

(1997) 08 OHC CK 0005
In the Orissa High Court
Case No : O.J.C. No. 10910 of 1997

Lingaraj Flour Mills (P) Ltd. APPELLANT
Vs
State of Orissa and Another RESPONDENT

Date of Decision : 21-08-1997

Acts Referred:

Constitution of India, 1950 — Article 226
Orissa Sales Tax Act, 1947 — Section 24, 24(2)

Citation : (2003) 133 STC 143

Hon'ble Judges : S.C. Datta, J;A. Pasayat, J

Bench : Division Bench

Advocate : R.P. Kar, A.N. Ray, N. Paikray, B.K. Mohanty and M.K. Badu, for the Appellant; Additional Standing Counsel (S.T.), for the Respondent

Judgement

A. pasayat, J.—During pendency of a reference application u/s 24(2) of the Orissa Sales Tax Act, 1947 (in short, "the Act"), petitioner has prayed for stay of realisation of extra demand raised for the assessment year 1985-86.

2. A brief reference to the factual aspects is necessary.

An ex parte assessment was made by the Sales Tax Officer which resulted in extra demand of Rs. 23,49,393 inclusive of demand raised under the Orissa Additional Sales Tax Rules, 1975 (in short, "the Rules"). Petitioner preferred an appeal before the Assistant Commissioner, Ganjam Ranga, Berhampur. The appellate authority reduced the total demand to Rs. 5,21,981. The order of the Assistant Commissioner was assailed by both the petitioner and the Revenue before the Orissa Sales Tax Tribunal. The appeals were numbered as second Appeal Nos. 1035 and 1034 of 1988-89, and 1109 and 1110 of 1988-89 respectively. The Tribunal allowed appeals filed by the Revenue and restored the demands raised by the Sales Tax Officer. An application filed u/s 24(2) of the Act by the petitioner was rejected by the Tribunal, and as indicated above the matter is pending adjudication in this Court u/s 24(2) of the Act in S.J.C. No. 55 of 1997.

3. According to Mr. R.P. Kar, learned counsel appearing for the petitioner, the basis on which the Tribunal proceeded to restore the assessment, is clearly erroneous as the petitioner could not have produced beyond its manufacturing/production capacity. If the findings recorded by the Tribunal would be accepted, it would mean that the petitioner worked its unit beyond the maximum capacity. It is submitted that the petitioner was granted relief in the first appeal by the Assistant Commissioner, which the Tribunal did not accept and dismissed the petitioner's appeal for further relief, but allowed the Revenue's appeals on untenable grounds. It is stated that the financial capacity of the petitioner would not permit it to make the payment of demand. It is pointed out that without prejudice to its claims, a sum of Rs. 7,91,964 has already been paid.

The learned Additional Standing Counsel for the Revenue with reference to Section 24(7) of the Act pointed out that there is no scope for entertaining the application for stay.

4. Section 24(7) of the Act reads as follows :

"24 Statement of the case to High Court.--(1) to (6).....

(7) The payment of the amount, if any, of tax due in accordance with the order of the Tribunal in respect of which an application has been made under Sub-section (1) shall not be stayed pending the disposal of such application or any reference made in consequence thereof, but if such amount is reduced as the result of such reference, the excess tax paid shall be refunded in accordance with the provisions of Section 14."

Similar view was expressed in Commissioner of Income Tax Vs. Bansi Dhar and Sons, , while considering the question of grant of stay during pendency of reference application in the background of Section 66 of the Income Tax Act, 1922, and Section 256 of the Income Tax Act, 1961. It was held that it cannot be said that the High Court has inherent power or incidental power in the matter of a reference pending before it to grant stay of realisation or to grant injunction. That must remain within the jurisdiction of the appellate authority and pendency of a reference does not detract from that jurisdiction of the appellate authority. Therefore, the order for stay of realisation of tax passed by the High Court in exercising its jurisdiction u/s 151 of the CPC in a pending reference was not proper. The High Court could have exercised its power if the appellate authority had not properly exercised its jurisdiction, not in reference jurisdiction but by virtue of its jurisdiction under article 226 or article 227 of the Constitution in appropriate cases. In an appropriate case, if the assessee feels that a stay or recovery pending disposal of the reference is necessary or is in the interest of justice, then the assessee is entitled to apply before the appellate authority to grant a stay until disposal of reference by the High Court or until such time as the appellate authority thought fit. But in case the appellate authority acted without jurisdiction or in excessive jurisdiction or in improper exercise of the jurisdiction, then decision of such appellate authority can be corrected by the

High Courts by issuing appropriate writs under articles 226 and 227 of the Constitution.

5. It is accepted that in *Iron Exchange India Ltd. Vs. State of Orissa and Others*, , it was held that in appropriate cases the High Court can grant stay of the collection of disputed demand on being satisfied about existence of basis to do so. Apex Court in *State of Orissa v. Iron Exchange India Ltd.*, SLP Nos. 17211 to 17214 of 1995, disposed of on July 23, 1995 [2000] 117 STC 436 (SC), accepted the view.

6. The case at hand has some peculiar features. The first appellate authority granted substantial relief by reducing the total demand to the tune of Rs. 5,21,981.

7. The main ground of the petitioner's challenge is about the maximum capacity up to which the unit could work. These aspects shall be considered by this Court when the Section 24(2) application is taken up. Therefore, we do not express any final opinion on merits, but on consideration of the peculiar circumstances as highlighted above, we direct that in case petitioner pays without prejudice to its claims involved further sum of Rs. 3 (three) lakhs, subject to verification of the claim of payment of Rs. 7,91,964 by the end of October, 1997, realisation of the balance shall be stayed till disposal of the reference application, i.e., S.J.C. No. 55 of 1997. If any payment has been made beyond Rs. 7,91,964 same shall be adjusted from the aforesaid sum of Rs. 3 lakhs.

The writ application is disposed of.

Urgent certified copy of the order on proper application shall be granted to the petitioner.

S.C. Datta, J.

8. I agree.