(2018) 04 OHC CK 0029

In the Orissa High Court

Case No : S.A.No.316 of 1988

STATE OF ORISSA AND OTHERS — APPELLANT

Vs

JAYKRUSHNA BRAHMACHARI — RESPONDENT

Date of Decision : 02-04-2018

Acts Referred:

Code of Civil Procedure, 1908 — Section 9
Orissa Motor Sprit (Taxation on Sales) Act, 1946 — Section 3(2), 8, 28(i), 28
Orissa Development Authorities Act, 1982 — Section 91

Citation : (2018) 04 OHC CK 0029

Hon'ble Judges : DR. A.K. RATH

Bench : Single Bench

Advocate : P.P.Mohanty

Final Decision : Dismissed

Judgement

Dr.A.K.RATH, J.

1. State of Orissa and its functionaries are the appellants against a reversing judgment.

2. The plaintiff-respondent instituted the suit for declaration that the orders passed by the Commercial Tax Officer, Puri, defendant no.3 demanding a

sum of Rs.63,119.42 towards arrear tax and Rs.31,569.71 as penalty are illegal, the said amount cannot be recovered in Certificate Proceeding under

the Orissa Public Demands Recovery Act (â??O.P.D.R. Actâ?) and permanent injunction. The case of the plaintiff is that he is the registered dealer

in petrol, diesel and other lubricants. He is liable to pay tax under the Orissa Motor Spirit (Taxation on Sales) Act, 1946 (â??the Actâ?). The

Commercial Tax Officer, defendant no.3 by its order dated 21.11.1974, 31.3.1977, 30.4.1977, 17.7.1978 and 17.4.1979 imposed penalty without issuing prior notice under Section 3(2) of the Act. Thereafter Certificate Case was initiated by defendant no.2 under O.P.D.R. Act to realize the same.

Though he challenged the liability of tax and penalty, but no relief was granted to him. The Certificate Officer has no power to adjudicate the matter.

The order is an infraction of natural justice. With this factual scenario, he instituted the suit.

3. The defendants filed written statement stating, inter alia, that the plaintiff had submitted three returns for the months of March and April, May to

August and September to November, 1977. He is liable to pay the admitted taxes under the Act. The plaintiff did not pay the arrear tax. The action

taken by defendant no.3 by imposing penalty on the plaintiff is legal and valid. The suit for permanent injunction is not maintainable. The suit is barred

under Section 9 C.P.C.

4. Stemming on the pleadings of the parties, learned trial court struck eight issues. Parties led evidence. Learned trial court dismissed the suit holding

inter alia that the order imposing penalty is illegal. The suit is barred under the provisions of the Act and O.P.D.R. Act and, as such, not maintainable.

The plaintiff appealed before the learned District Judge, Puri, which was subsequently transferred to the court of the learned Additional Sub-Judge,

Puri and renumbered as Title Appeal No.16/134 of 1986/1983. Learned appellate court held that no notice under Section 3(2) of the Act has been

served on the plaintiff. The plaintiff is not liable to pay penalty. The Civil Court has jurisdiction to entertain the suit. Held so, it allowed the appeal.

5. The Second Appeal was admitted on the following the substantial question of law.

â??Whether the civil court has jurisdiction to entertain the suit against the order passed by the Commercial Tax Officer, Puri under Sec.3(2) of the

Orissa Motor Sprit (Taxation on Sales) Act, 1946 read with Rules 27 and 28 of the said Rules framed thereunder, when a hierarchy of forum is

provided in the statute ?â??

6. Heard Mr.P.P.Mohanty, learned Additional Standing Counsel (C.T.) for the appellants. None appeared for the respondent.

7. Mr.Mohanty, learned Additional Standing Counsel (C.T.) for the appellants submitted that any person aggrieved by any order passed under sub-

section (2) of Section 3 of the Act or under Section 8 may file appeal under

Section 28 (I) of the Act within thirty days. Thus, the jurisdiction of the

Civil Court is impliedly barred. He placed reliance on the decision of the apex Court in the case of Premier Automobiles Ltd. v. Kamlakar Shantaram

Wadke and others, AIR 1975 SC 2238 and this Court in the case of Puri Konark Development Authority v. Ratna Bhadra and others, AIR 2002

Orissa 207.

8. Before adverting into the contentions raised by the learned Additional Standing Counsel (C.T.) for the appellants, it will be necessary to set out

Section 28 of the Act. Section 28 of the Act reads thus:-

â??28. (1) Any person aggrieved by any order passed under sub-section (2) of section 3 or under section 8 may, within thirty days after the date of

such order, appeal-

(a) To the Revenue Commissioner, if such order is passed by the Collector or Deputy Commissioner of a district, or

(b) To the Collector or Deputy Commissioner of the district, if such order is passed by an officer exercising the powers of a Collector under this Act,

(2) Every order passed in appeal under this section shall, subject to the provisions of sub-section (3), be final.

(3) The Revenue Commissioner may, at any time, call for and examine the record of any case in which any order referred to in sub-section (1) or

subsection (2) is passed for the purpose of satisfying himself as to the legality or propriety of such order and may, after examining the record, pass any

order which he thinks proper.â??

9. In Dhulabahi etc. and others v. State of Madhya Pradesh and another, AIR 1969 SC 78, the Constitution Bench of the apex Court laid down the

principles regarding exclusion of jurisdiction of the Civil Court. The apex Court held :

â??(1) Where the statute gives a finality to the orders of the special tribunals the civil courts' jurisdiction must be held to be excluded if there is

adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions

of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial

procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the

sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court. Where there is no express

exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the

inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of

the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and

whether remedies normally associated with actions in Civil Courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court

cannot go into that question on a revision or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari

may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a

suit.

(5) Where the particular Act contains no machinery for refund' of tax collected in excess of constitutional limits or illegally collected a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if

the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular

Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply.â??

10. Dhulabahi (supra) was referred to in Premier Automobiles Ltd. (supra). The apex Court held that if a statute confers a right and in the same

breath provides for a remedy for enforcement of such right the remedy provided by the statute is an exclusive one. Under Section 9 of the Code, the courts have subject to certain restrictions, jurisdiction to try suits of civil nature excepting suits of which their cognizance is either expressly or

impliedly barred. In the said case, the jurisdiction of the Civil Court with regard to the Industrial Disputes was the subject matter of consideration.

11. In Raja Ram Kumar Bhargav (dead) by LRs., v. Union of India, AIR 1988 SC 752, the apex Court held that generally speaking the broad guiding

considerations are that wherever a right, not pre-existing in common law, is created by a statute and that statute itself provided a machinery for the

enforcement of the right, both the right and the remedy having been created uno-flatu and a finality is intended to the result of the statutory

proceedings, then, even in the absence of an exclusionary provision the civil courts' jurisdiction is impliedly barred.

12. In Puri Konark Development Authority (supra), a Division Bench of this Court had the occasion to consider the jurisdiction of the Civil Court to

examine the order passed under Section 91 of the Orissa Development Act (â?? O.D.A.Actâ?). A Bench speaking through Justice A.S.Naidu (as he

then was) on a survey of the decisions of the apex Court held that without exhausting the remedies stipulated under the Special Statute, i.e., ODA

Act, a person cannot knock at the doors of a Civil Court and that the Civil Court has no jurisdiction to entertain such a suit.

13. Section 28(1) of the Act provides that any person aggrieved by any order under sub-section (2) of Section 3 or under section 8 may file appeal

within thirty days. Sub-section (2) of Section 28 provides that every order passed in appeal under sub-section (2) shall subject to the provisions of sub-

section (3), be final. The statute gives a finality to the order of the Commercial tax Officer. Adequate remedy has been provided under Section 28 of

the Act. Where a special statute provides for an appeal, jurisdiction of the Civil Court is impliedly barred. Since the statute gives a finality to the orders

passed by the competent authority under the Act, the Civil Courtâ??s jurisdiction must be held to be excluded. The substantial questions of law are

answered accordingly.

14. A priori, the impugned judgment is set aside. The appeal is allowed. Consequently, the suit is dismissed. No costs.

