(1987) 03 OHC CK 0021

In the Orissa High Court

Case No : O.J.C. No. 861 of 1987

Greaves Cotton and Co. Ltd. APPELLANT

Vs

Sales Tax Officer and Another RESPONDENT

Date of Decision : 18-03-1987

Acts Referred:
Constitution of India, 1950 — Article 226, 227

Citation : (1987) 67 STC 364

Hon'ble Judges : S.C. Mohapatra, J;R.C. Patnaik, J;G.B. Patnaik, J

Bench : Full Bench

Advocate : R.B. Roy, for the Appellant; The Standing Counsel for Commercial Taxes Department, for the Respondent

Final Decision : Allowed

Judgement

R.C. Patnaik, J.—Heard counsel for the petitioner and the learned Standing Counsel for the Commercial Taxes Department.

2. The petitioner, who had supplied goods to Paradeep Phosphates and was assessed to sales tax by the Sales Tax Officer, Jagatsinghpur, being aggrieved by the order of assessment, preferred an appeal and moved for stay. The Assistant Commissioner of Sales Tax granted a conditional stay and directed the petitioner to pay Rs. 2,29,458. The petitioner thereupon moved the Commissioner of Commercial Taxes contending, inter alia, that his entire turnover comprised of inter-State sales for which C forms had been supplied by Paradeep Phosphates. Hence, there was no taxable turnover on which there could be a levy of Orissa sales tax. The contentions of the petitioner were noted in the 2nd paragraph of the Commissioner''s order. The Commissioner observed :

After hearing the contentions of the learned Advocate I find some force in the contentions and feel that the demand raised by the learned Sales Tax Officer is very high....

But, inasmuch as the merits of the case would be considered at the time of hearing, he directed that if the petitioner paid Rs. 50,000 by 17th March, 1987, and produced proof of payment before the concerned assessing officer, the balance amount would be stayed till the disposal of the first appeal.

3. The learned counsel for the petitioner has invoked our extraordinary jurisdiction in the peculiar facts and circumstances of the case, namely, where the entire turnover of the petitioner comprised of inter-State sales and is not liable to Orissa sales tax at all and especially, when the Commissioner upon perception of the contentions of the counsel for the petitioner finds force therein and furthermore, also holds that the demand raised by the learned Sales Tax Officer is very high, it was unjust on the part of the Commissioner to refuse the prayer for stay. No part of the turnover of the petitioner was exigible to Orissa sales tax. Despite perception of the said aspect, it was an illegal exercise of jurisdiction on the part of the Commissioner in whom the State has vested the power to grant stay, to require the petitioner to pay Rs. 60,000.

4. The learned Standing Counsel for the Commercial Taxes Department brings to our notice certain decisions of the Supreme Court laying down principles guiding jurisdiction in the matter of grant of stay of realisation of tax. The principles are well-settled and are well-known. The said principles, however, do not denude this Court of its discretion in the matter of grant of stay of realisation of tax in appropriate cases. The Supreme Court has not said anywhere that in no case, whatsoever the circumstances and howsoever the disposal may be, stay should be granted. Therefore, we should, while exercising our jurisdiction to grant or refuse stay, approach the matter with care and circumspection and not grant stay as a matter of course.

5. The facts are tell-tale. It would be injustice to refuse stay even though we are satisfied that the petitioner is not at all liable to Orissa sales tax but nevertheless has been saddled with tax. It is then, in my humble opinion, incumbent on us to exercise extraordinary jurisdiction to relieve the party of injustice. On the peculiar facts of this case, when it prima facie appears from the contentions raised in the writ petition and also before the Commissioner that the entire turnover of the petitioner is comprised of inter-State sales and the petitioner is not at all liable to Orissa sales tax, to refuse to exercise jurisdiction would be tantamount to abdicating our jurisdiction under Articles 226 and 227 of the Constitution of India. I exercise my discretion and grant stay until disposal of the appeal.

S.C. Mohapatra, J.

6. With respect, I am not able to agree with my learned brother.

7. This writ application has been filed against the order of the Commissioner granting part stay during the pendency of the first appeal before the Assistant Commissioner. The order was passed on 27th February, 1987. It has been purported to have been communicated on 2nd March, 1987. No whisper has been made in the writ application as to when the same has been received by the

petitioner. The writ application has been filed on 10th March, 1987. Although the matter was not in today''s list, by a special mention it has been placed before this Division Bench for hearing on the question of admission. There is no prayer for any interim relief during the pendency of the writ application. As per the High Court Rules, for making such a prayer a separate application is to be filed and registered as a miscellaneous case. When I called upon Mr. Roy to explain if he wants any interim relief, he clearly submitted that he does not want any interim relief during the pendency of the writ application and wants disposal of the writ application which has been filed invoking the power of superintendence under Article 227 of the Constitution of India. For exercising the power of superintendence, the records are necessary. The learned Standing Counsel for the department who had been served with a copy of the writ application does not even possess the copy of the writ application since he did not have notice that the matter would be taken up today. However, in view of our request, he agreed for final disposal of the writ application today. In the circumstances, we have decided to hear the application and dispose of the same as prayed for by the petitioner.

8. In the writ application, stay has been prayed for on the ground of nonliability of the petitioner and absence of jurisdiction of the assessing officer. Both the questions can be decided in the appeal which is pending. Neither in the writ application nor while making submission, Mr. Roy has breathed a word that the appeal would not be pressed. The prayer is to direct the Sales Tax Officer not to take coercive steps to realise the demanded amount during pendency of the appeal. When the Commissioner has granted stay partially, grievance of the petitioner is against his order refusing stay partially. In such circumstances, the question to be considered is whether stay should be granted.

9. As laid down by the Supreme Court in AIR 1969 SC 430 (income tax Officer, Cannanore v. M.K. Mohammed Kunhi) :

A certain apprehension may legitimately arise in the minds of the authorities administering the Act that if the Appellate Tribunals proceed to stay recovery of taxes or penalties payable by or imposed on the assessees as a matter of course the Revenue will be put to great loss because of the inordinate delay in the disposal of appeals by the Appellate Tribunals. It is needless to point out that the power of stay by the Tribunal is not likely to be exercised in a routine way or as a matter of course in view of the special nature of taxation and revenue laws. It will only be when a strong prima facie case is made out that the Tribunal will consider whether to stay the recovery proceedings and on what conditions and the stay will be granted in most deserving and appropriate cases where the Tribunal is satisfied that the entire purpose of the appeal will be frustrated or rendered nugatory by allowing the recovery proceedings to continue during the pendency of the appeal.

10. In this writ application, while pressing for immediate disposal, the application before the Commissioner for stay has not been attached. The grounds taken

before the Commissioner could have been examined if the application would have been attached. In the absence of the records and in the absence of the application before the Commissioner, if it can be assumed that the petitioner did not urge that the entire purpose of the appeal will be frustrated or rendered nugatory by continuing the recovery proceeding. In law also this would not be correct since there is clear provision in the statute for refund when an appeal is allowed. Therefore, the purpose of the appeal will not be frustrated or be rendered nugatory. When the petitioner has not urged that point before the Commissioner and the Commissioner has also taken into consideration the circumstances and has granted stay of realisation on condition that Rs. 60,000 would be deposited, I am not able to accept that this is a fit case where the Commissioner''s order is to be set aside on the ground of infirmity.

11. Even if the order of the Commissioner is liable to be set aside, this Court is to direct the Commissioner to examine the question in the guidelines for stay indicated by the Supreme Court in several decisions. Where the Commissioner would not observe the guidelines in spite of the same being brought to his notice, the question of interference in a writ application would arise if interest of justice would demand the same.

12. In the result, I am satisfied that this is not a fit case for interference. The writ application is dismissed.

13. Inasmuch as we have differed, the matter be placed before Honourable B. K. Behera, J., for disposal of the matter by a third Judge.

G.B. Patnaik, J.—The assessee is the petitioner challenging the order of the Commissioner in revision who by the impugned order directed the petitioner to pay a sum of Rs. 50,000 out of the assessed amount of Rs. 2,29,458. Against the order of assessment, the petitioner has carried an appeal which is pending before the Assistant Commissioner. This matter was before a Bench of this Court on 12th March, 1987, but difference of opinion having been expressed by the two learned Judges, this matter has been listed before me.

2. The petitioner''s main grievance is that the sale in question for which he has been assessed is inter-State sale and for such transaction, C forms had been supplied by Paradeep Phosphates. In this view of the matter, no Orissa sales tax is leviable. The petitioner''s contention is that the assessing authority is wholly without jurisdiction in levying Orissa sales tax, inasmuch as the transactions in question were included in Central sales tax returns and tax thereon has been paid in Maharashtra.

3. Before the Commissioner he also raised the aforesaid contention and the Commissioner also found force in the same, but instead of granting full stay, passed an order directing the petitioner to pay a sum of Rs. 50,000 and on such payment being made directed the balance amount to be stayed till the disposal of the first appeal.

4. Mr. Roy for the petitioner contends that in view of the admitted nature of transaction which is an inter-State sale, and prima facie Orissa sales tax not being leviable, the Commissioner erred in law in not granting full stay. The learned Standing Counsel, on the other hand, though does not dispute the proposition that in case it is held that it is an inter-State sale, no Orissa sales tax is leviable, yet contends that this is a matter to be gone into by the appellate authority and the learned Standing Counsel contends that it would not be appropriate for this Court to express any opinion as to the legality of the demand in question which may embarrass the appellate court in any manner. I find sufficient justification in the contention of the learned Standing Counsel and, therefore, I do not think it appropriate to express any opinion as to whether the transaction is an inter-State sale or not. But at the same time, as has been admitted by the learned Standing Counsel that if it is held that the transaction is an inter-State sale, and for which C forms have been supplied by Paradeep Phosphates and which had also been produced by the assessee before the assessing officer, there is sufficient force in the contention of Mr. Roy for the petitioner that the Orissa sales tax may not be leviable. In fact, the learned Additional Commissioner of Sales Tax was quite aware of this position and that is why he has reduced the quantum by directing only to pay a sum of Rs. 60,000 out of the total amount of Rs. 2,29,458. It is no doubt true that when the Commissioner exercises his jurisdiction in the matter of stay, he has wide discretion over the matter and he has to look to the prima facie nature of the case as well as the balance of convenience for grant or refusal of stay. But that discretion is undoubtedly a judicial discretion and not an arbitrary one. If the Commissioner was satisfied that Orissa sales tax was not leviable in respect of the transaction in question, there was no bar for granting relief of stay to the extent of full amount in favour of the assessee while the appeal was pending before the Assistant Commissioner, till the disposal of the first appeal. Normally, in a writ petition if this Court interferes with an order of stay, the matter should be remitted back to the Commissioner for reconsideration. My learned brother Justice S. C. Mohapatra while differing with the views expressed by my learned brother Justice R. C. Patnaik, has referred to a decision of the Supreme Court and has given quite weighty reasons which weighed with him to reject the prayer for stay. But the said Supreme Court decision nowhere prohibits the High Court from granting an order of stay during the pendency of an appeal before the Assistant Commissioner. In the facts of this case, it must be held that the petitioner has made out a strong prima facie case and it will be inequitable to refuse stay in such case. On the one hand Honourable Justice R. C. Patnaik has interfered with the order of the Commissioner and granted stay of the entire amount under demand till the disposal of the appeal, while on the other hand, Honourable Justice S. C. Mohapatra has refused to entertain the application and has not interfered with the order of the Commissioner. In a taxation matter when the two learned Judges have differed with one another, the assessee is entitled to get the benefit. I quite agree with Justice Mohapatra that the petitioner had not given sufficient details in the application to enable this Court to dispose of the

matter and Justice Mohapatra was fully justified to observe that on a matter being moved, the same not having been in the list, could not have been disposed of without prior notice to the learned Standing Counsel. That situation does not exist today and the learned Standing Counsel does not make any grievance on that score. Keeping in view the stand of the petitioner which has been to a great extent accepted by the Commissioner, this would be a most deserving and appropriate case for grant of full stay, and in view of the difference of opinion between the two learned Judges, in my opinion, the view which is beneficial to the assessee should be accepted. I would, therefore, agree with the conclusion of Honourable Justice R. C. Patnaik and hold that the order of the Commissioner be modified and the entire amount under demand be stayed till the final disposal of the appeal by the Assistant Commissioner. The Assistant Commissioner is directed to dispose of the pending appeal before him within two months from today.

This writ application is accordingly disposed of.

