
(1964) 04 OHC CK 0007

In the Orissa High Court

Case No : S.J.C. No's. 34, 35, 36, 37 and 38 of 1963

N.N. Soor

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 09-04-1964

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 12(8), 24(1)

Citation : (1965) 31 CLT 83 : (1964) 15 STC 872

Hon'ble Judges : R.L. Narasimham, C.J;G.K. Misra, J

Bench : Division Bench

Advocate : R.N. Misra, for the Appellant; R.K. Ghosh, for the Respondent

Final Decision : Dismissed

Judgement

G.K. Misra, J.—These 5 references relate to five quarters ending 31st March, 1956, to 31st March, 1957, and involve common questions of law. Two questions of law have been referred by the learned Tribunal. Those are--

(a) Whether in the circumstances of the case, there has been violation of the principles of natural justice by the learned Assistant Commissioner, the first appellate authority ; and

(b) If there has been such violation of natural justice at the first appellate stage, whether in the circumstances of the case, the Tribunal was competent to dispose of the appeals on a consideration of the materials on record.

2. In the reference order, the learned Tribunal has given a clear statement of facts. The material facts are that the petitioner supplied rubbles for construction of spurs at Daleighai. For the aforesaid quarters he furnished no returns alleging that they involved merely payments of labour charges and that he had no title to the rubbles. His contention was accepted in the first instance and there was no assessment of the sale price paid for the rubbles on the footing that it merely represented the labour charges. On investigation by the Intelligence Circle, the Sales Tax Officer reopened the assessment u/s 12(8) of the Orissa Sales Tax Act

(hereinafter referred to as the Act). Against the order of assessment, the petitioner filed first appeals which were heard by Sri S. K. Das, Assistant Commissioner. Sri Das did not deliver judgment as he was transferred away. His successor, Sri M. Ramarao did not give any hearing to the petitioner and dismissed the appeals on the basis of the notes prepared by Sri S. K. Das and after making a further enquiry by examining the records of the Public Works Department and after having discussions with the officers in the Irrigation Department of the P.W.D. Against the first appellate orders, the petitioner filed second appeals before the Tribunal. On the date of hearing, after service of notice, the petitioner was absent and the appeals were heard ex parte. The Tribunal dismissed the appeals on the basis of the materials on record after hearing the State representative.

3. In his statement of facts the learned Tribunal recorded two findings of fact, which may be reproduced in his own words:--

(i) It is obvious that Sri Rao had discussions with the concerned officers of the Irrigation Department behind the back of the petitioner, but as the record shows he did so to satisfy his own conscience....The learned Assistant Commissioner found behind the back of the petitioner that he checked the analysis of the rate prepared by the P.W.D. for their own reference which includes an item to cover the element of Income Tax and sales tax payable by the appellant.

(ii) I have come to my findings on a consideration of the materials on record independently also of the observations of the learned Assistant Commissioner.

4. u/s 24(1) of the Act, the Tribunal shall refer to the High Court any question of law arising out of its appellate order. It is remarkable that though at the appellate stage in the grounds of appeal and at the reference stage the petitioner's advocate raised the question that Sri Ramrao's order was contrary to the principles of natural justice, the learned Tribunal refrained from expressing any view on the question and yet he referred it as a question of law for the answer of the High Court. It is elementary that whenever a question of law is raised before the Tribunal, he must apply his mind to the question, categorically give an answer whether it raises any question of law or not, and thereafter refer the question if it is one of law arising out of the appellate order.

5. In our view, however, the first question does rise a question of law arising out of the appellate order of the Tribunal and the matter is beyond controversy. In *Raghubur Mandal v. State of Bihar* [1957] 8 S.T.C. 770, their Lordships of the Supreme Court accepted with approval the dictum of the Full Bench of the Lahore High Court in *Gurmukh Singh v. Commissioner of Income Tax*, Lahore AIR 1944 Lah. 353. The two rules laid down by the Supreme Court, relevant to the present purpose, may be quoted :--

(i) The assessing officer is not, however, deprived from relying on private sources of information which sources need not be disclosed to the assessee at all.

(ii) In case he proposes to use against the assessee the result of any private inquiries made by him, he must communicate to the assessee the substance of the information so proposed to be utilised to such an extent as to put the assessee in possession of full particulars of the case he is expected to meet and to further give him ample opportunity to meet it, if possible.

6. It is unnecessary to refer to a catena of other decisions of the Supreme Court unequivocally reaffirming the aforesaid propositions.

7. Under Rule 50, Sub-clause (2), of the Orissa Sales Tax Rules (hereinafter referred to as the Rules), the first appellate authority may, before disposing of any appeal, make such further inquiry as it thinks fit. Sri Ramarao acts within his jurisdiction in making further inquiry, but exercised his jurisdiction illegally and with material irregularity in not following the principles of natural justice and the law laid down by the Supreme Court in not communicating to the assessee the substance of the information gathered in the further inquiry and not giving the assessee opportunity of rebutting that evidence.

8. The Tribunal has found that Sri Ramarao also did not hear any arguments of the appellant. This, by itself, is sufficient to quash his order as the principles of natural justice were violated. Apart from the principles of natural justice, under Rule 51, Sub-clause (1) of the Rules, if the appeal is not summarily rejected, the appellate authority shall fix a date and place for hearing the appeal and may from time to time adjourn the hearing. The object of hearing is to give full opportunity to the parties to present their cases and is not to make a show that it is being heard. Hearing of the appeals by Sri S. K. Das, who did not deliver the judgment, can in no circumstances amount to hearing of the appeals by his successor, Sri Ramarao. The learned Tribunal not only failed to record its own opinion on this question, but allowed the State representative to advance a fantastic contention that the hearing by the predecessor amounts to hearing by the successor, and that if the appellant was aggrieved, he could ignore the decision. Sri Ramarao's order could be ignored as a nullity only if he acted without jurisdiction. But the judgment could not have been ignored as he acted within jurisdiction under the powers vested in him in law, but he exercised his jurisdiction illegally and with material irregularity.

9. Mr. Ghosh for the State placed reliance on a Division Bench decision of the Calcutta High Court reported in *Kanailal Gatani v. Commissioner of Income Tax, West Bengal* [1963] 48 ITR 262, in support of the contention that sometimes a successor can deliver judgment even when the predecessor heard the matter. Far from supporting his contention, this decision supports our conclusion. The relevant passage may be extracted :-

A hearing of a case may be of many kinds. It usually involves the calling of witnesses, their examination and cross-examination and then arguments are addressed to the Tribunal. Where witnesses have been called and examined, or where arguments have been advanced, it is clear that one man cannot hear the

case and another man pass judgment. The reason is that much may depend upon the view that the Tribunal takes as to the credibility of witnesses and his mind may be swayed one way or the other by the demeanour of witnesses and as a result of arguments. This is such an intangible and personal task, that it cannot be handed over to the successor. Where, however, no witnesses have been called and no arguments have been advanced, but the matter depends on written objections filed, then the successor is in the same position as the officer originally was in the conduct of the case. Therefore, as long as the successor applies his mind to the materials before him, this is sufficient.

10. The present case comes within the dictum laid down in the first portion. Sri Ramarao's order is vitiated in law, and such an order is liable to be quashed by the Tribunal. We would accordingly answer the first question in the affirmative.

11. On the second question, the statement of fact given by the Tribunal is that it disposed of the appeals on the materials on record and after hearing the State representative. u/s 23(3)(c) of the Act, while disposing of an appeal under that section, the Tribunal shall have the same powers subject to the same conditions as enumerated in Sub-section (2). Rule 60 prescribes the procedure for hearing the appeal by the Tribunal in the absence of parties. It lays down that if on the date fixed for hearing, the appellant does not appear when the appeal is called for hearing, the Tribunal may dismiss the appeal or may decide on merits after hearing the respondent if present. In this case, the Tribunal decided the appeal on merits after hearing the State representative, the respondent. The Tribunal acted within its jurisdiction if it decided the appeal on the materials on record. The statement of facts in the reference order shows that the Tribunal decided the appeals on the materials on record and not on any extraneous materials.

12. The extraneous materials used by Sri Ramarao by further inquiry came to the notice of the petitioner clearly by the judgment of Sri Ramarao. If the petitioner had appeared before the Tribunal on the date of hearing, he could legitimately urge that he should be given full opportunity for rebutting the materials used by Sri Ramarao. The petitioner disabled himself from availing that opportunity. The use of the materials introduced by Sri Ramarao which were already on record, cannot be treated as extraneous at the second appellate stage so far as the Tribunal is concerned. The Tribunal's power u/s 23(3) is plenary and its amplitude is co-extensive with that of the first appellate Court. If the petitioner had appeared before the Tribunal, the Tribunal could have either remanded the case to the first appellate authority or could have given full opportunity to the petitioner to rebut before itself the materials used by Sri Ramarao. In the peculiar circumstances of this case, when the appellant absented himself and allowed the appeals to be heard ex parte, it cannot be said that the tribunal was not competent to dispose of the appeals on a consideration of the materials on record. The second question, therefore, is answered in the "affirmative.

13. Mr. Misra, however, contends that the Tribunal itself used some extraneous materials produced before it by Sri L. C. Sahu, the State representative, which

did not constitute a part of the record even before Sri Ramarao. The basis for such a contention is the statement of the learned Tribunal in its appellate order to the following effect:-

He (the State representative) produced before me the copies of the letters that passed between the assessee-appellant and the Works Department and also extract from the ledger of the P.W.D. to show the nature of the transactions.

14. This by itself also does not indicate whether the documents produced by the State representative refer to those already brought into record by Sri Ramarao or fresh documents. In view of the Tribunal's emphasis at more than one place in the reference order that its decision is based on the materials on record, the more reasonable view would be that these documents were not fresh documents admitted for the first time before the Tribunal. Mr. Misra contends that this further consideration of extraneous matters by the Tribunal itself without giving notice of that fact to the petitioner introduces a serious infirmity into the judgment of the Tribunal as a result of which the judgment is vitiated inasmuch as it is not possible to say to what extent the extraneous evidence weighed with the Tribunal in arriving at the ultimate findings in dismissing the appeals. The contention raised by Mr. Misra is not admissible as it is not a part of the questions referred to us. Even the petitioner did not file an application before this Court to ask for a supplementary statement of facts on the basis of a question so formulated. There is no such allegation in the reference application filed before the Tribunal on 28th December, 1962. Nor is there a statement of fact to that effect in the reference order of the Tribunal. This Court has no jurisdiction to answer such a question not referred to it. The position is also well settled by the Supreme Court in *Raghubar Mandal Harihar Mandal v. State of Bihar* [1957] 8 S.T.C. 770 . Their Lordships observed :-

It is well settled that the duty of the High Court is to start with the statement of the case as the final statement of the facts and to answer the question of law with reference to that statement.

15. It is on this ground alone that the Supreme Court reversed a judgment of the Orissa High Court in *Collector of Commercial Taxes v. Bharat Sabai Grass Ltd.* [1958] 9 S.T.C. 289, where their Lordships observed :-

Therefore, we have come to the conclusion that the reference directed by the Orissa High Court was itself incompetent, because no such question of law as was formulated by that Court arose on the facts of the case, and it was quite unnecessary to answer such a question in the present case .

16. We are satisfied that there is no statement of fact before us that the Tribunal used any materials extraneous to those already used by Sri Ramarao.

17. In the result, both the questions are answered in the affirmative and the applications are dismissed with costs. Consolidated hearing-fee of Rs. 100 (rupees one hundred).

Narasimham, C.J.

18. I agree.