

(1973) 04 OHC CK 0021

In the Orissa High Court

Case No : Special Jurisdiction Case No. 16 of 1971

Polaki Sri Rangam and Sons

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 17-04-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27
Orissa Sales Tax Act, 1947 — Section 24(2)(b)

Citation : (1973) 32 STC 549

Hon'ble Judges : R.N. Misra, J;B.K. Ray, J

Bench : Division Bench

Advocate : B.K. Mohanty, for the Appellant; Standing Counsel (S.T.), for the Respondent

Judgement

R.N. Misra, J.—By order dated 17th January, 1972, this court on an application made u/s 24(2)(b) of the Orissa Sales Tax Act (hereinafter referred to as the Act) by the assessee, called upon the Tribunal to make a statement of the case referring the following four questions for determination:

- (i) Whether the low margin of profit can be a reason for rejecting the books of account of a dealer under the Orissa Sales Tax Act ?
- (ii) Whether non-mention of the names and addresses in the cash bills will render the accounts of a dealer rejectable under the Sales Tax Act?
- (iii) Whether, in the facts and circumstances of the case, the authorities below were correct in holding that the transactions mentioned in the 16 slips were suppression of sales ?
- (iv) Whether it was necessary for the Tribunal to deal with and/ or give reasons in not considering the affidavits filed before it ?

2. The assessee is a firm carrying on business in kerosene oil, cement, petrol, tyres, batteries and automobile spares at Berhampur in the district of Ganjam

and has been assigned registration number GA I 263. For the assessment year 1963-64, the Sales Tax Officer did not accept the accounts of the assessee and after rejecting the same enhanced the turnover by addition of Rs. 40,000. He found : (i) the assessee had not maintained the goods ledger in regular course of business and the gross profit disclosed was low keeping in view the dealer's nature and extent of business; (ii) the cash bills issued by the assessee did not indicate the names and addresses of the purchasers on account of which lapse, the sales were not verifiable; (iii) the low margin of the gross profits was correlated to under-statement of cash sales and the gross profit as per the trading account for the year 1963-64 was not accepted by the Income Tax department; and (iv) on a surprise visit to the business premises on 22nd May, 1963, an inspecting officer of the department found 16 slips evidencing sale transactions for which there were no corresponding cash or credit bills.

Against the assessment, the assessee preferred first appeal. The appellate authority agreed with the assessing officer that the books were liable to rejection and estimates were justified. But he reduced the estimate. The second appeal to the Tribunal by the assessee was fixed for hearing on 12th May, 1970. It is stated that on that day five affidavits were filed before the Tribunal. The Tribunal disposed of the appeal by order dated 16th May, 1970 and affirmed the assessment as modified by the first appellate authority. An application made u/s 24(1) of the Act was rejected on the footing that no question of law arose out of the appellate order.

3. Whether in a given case low profits disclosed by the assessee can be used as a ground for rejecting the books of account would depend on the facts of the case. If upon comparative material, the assessing officer comes to hold that the low profits were the outcome of suppression of cash transactions, rejection of books cannot be disputed. Similarly, in cash transactions (sic) addresses and particulars are not shown in the cash memos, the accounts must be rejected. The assessing officer has not used these independent grounds for rejecting the books of account in this case. These are features which have been taken into consideration along with other aspects and the cumulative effect has led to the rejection of the accounts. We are at one with the contention raised by the learned standing counsel that the first three questions indeed raise disputes of fact only and because colour has been added to these questions, they cannot become questions of law. Mr. Mohanty for the assessee also accepts this contention of the learned standing counsel so far as the first three questions are concerned. According to him, however, if we hold for the assessee on the 4th question, the aspects raised in the first three questions have got to be considered.

4. As already stated, on the date of hearing of the second appeal before the Tribunal 5 affidavits were filed by the assessee. The ordersheet of that date in the second appeal reads as follows :

The appellant with his authorised agent appeared and filed affidavit which is

placed below. Heard both parties. Judgment to 16th May, 1970.

In the judgment of the second appeal no reference has been made to these affidavits. The learned standing counsel contends that these affidavits were not considered by the Tribunal and, therefore, the fourth question does not arise out of the appellate order of the Tribunal. In regard to this aspect of the matter, reliance is placed by both sides on the decision of the Supreme Court in the case of Commissioner of Income Tax, Bombay v. Scindia Steam Navigation Co. Ltd. [1961] 42 ITR 589 (S.C.). Dealing with the argument as to when a question of law can be said to arise out of an appellate order, their Lordships summed up the result thus:

- (1) When a question is raised before the Tribunal and is dealt with by it, it is clearly one arising out of its order.
- (2) When a question of law is raised before the Tribunal but the Tribunal fails to deal with it, it must be deemed to have been dealt with by it and is, therefore, one arising out of its order.
- (3) When a question is not raised before the Tribunal but the Tribunal deals with it, that will also be a question arising out of its order.
- (4) When a question of law is neither raised before the Tribunal nor considered by it, it will not be a question arising out of its order notwithstanding that it may arise on the findings given by it.

Stating the position compendiously, it is only a question that has been raised before or decided by the Tribunal that could be held to arise out of its order.

Mr. Mohanty for the assessee contends that the second proposition covers this case. The affidavits were filed before the Tribunal and the Tribunal has omitted to deal with them. On the other hand, the learned standing counsel contends that the affidavits were not legally before the Tribunal and, therefore, could not have been considered by it and the second proposition is not attracted. Admittedly, the affidavits which were filed on the date of hearing were placed before the Tribunal by way of additional evidence.

Section 23(3)(c) of the Act provides:

While disposing of an appeal under this Sub-section the Tribunal or Additional Tribunal, as the case may be, shall have the same powers subject to the same conditions as are enumerated in Sub-section (2) and any order passed under this Sub-section shall, except as otherwise provided in Section 24, be final.

Sub-section (2) of that Section provides :

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 penalty, if any, or both;
- or

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

So far as the Tribunal is concerned, Rule 61 of the Rules deals with the matter of fresh evidence. The entire rule may be quoted:

(1) No party to an appeal or application for reference shall be entitled to adduce fresh evidence whether oral or documentary, before the Tribunal:

Provided that-

(a) if the authority from whose order the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(b) if the person other than the State Government seeking to adduce additional evidence satisfies the Tribunal that such evidence notwithstanding the exercise of due diligence was not within his knowledge or could not be produced by him at or before the time when the order under appeal was passed, or

(c) if the Tribunal requires any documents to be produced or any witness to be examined to enable it to pass order or for any other substantial cause, the Tribunal may allow such evidence or document to be produced or witnesses examined and in such case the other party shall be entitled to produce rebutting evidence, if any.

(2) When fresh evidence has been adduced the parties may, if they so desire, address the Tribunal on points arising out of the fresh evidence.

The CPC does not apply to the sales tax authorities and particularly the Tribunal. But, undoubtedly, Rule 61 has been on the model of Order 41, Rule 27, of the Code of Civil Procedure. That rule as amended in Orissa reads thus :

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary in the appellate court. But if-

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or...

(c) the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the appellate court may allow such evidence or document to be produced or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an appellate court, the court shall record the reason for its admission.

Except to the extent of the need of recording reason for admitting additional evidence as provided under Order 41, Rule 27(2), of the Code, other provisions are almost similar. In fact a Bench of this Court in the case of Commissioner of Sales Tax v. Bhima Palo [1961] 12 S.T.C. 785 stated so. There it was stated :

...While it is clear that under Rule 61 the Tribunal has residuary powers in the matter of adducing fresh evidence, whether oral or documentary, such powers must be exercised subject to certain limitations and restrictions as laid down in the provisos (a), (b) and (c) to Section (obviously, Rule) 61. The corresponding provision in the CPC is Order 41, Rule 27, relating to production of additional evidence in appellate court. The Privy Council and the courts in India have repeatedly held that the power given by this rule in the CPC should be exercised very sparingly and that great caution should be exercised in admitting new evidence. In our opinion, the object and the spirit of Rule 61(c) of the Orissa Sales Tax Rules are the same as of Order 41, Rule 27, Civil Procedure Code....

In the case of State of U.P. Vs. Manbodhan Lal Srivastava, , their Lordships referring to receipt of additional evidence at the appellate stage have stated:

It is well-settled that additional evidence should not be permitted at the appellate stage in order to enable one of the parties to remove certain lacunae in presenting its case at the proper stage and to fill in gaps. Of course, the position is different where the appellate court itself requires certain evidence to be adduced in order to enable it to do justice between the parties....

5. In the case before us, apart from filing those five affidavits no further action seems to have been taken before the Tribunal on the date of hearing in regard to them. There is no application before the Tribunal to receive additional evidence nor has it been indicated in any petition or even in the affidavits that according to the assessee such affidavits are receivable as fresh evidence under Clause (a) or (b) of Rule 61. The order-sheet of the Tribunal does not also indicate that it was the assessee's contention that the affidavits became receivable by way of fresh evidence under Clause (a) or (b) or that it was contended that the affidavits were necessary for the Tribunal to enable it to pass order or for any other substantial cause. In view of the clear bar provided in Sub-rule (1) of Rule 61 that no party would be entitled to adduce fresh evidence, whether oral or documentary, before the Tribunal, burden lay on the assessee to bring the case within Clause (a) or (b) of that Sub-rule in order that the documents in question could be received as fresh evidence at the second appellate stage. Since any of the three alternatives indicated in Rule 61 has not been satisfied, we agree with the contention of the learned standing counsel that those documents were not properly before the Tribunal and we cannot hold that the acceptance of the affidavits had been raised before the Tribunal and the Tribunal has failed to deal with it, therefore, the aspect must be deemed to have been dealt with by the Tribunal.

6. The affidavits though physically found on the record have not been legally made a part of it and, therefore, it was not necessary for the Tribunal to deal with and/or give reasons in not considering the affidavits filed before it. Once the assessee fails on that question, the other aspects do not indeed arise for consideration as conceded by Mr. Mohanty for the assessee. We would accordingly answer the fourth question in the negative as stated above and

decline to answer the other three questions in the circumstances and for the reasons indicated above.

We direct the parties to bear their own costs of this reference. Consequently the reference fee is available to be withdrawn by the assessee.

B.K. Ray, J.

7. I agree.