005 deals with the appeal to the High Court against the order passed under section 18. After amendment, section 19 contains revisional power of the High Court in certain matters where order has been passed under section 7(4) of the O.E.T. Act, 1999. On bird's eye view of these provisions, it shows that second appeal against the order passed under section 16, before its amendment in 2005, lies to the Tribunal under section 17 of the O.E.T. Act, 1999. So, there is forum prescribed under the statute for any aggrieved person, whose right has been affected by the order of the First Appellate Authority. Not only this, but also pre-amendment of section 17 of the O.E.T. Act depicts that within a period of 60 days any person, either revenue or the person affected by the order passed by the First Appellate Authority, can file second appeal before the Tribunal. Under Sub-section (4) of section 17, the Tribunal shall dispose of the appeal in the prescribed manner subject to the provisions of the Sales Tax Act. Under the O.E.T. Rules, 1999, the prescribed procedure for disposing of the appeal before the Tribunal has been prescribed. But, such procedure vide Rule 23A has been inserted by the Orissa Entry Tax (Amendment) Rules, 2005 w.e.f. 15.10.2005. Before amendment of the Rules in 2005, Rule 23 of erstwhile original O.E.T. Rules, 1999 was dealing with appeal and revision about the procedure adopted by the Appellate Authority and the Revisional Authority. According to that Rule 23 of the erstwhile O.E.T. Rules, 1999, except for the condition expressly provided in section 16 of the Act in respect of the appeal and in section 18 of the Act in respect of revision, the provisions under the Sales Tax Act and the Sales Tax Rules for appeals and

revisions shall, mutatis mutandis, apply to the appeals and revisions under the Act. So, before incorporating the amended Rule 23A under the O.E.T. Rules (Amendment) Rules, 2005, the rules of the Orissa Sales Tax Rules will apply to the appeals and revisions filed under pre-amended provisions under the O.E.T. Rules. Rule 52 of the Sales Tax Rules, 1947 says that the second appeal will be filed before the Tribunal and necessary order will be passed by the Second Appellate Authority and under Rule 70, the Tribunal will pass the order in writing after hearing of the appeal is complete. So, prior to 2005, the Sales Tax Act and Rules will apply, mutatis mutandis, even if the appeal has been filed under the O.E.T. Act, 1999. When there is specific provision already made for the second appeal before the Tribunal and the appellate forum can take into consideration all the matters agitated by the appellant having wide jurisdiction, the present petition under Art. 226 and 227 of the Constitution of India is not maintainable. Our view is fortified with the decision in the case of Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, AIR 1983 SC 603 : (1983) 34 CTR 393 : (1983) 142 ITR 663 : (1983) 1 SCALE 437 : (1983) 2 SCC 433 : (1983) 2 SCR 743 : (1983) 53 STC 315 . where Their Lordships have been pleased to observe that where the petitioner has alternative remedy by way of appeal and second appeal, no relief can be granted under Art. 32 and 226 of the Constitution.

12. After extensive discussions, as made above, due to the existence of a right to file a second appeal and revision available to the petitioner against the impugned orders, which are otherwise defective, as discussed above, can be agitated in the second appeal. Apart from this, it is reported in the case of Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, AIR 2003 SC 2120 : (2002) 10 JT 561 : (2003) 2 SCC 107 : (2003) AIRSCW 126 : (2003) 1 Supreme 446 , where Their Lordships have been pleased to observe:

"In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three categories - (1) Where the writ petition seeks enforcement of any of the fundamental rights; (2) Where there is failure of principles of natural justice; or (3) Where the orders or proceedings are wholly without jurisdiction or the vires of the Act and is challenged". [See Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, AIR 1999 SC 22 : (1998) 7 JT 243 : (1998) 5 SCALE 655 : (1998) 8 SCC 1 : (1998) 2 SCR 359 Supp : (1998) AIRSCW 3345 : (1998) 8 Supreme 176].

13. With due respect to the above decision, we find that the question of enforcement of any of the fundamental rights, in the present facts and circumstances, does not arise. Even if opportunity was not given to submit the documents, but there was hearing of the case and judgment has been passed and, as such, it cannot be said that principle of natural justice is not followed. In view of the discussions in point Nos. (i) & (ii), we are of the considered view that there is no compliance with the provisions of the O.E.T. Act and the circular issued by the Department under the relevant rules framed under the said Act.

Therefore, it must be held that the impugned orders of the Assessing Authority and the Appellate Authority have been passed without jurisdiction. Although alternative remedy as per the decision reported in *Titaghur Paper Mills Co. Ltd. v. State of Orissa* (supra) is available, but by virtue of the later decision of the Hon"ble Apex Court in the case of *Haribanslal Saharia and another v. Indian Oil Corporation Limited and others* (supra), entertaining the writ petition is not barred, even if alternative remedy is available. It is, therefore, held that the present writ petition is maintainable. Point No. (iii) is answered accordingly. As discussed above, the present matter has been agitated before this Court for quite a long time i.e. since 2006. Although alternative remedy is available and, at the same time, the writ petition is maintainable, for the interest of justice, it is more prudent to allow the writ petition by quashing the impugned orders so that the rights of the petitioner can be addressed expeditiously. Hence, we hereby quash the impugned orders vide Annexures-4 & 5. At the same time, we remit back the matter to opposite party No. 1 with a direction to reassess the incidence of payment of tax for the year 2001-2002 within a period of three months from the date of receipt of copy of this order after giving reasonable opportunity to both parties to produce their respective evidence. The writ petition is disposed of accordingly.