

(1988) 02 OHC CK 0007

In the Orissa High Court

Case No : Original Jurisdiction Case No. 918 of 1980

Orissa Cement Limited and Another

APPELLANT

Vs

The State of Orissa and Others

RESPONDENT

Date of Decision : 19-02-1988

Acts Referred:

Representation of the People Act, 1951 — Section 109, 110, 116A

Citation : (1988) 66 CLT 105 : (1988) 70 STC 254

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

Bench : Division Bench

Advocate : J. Das, for the Appellant; The Additional Government Advocate and the Standing Counsel (C.T.), for the Respondent

Judgement

G.B. Patnaik, J.—The short question for consideration in this writ application is whether the appellate authority under the Orissa Sales Tax Act is entitled to reject an application filed by the assessee to withdraw the appeal that had been filed by him u/s 23(1) of the Orissa Sales Tax Act and to initiate a proceeding for enhancement of assessment, or not ?

2. The aforesaid point arises for consideration under the following circumstances: For the assessment year 1966-67, the Sales Tax Officer, Rourkela Circle, passed an order of assessment against petitioner No. 1-company on 25th March, 1970 and communicated the same to the petitioner on 13th May, 1970. Against the said order of assessment, the assessee-petitioner No. 1 preferred an appeal on 1st June, 1970 and hearing of that appeal was fixed to 12th August, 1972. Thereafter, the appeal stood transferred to the newly created appellate authority at Rourkela and was fixed for hearing on 29th March, 1978, but the same could not be heard on that day. Before the appeal could be finally heard, the appellant, the Orissa Cement Limited, filed an application on 13th November, 1979 stating therein that the appellant does not want to pursue the appeal and accordingly abandons the same. The appellate authority, however, instead of treating the appeal to be withdrawn, passed an order on 22nd April, 1980 rejecting the

application for withdrawal and fixing a date of hearing therein. The ground for rejection of withdrawal is the existence of prima facie ground for enhancement of the assessment. This order of the appellate authority has been annexed as annexure 3 and the same is being impugned in the present writ petition.

3. Mr. Das, the learned counsel for the petitioners, contends that the right to file an appeal inheres in it the right to withdraw the same, particularly when there is no prohibition in the statute. Since the Orissa Sales Tax Act nowhere puts any embargo on withdrawal of an appeal, the appellate authority had no jurisdiction to refuse the prayer for withdrawal merely because he was of the opinion that prima facie ground exists for enhancement of assessment.

The learned Standing Counsel for the department, on the other hand, contends that in view of Sub-section (2) of Section 23 of the Orissa Sales Tax Act empowering the appellate authority to enhance the assessment while disposing of any appeal under Sub-section (1), withdrawal of an appeal cannot be said to be automatic and an appeal filed by an assessee cannot be unilaterally withdrawn so as to prevent the appellate authority from enhancing the assessment if facts and circumstances of a case so warrant. According to the learned Standing Counsel, the appellate authority in the present case was fully justified in rejecting the prayer for withdrawal. The rival submissions require careful examination.

4. Before examining the rival submissions, it would be appropriate to note the relevant provisions of the statute since the authorities cited at the Bar have interpreted the different provisions of the statute in coming to the conclusion whether an appeal can be withdrawn by the appellant or not. Under the Orissa Sales Tax Act, Section 23 is the provision for appeal. Under the said section, an order of assessment with or without penalty u/s 12, 12-A or 12-B can be appealed against within thirty days from the date of receipt of the copy of the order in the prescribed manner to the prescribed authority. The word "prescribed" has been defined in section to mean, prescribed by the rules made under the Act. Under the Orissa Sales Tax Rules, Chapter X deals with "appeal". Rule 47 provides that an appeal against an order of assessment with or without penalty lies to the Assistant Commissioner of Sales Tax if the order is passed by the Assistant Sales Tax Officer or the Sales Tax Officer and to the Additional Commissioner of Sales Tax if the order is passed by the Assistant Commissioner of Sales Tax. Rule 48 is the procedure for submission of appeal. Under the said rule, a memorandum of appeal against an assessment to tax under Sections 12, 12-A and 12-B with or without penalty shall be presented in form XVI being signed by the dealer or his agent and may be presented in person at the office of the appellate authority or sent by registered post. Rule 49 is the power for summary rejection of appeal. Under the said rule, if the memorandum of appeal is not filed in the specified form or if all the requirements of the form are not fully complied with, then the appellate authority may reject the appeal summarily after giving the appellant such opportunity as it may think fit to rectify the

defects. Under Sub-rule (2) of Rule 49, the appeal can also be summarily rejected on other grounds, but before rejecting the same, the appellant has to be given a reasonable opportunity of being heard. Rule 50 is the provision for hearing of appeal. If the appeal is not summarily rejected under Rule 49, then the appellate authority shall fix a day and place for hearing of the appeal and may from time to time adjourn the hearing. Sub-rule (2) of Rule 50 authorises the appellate authority to make further enquiry as it thinks fit before disposing of any appeal or to cause further enquiry to be made by the Assistant Sales Tax Officer or the Sales Tax Officer, as the case may be. These are all the provisions of the Act and the Rules dealing with an appeal.

Then comes the provision for enhancement with which we are directly concerned in the present case. Sub-section (2)(a) of Section 23 of the Act authorises the appellate authority to confirm, reduce, enhance or annul the assessment or the penalty or interest, if any. Sub-section (2) may be extracted hereinbelow in extenso for better appreciation of the point in issue:

(2) Subject to such rules as may be made or procedure as may be prescribed, the appellate authority, in disposing of any appeal under Sub-section (1), may-

(a) confirm, reduce, enhance or annul the assessment or the penalty or interest, if any; or

(b) set aside the assessment or the penalty or interest, if any, and direct the assessing authority to pass a fresh order after such further enquiry as may be directed.

Sub-rule (3) of Rule 50 of the Orissa Sales Tax Rules provides that the appellate authority shall not enhance an assessment or penalty unless the appellant has had a reasonable opportunity of showing cause against such enhancement. These are all the relevant provisions of the Act and the Rules dealing with enhancement of an assessment and the procedure to be adopted.

5. Mr. Das, the learned counsel for the petitioners, contends that no doubt the appellate authority under the Orissa Sales Tax Act has the power to enhance an assessment while disposing of an appeal, but that by itself does not take away the right of an appellant to withdraw the appeal before the same is heard. Since the appeal is preferred by an assessee being aggrieved by an order of assessment, he has the right to withdraw the same at any time and, at any rate, at least before the hearing of the same. Such a right cannot be taken away by the appellate authority. Consequently, the appellate authority committed an error in rejecting the prayer to withdraw the appeal and thereafter issuing notice of enhancement. In support of his aforesaid contention, the learned counsel places reliance on the decision of the Gujarat High Court in the case of *State of Gujarat v. Premier Auto Electricals Ltd.*, Ahmedabad 1982 TLR 3220 and on the decision of the Supreme Court, in the case of *Bijayananda Patnaik Vs. Satrughna Sahu and Others*, . The learned Standing Counsel for the sales tax department, on the other hand, places reliance on the decision of the Madhya Pradesh High Court in

the case of Commissioner of Sales-tax Vs. Mohanlal Harprasad Bidi Merchant, and also on the decision in R. v. Income Tax Special Commissioners; Elmhirst [1935] AllER 808 and contends that the appellant has not got the right to unilaterally withdraw an appeal once the appeal is filed and made ready for hearing and, therefore, the appellate authority was fully justified in rejecting the prayer of the appellant to withdraw the appeal, particularly when the appellate authority was prima facie satisfied about the existence of grounds for enhancement of the assessment. We shall now examine the different decisions cited by the counsel for parties.

6. In the Gujarat case 1982 TLR 3220 (State of Gujarat v. Premier Auto Electricals Ltd.) on which Mr. Das for the petitioners places reliance, the point for consideration was whether a reference made at the instance of the State u/s 61(4) of the Bombay Sales Tax Act could be withdrawn before the conclusion of hearing and before any vested right had come into existence in favour of the opponent-assessee. After analysing the provisions of the Bombay Sales Tax Act, more particularly Section 61 thereof, the learned Judges of the Gujarat High Court came to the conclusion :

...It is important to bear in mind, however, that before the obligation to do the things therein prescribed arises, the condition precedent which is required to be satisfied is that there must have been a hearing of the case. It is only upon the hearing of any such case that the duty to take the several steps prescribed in the sub-section arises and the context suggests that the hearing must be one which is full, effective and complete.

After referring to several decisions, the court observed :

The statutory provisions analysed above enact no bar, express or implicit, against the abandonment midstream of the reference by the person at whose instance it is made. He is the person who has caused the reference to be made and he is in the position of a plaintiff. He is at the centre of the stage and in-charge of the proceeding. The choice of not seeking adjudication on the question of law from the High Court, which was his at the initial stage, is not lost or to be denied to him merely because the reference is caused to be made by him. Even after the reference is made, it is still within the domain of his choice whether or not to prosecute it and the High Court would not ordinarily impose the adjudication upon him even if he does not seek it any longer. If, therefore, such person declares at any stage before the hearing has concluded that the question of law which has been referred should not be answered, which he is entitled to do, the High Court will not answer the same unless, of course, it is shown that the abandonment of the proceeding at that stage will result in defeating a vested right which has come into existence in favour of the other party before the declaration is made. The other party will be entitled to object and be required to be heard on the objection only in the latter case and not otherwise. This view is entirely in consonance with the statutory scheme and language and with the spirit of the enactment.

The court also considered the question as to whether de hors the statute there is any rule of law or practice which prevents a party seeking a reference from requesting the court, as of right, not to answer the question. After taking into consideration the decision of the Supreme Court in Bijayananda Patnaik's case AIR 1963 SC 1666 as well as the decision in the case of Hulas Rai Baij Nath Vs. Firm K.B. Bass and Co., and the decision in the case of R. Ramamurthi Iyer Vs. Raja V. Rajeswara Rao, the court observed :

Although a tax reference is not a suit and it is not, in terms, governed by the provisions contained in the CPC relating to withdrawal of a suit and the request of the party at whose instance the reference is made that the answer to the question referred need not be recorded as the question is not pressed may not strictly amount to the withdrawal of a reference, there is no reason why the principle underlying those provisions cannot be applied when such party does not press the question of law and requests that it need not be answered....

In Bijayananda Patnaik's case AIR 1963 SC 1566, the Supreme Court was considering the power of the High Court u/s 116A(2) of the Representation of the People Act while hearing an appeal from an election petition and whether the appellant had the right of withdrawing an appeal filed against the order of the Election Tribunal or not. After examining the provisions contained in Section 116A of the Representation of the People Act, which is the appellate power of the High Court, the Supreme Court held that the High Court has the same powers, jurisdiction and authority and has to follow the same procedure in the matter of withdrawal of an appeal u/s 116A, as in the matter of an appeal from an original decree before it and there is no warrant for importing any limitation in the matter on the analogy of Section 109 or Section 110 of the Act which expressly deal only with election petitions and not with appeals u/s 116A. Thereafter the Supreme Court referred to the provisions of the CPC relating to the withdrawal and finally came to the conclusion :

...Therefore, when an appellant u/s 116A makes an application for an unconditional withdrawal of the appeal, the power of the High Court consistently with its power in an appeal from an original decree, is to allow such withdrawal, and it cannot say that it will not permit the appeal to be withdrawn....

In our opinion, both the aforesaid decisions fully support the contention of Mr. Das, the learned counsel for the petitioners.

7. So far as the decision of the Madhya Pradesh High Court reported in Commissioner of Sales-tax Vs. Mohanlal Harprasad Bidi Merchant, , on which the learned Standing Counsel relies, is concerned, it was a case where the assessee had preferred an appeal against the appellate order of the Deputy Commissioner of Sales Tax. The State Government had also filed an application u/s 38(5) of the Madhya Pradesh General Sales Tax Act for enhancement of the assessment and both the appeal and the application for enhancement came up for hearing on 17th August, 1963, when the learned counsel for the appellant did not press the

appeal. The Board of Revenue permitted the appeal to be not pressed and on the application for enhancement filed u/s 38(5) by the State, passed an order that since the appeal was dismissed as not pressed, no order on the application for enhancement of the assessment could be passed. When the matter came to the High Court in reference, the High Court observed that the assessee either by withdrawing the appeal or by refusing to be present at the hearing of the appeal prevented the appellate authority from determining on the facts found what the assessment ought to be. The court held :

In this case, the Tribunal allowed the assessee to withdraw his appeal and dismissed it as not pressed without passing any order on the application for enhancement of the assessment. It appears that, in so doing, it did not duly advert to the position that it could consider the application for enhancement only so long as the appeal was pending. The consequence was that, with the dismissal of the appeal, the application for enhancement also came to be disposed of without even being considered. In our opinion, that application could not be dealt with in this manner....

The aforesaid conclusion was reached substantially because of a provision like Section 38(5) of the Madhya Pradesh General Sales Tax Act under which the State Government had filed an application for enhancement of the assessment. Such a provision is absent in the Orissa Sales Tax Act. That apart, it may be noted that in paragraph 4 of the judgment, it has been clearly stated that "the learned counsel for the assessee also fairly concedes that this is so". Thus it was a decision on concession. The ratio of the aforesaid decision cannot have any application to the facts of the present case in view of the analysis of the Orissa Sales Tax Act made by us earlier.

The other English decision on which the learned Standing Counsel for the department also places reliance is also not applicable to the present case. In the said English case [1935] AllER 808 (R. v. Income Tax Special Commissioners), the provisions of the Income Tax Act, 1918, came up for consideration. After analysing the different provisions in different parts of the statute, more particularly, Part VI and Part VII, their Lordships have come to the conclusion that an assessment which is made provisionally by the Additional Commissioner is not effective until it has been allowed and confirmed by the General Commissioner. Further, if no notice of appeal has been lodged and the time for hearing of the appeal has expired, then the assessment has to be confirmed. It has been further held that u/s 137 of the Act, it is the duty of the Commissioner to give notice of the day for hearing of appeals to every appellant, and the word "appellant" is important to indicate that when provision of Section 136 has been followed and the tax-payer who has given notice of appeal is the appellant and the appeal is in existence, it has to be heard. Sub-sections (4) and (5) of Section 137 of the Act were considered and it was held that the two sub-sections contemplated, first, that an appeal had been constituted by the giving of notice of appeal, and secondly, that "on the hearing of that appeal the appellant may

give evidence on oath, other lawful evidence may be called, and furthermore that the Commissioners have the duty and the right of coming to a conclusion, not only diminishing, if that appears to them to be the proper course, but increasing the assessment". Their Lordships further examined the other provisions of the Act and then held:

...I will only say that on an examination of this code (because I think all these sections from 139 to 145 inclusive ought to be read together as embodying an inclusive code; Section 146 merely, I think, deals with penalties), the conclusion I draw from the code is that the Commissioners, having set before them the duty of ascertaining and settling according to the best of their judgment the sum on which the tax-payer ought to be assessed, are required to make the assessment in accordance with that judgment, and in view of that I find it quite impossible to accept the argument that the giving of the notice of appeal is merely, as it were, a sort of offer, or is merely an act from which the tax-payer can at his discretion at any time resale, subject to his obeying the precepts and so forth, and that he can at any moment prevent the Commissioners from ascertaining and settling the sum to be assessed by the simple process of intimating by word or by deed that he withdraws from the appeal, or rather that he withdraws the notice of appeal, and that there is no appeal pending at all. It seems to me that the code contained in these sections is quite inconsistent with any such argument....

The decision of the aforesaid case will have absolutely no application to the facts of the present case since under the Orissa Sales Tax Act, the provisions are not in pan materia with the provisions of the Income Tax Act, 1918, which their Lordships were, considering in the Special Commissioner's case [1935] ALLER 808. Under the Income Tax Act, 1918, once the procedure laid down in Part VII of the Act was brought into being, the tax-payer had no further power of preventing it from being carried out to its full effect. But that is not the position so far as the Orissa Sales Tax Act is concerned with which we are concerned in the present case. In our opinion, the aforesaid English decision will have no application to the present case.

8. Under the Orissa Sales Tax Act, an assessee being aggrieved by an order of assessment can prefer an appeal u/s 23(2) of the Act and there is no embargo either under the Act or the Rules made thereunder for withdrawal of that appeal at the choice of the appellant before the same is heard. The power of enhancement can be exercised only while disposing of an appeal and that power can be exercised subject to the condition that the assessee will have an opportunity of showing cause against such enhancement as required under Sub-rule (3) of Rule 50 of the Orissa Sales Tax Rules. Therefore, where the appellate authority issues notice of enhancement during the pendency of appeal, whether the assessee can still withdraw the appeal or not is a rather debatable point, but does not arise in the present case for consideration. But even before issuance of such a notice when the appellant wants to withdraw the appeal, we do not find any justification for the appellate authority to reject the same. Here, in the

present case, the petitioner who had preferred the appeal on 1st June, 1970 filed an application for withdrawing the same on 15th November, 1979. At that point of time, the appellate authority had not exercised his powers under Sub-rule (3) of Rule 50 and yet by order dated 22nd April, 1980, he rejected the application of the appellant for withdrawal of the appeal and thereafter issued notice of enhancement. In our opinion, the appellate authority had no jurisdiction to reject the prayer for withdrawal of appeal before hearing of the same and even before issuance of any notice for enhancement. The impugned order dated 22nd April, 1980 passed under annexure 3, therefore, cannot be sustained. We would accordingly quash 3 and hold that the appeal must be held to have been withdrawn.

9. This writ application is accordingly allowed, but in the circumstances, there would be no order as to costs.

R.C. Patnaik, J.

10. I agree.