

(1995) 07 OHC CK 0001
In the Orissa High Court
Case No : O.J.C. No. 3784 of 1995

Orient Paper and Industries Limited and Another	APPELLANT
Vs	
Superintendent, Central Excise and Others	RESPONDENT

Date of Decision : 25-07-1995

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (1995) 52 ECC 1 : (1996) 82 ELT 192 : (1995) 2 OLR 299

Hon'ble Judges : Susanta Chatterji, J;B.N. Dash, J

Bench : Division Bench

Advocate : R.K. Mohanti, B. Mohanti, D.P. Das, B. Pr. Das, S.N. Sarangi and S.P. Mohapatra, for the Appellant; A.B. Misra, Senior Standing Counsel, Central Govt., for the Respondent

Judgement

Susanta Chatterji, J.—The present writ application is at the instance of Orient Paper and Industries Limited, an-- existing company within the meaning of the Companies Act. 1956, and one of its share-holders praying inter alia :

"In the facts and circumstances of the case the petitioners pray that this Hon''ble Court may be pleased to examine the aforesaid and issue a writ in the, nature of mandamus or any other appropriate writ, direction or order calling upon the opp. party No. 1 to certify and send up to this Hon''ble Court all papers, documents filed by the petitioner under rule 173-C in connection with orders made in Annexure-1 by him so that this Hon''ble Court can examine and quash the order in Annexure-1 and to pass such other order as may deem fit in the circumstances of the case."

2. It is stated in detail that the petitioner company carries on business in the manufacture and sale of paper and paper-board coming within the notification issued under Rule 173-A of the Central Excise Rules at its plants at Brajarajnagar in Orissa and Amlai in Madhya Pradesh. The petitioner challenges the orders of provisional assessments for the period from April, 1994 to September, 1994, vide Annexure-1 to the writ petition, passed by opp. party No. 1, Superintendent,

Central Excise, Jharsuguda, claiming, inter, alia that the said provisional assessments were without jurisdiction, contrary to the procedure laid down in the Central Excise Act (for short the "Act") and the same are alleged to be arbitrary because of ignoring the earlier determination made on similar matters in earlier adjudication.

3. It is placed on record that the Superintendent of Central Excise, opp. party No 1, is one of the proper officers for the purpose of administration of Central Excise in relation to the matters referred to in the petition and it is claimed that the said opp. party No. 1 is not a Central Excise officer u/s 2(b) of the Act and has no power to demand a tax u/s 114 of the Act or levy or raise demand of tax. The petitioners further state that up to 16-3-1976 duty on petitioner-Company's products were specific, but after that, the duty became both specific and ad valorem as would be evident from columns 3 and 4 of the page in the said chapter which indicates in column 3. The nomenclature and description of the product, its, heading and sub-heading in column-4 for the rate of duty provide a fixed percentage plus amount per tonne. The petitioner-company was however filing fresh price- lists as and when re-affirmed under the rules. The proper officers were making correction by adjudication which were challenged for the price-list elective from 16-3-1976 up to 16-3-1981. For such refusal, the petitioner-company had filed appeals as provided under the statute and there has been determination not only in respect of Brajarajnagar plant but also Amalai plant and the said, decisions are binding for all subsequent periods, the details of which are mentioned in Annexure-2. The petitioner filed appeals against disallowance before the Collector of Central Excise (Appeals), Calcutta and the order passed in the said appeal is detailed in the petition. The claim of the petitioner towards deduction of trade discount was allowed as an allowable deduction. These orders were challenged by the. Department before the statutory, Tribunal (for short CEGAT);and by order Nos. 114 to 137/944 dated 16-6-1994, the Assistant Collector Sambalpur was directed to make a de novo adjudication basing on some, guidelines. The Assistant Collector, opp. party No. 2, has not yet completed the assessments for the last nineteen years as submitted.

4. It is further stated in the writ petition that for price-lists with effect from, 16-3-1981 to 7-12-1983 where besides trade discount the petitioner had claimed deduction on quality rebate, loading charges interest elements/cash discount and wrapping paper, the Assistant Collector, Rourkela by original order No. 4/VC/86 dated 31-12-1986 and No. 1/VC/87 dated 12-1-1987 allowed trade discount and disallowed the other deductions for which the petitioner filed appeals. The Collector of Appeals by order in appeal Nos. 134-135/BBSR/87 dated 8-4-1987 allowed the claims of interest element/cash discount and the loading charges. The revenue preferred appeals against such allowance and the petitioner against the disallowance. The said appeals are pending having not been decided since 1987.

5. The petitioners allege that the Assistant Collector, opp. party No. 2 approved the price-lists dated 16-2-1987 by his orders dated 31-12-1986 and 12-1-1987 and allowed the trade discount. No revision has been made. Basing on such determination, the petitioner has been adjusting the prices u/s 4 of the Act accordingly. The facts reveal that on 16-2-1987 when the petitioner filed the price-list claiming not only trade discount but other deductions like loading charges, packing charges, cash discount/ interest element, sub-standard rebate/ retiree rebate, reel rebate, the Assistant Collector by his order dated 30-6-1993 only allowed trade discount for the price-lists from 16-2-1987 to 25-3-1992 and disallowed the other deductions. In the petitioners appeal before the Collector (Appeals)/ Calcutta by order No. 220/BBSR/94 dated 29-4-1994, retiree rebate reel rebate, cutting rebate, cash discount/interest element were allowed but the secondary packing charges and loading charges were disallowed. The revenue's appeals before the CEGAT are still pending. Similarly, the price-lists filed for the period from April, 1992 to 31st March, 1994 claiming the above deductions are still pending before the Assistant Collector, Central Excise, Sambalpur for approval. In an appeal before the CEGAT by the petitioner-company's Amalai Division, by order dated 30-5-1993 it was held that central excise duty and sales tax levied and included in the wholesale cash price were to be excluded from assessable value for "cess" purpose. This order has not been challenged nor reversed and has become final. By this process the petitioners have given the detailed background and various facts and circumstances of the pending disputes between them and the Revenue authorities.

6. In the present case, the petitioners have mainly challenged the orders under Annexure-1 on the ground that opp. party No. 1 has made provisional assessments for which he has no jurisdiction and the statute also does not provide anywhere to get those demands fulfilled. By making provisional assessments and revising the earlier demand as per Annexure-2-A the said officer has tried to override the earlier finding against the principles laid down in various judgments.

7. Developing all these facts in depth and detail, the petitioners have visited the writ Court seeking the reliefs as indicated above.

8. The petition is seriously opposed by the opp. party-revenue authorities.

9. Having heard Mr. B.K. Mohanty, learned Senior Advocate for the petitioners and Mr. A.B. Misra, learned Senior Standing Counsel (Central), a short but interesting point has arisen in the case to be decided, i.e. whether the writ petition is at all maintainable. Both the learned counsels have conceded that the Court may consider the question of maintainability of the writ petition as a preliminary point. If the petition would be found maintainable, the matter may be gone into in further details and decided comprehensively. The main point of argument of Mr. Mohanty is that if a statute provides a remedy of appeal, the said remedy available to the aggrieved party has to be exhausted. But in a given case where the authority passes an order without jurisdiction and not in the

manner as provided under the statute, it should be futile for the aggrieved party to seek remedy before the appellate forum. If the decision-making process suffers from such inherent defect, inasmuch there is lack of jurisdiction, the only efficacious remedy is to visit the writ Court and seek relief by quashing such arbitrary, irregular and illegal orders. In support of such contention, he has referred to a good number of reported decisions to draw the attention of the Court. He has further-developed his argument by referring to the decision in 6 (1980) ELT 274 (Y.B.M. World Trade Corporation V. Union of India). This decision relates to precedent, revisionary order and the binding effect and the ratio of the decision is

"Once the Government of India had given a finding on a contention raised, before it is binding upon the subordinate authorities in subsequent proceeding unless some other material is brought to their notice to take a contrary view."

More important is the discussion in paras 10 and 11 of the said decision.

10. In Trident Television Private Limited Vs. Collector of Customs, , the learned Single Judge of Calcutta High Court has observed

"Alternative remedy not a complete bar to maintainability of writ application--Circumstances in which the High Court may interfere--Petition admissible when adjudication, order illegal, manifestly, arbitrary, unreasonable, and delay would cause irreparable loss and prejudice to the petitioner."

11. In the next case referred in 1982 ELT 875(M/s. Orissa Forest Corporation Ltd. v. Assistant Collector, Central, Excise, Sambalpur and Ors.), a Division Bench of this Court considered the precedents and held that demand set aside for one period cannot be raised for another period on the same facts. If the demand for one period was set aside by the appellate authority another demand cannot be raised for subsequent period on the same facts until the order of the appellate authority is set aside by the revisionary authority.

12. Our attention has also been drawn to the case reported in (1984) 2 SCC 325 (Syed Yusufuddin Syed Ziauddin v. State of Maharashtra) wherein the Supreme Court in unequivocal terms has observed on jurisprudence--stare decisis--orders--and directions of appellate Court bind the lower Courts and must be strictly followed. Discussing the scope of Section 23 of the Land Acquisition Act and the practice and procedure regarding remand and its effect there was observation that order setting aside the judgment of High Court and remanding the matter to it would nullify the High Court's judgment. High Court therefore cannot revive that earlier judgment and put it on the record on the ground that despite remand it is still of the same view and the proper action for High Court in such situation was pointed out.

13. In the next case i.e. (1968) 3 SCC 579 (M/s. Jain Exports (P) Ltd. and Anr. v. Union of India and Ors.) considering the concept of administrative law-quasi judicial decisions lower authorities bound by decisions of higher authorities, it

was held that in a tier system, decisions of higher authorities are binding on lower authorities and quasi-judicial tribunals are also bound by this discipline. But that is not relevant for the Court when it is concerned not with disciplining the Collector in his quasi-judicial conduct but to ascertain what the correct position in the matter was. The relevant proposition has been elaborately dealt with in paras-9 and 11 of the said decision.

14. The decision reported in M/s. Radhasoami Satsang Saomi Bagh, Agra Vs. Commissioner of Income Tax, has been referred. There the Supreme Court considered that the principles of *res judicata* did not apply to Income Tax proceedings. Again, each assessment year being a Unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.

15. There is also reference to the decision reported in the self-same report at page 711 (Union of India and Ors. v. Kamalakshi Finance Corporation Ltd.). There the Supreme Court held the powers of Assistant Collector, Central Excise vis-a-vis matters disposed of by Assistant Collector by by-passing two appellate orders in regard to the same issue. It was held that High Court criticising such conduct of Assistant Collector causing harassment to assessee was Justified. Emphasis has been made that there is need to follow judicial discipline and to give effect to orders of higher appellate authorities.

16. Our attention has also been drawn to the provisions of the Central Excise and Salt Act, 1944, Central Excise Rules 1944 and the Central Excise Tariff Act, 1985.

17. Strong argument has been made on behalf of the petitioner that the writ petition may be entertained by this Court., the impugned orders Annexure-1 may be considered on merits and all the issues may be considered in proper perspective.

18. Mr. Misra in his usual manner of fairplay and wisdom, has. drawn the attention of the Court that it is not for the writ Court to assume the role of the appellate authority relating to the orders passed by the statutory authorities. His main thrust of submission is that true it is if the orders challenged are patently without jurisdiction and arbitrary, a party aggrieved may certainly come to writ Court and the writ Court will not hesitate to interfere. But it is the paramount duty of the writ Court to examine the decision-making process as found by the Supreme Court in the decision reported in State of Uttar Pradesh and Others Vs. Maharaja Dharmander Prasad Singh and Others, . It has been held in the said decision :

"Judicial review under Article 326 cannot be converted into an appeal. Judicial review is directed, not against the decision. but is confined to the examination of the decision-making process. When the issues raised in judicial review is whether

a decision is vitiated by taking into account irrelevant, or neglecting to take into account of relevant factors or is so manifestly, unreasonable, that no reasonable authority, entrusted with the power in question could reasonably have made such a decision, the judicial review of the decision-making process includes examination, as a matter of the relevance of the factors."

19. By considering the lengthy submissions made on behalf of the respective parties we are to decide the only point whether it would be just and prudent for the writ Court to entertain the writ petitions and consider all the grievances of the petitioners in the present forum. Admittedly the petitioners have preferred appeals before the appellate forum as provided under the Act and the Rules. At certain stages they succeeded and at certain other stages the revenue scored their points. The matters are now pending at different appellate stages either before the Tribunal or before the CEGAT. These impugned orders if are ex facie or perse illegal and without jurisdiction, certainly we shall not hesitate to consider the grievances of the petitioners by not driving them to seek remedy in the alternative forum. It is well conceded before us that the Act and the Rules enable the statutory authorities to make provisional assessments. Even against such provisional assessments an aggrieved party can prefer appeals. In the present case, the petitioners main grievance is with regard to filing of the price-lists and considering the scope of granting relief by admissible deductions. Previously certain materials were considered, certain factual aspects were also considered and part relief was granted. The ratio decidendi of the earlier decision is not in dispute. For each and every period there are certain salient features and there are factual disputes. It is not for the writ Court to consider the factual details and to consider the allegations and counter allegations, or grievances and counter grievances. If the rights of the parties are affected perse illegal step, the petitioners may well come to the writ Court seeking remedy. But in the instant case, we find that in order to avoid delay and for expeditious relief the petitioners have filed the writ application. When admittedly statute provides an alternative forum, filling an appeal against the orders in question would not be prudent on the part of the petitioners and not to come to this Court for expeditious remedy alone. Law demands efficacious remedy. ? Expedition of the cases and diminishing of delay may be one or, two factors, but not all the criteria as the law demands as to effective and comprehensive, adjudication. With all anxiety we have considered the submissions made on behalf of both sides. We are of the considered view that the orders under Annexure-1 are not perse without jurisdiction. The legality, validity and propriety of the orders can be considered by the appellate authority more succinctly and more effectively. Considering this aspect, we decide the preliminary point against the: petitioners. We dispose of the case observing that we have not considered the merits of the grievances of the petitioners and the petitioners may well seek remedy by visiting the appellate forum and all the points of law and facts as canvassed before this Court are open to be raised by them. There will be no order as to costs.

B.N. Dash, J.

20. I agree.