

(1997) 01 SC CK 0036

In the Supreme Court Of India

Case No : Civil Appeal No's. 643 and 644 of 1978 (From the judgment and order dt. 28th April, 1977, of the Orissa High Court in OJC No's. 1680 and 1681 of 1975)

STATE OF ORISSA and Others

APPELLANT

Vs

KRISHNA STORES.

RESPONDENT

Date of Decision : 21-01-1997

Acts Referred:

Income Tax Act, 1961 — Section 263

Citation : (1997) 138 CTR 224

Hon'ble Judges : Sujata V. Manohar, J; Mrs. Sujata V. Manohar, J

Bench : Division Bench

Final Decision : Allowed

Judgement

MRS. SUJATA V. MANOHAR, J. :

The respondent is a partnership firm carrying on business as agents of Hindustan Lever Ltd., Indian Oil Corporation and various other corporations. The respondent carries on wholesale business in the products of these companies and has its registered office at Kanatabanji District, Bolangir, in the State of Orissa. For the asst. yr. 1969-70 the respondent was assessed under s. 12(4) of the Orissa Sales-tax Act, 1947 (hereinafter referred to as the said Act) by order dt. 23rd Sept., 1970. Thereafter on 26th Nov., 1970, the Vigilance Unit of the Sales-tax department seized the books of account and other documents of the respondent. On the basis of the report which was submitted by the Vigilance Unit the assessment for asst. yr. 1969-70 was reopened. The respondent was reassessed under s. 12(8) of the said Act under an order dt. 27th May, 1972. By another order of the same date, namely 27th May, 1972, an assessment order for asst. yr. 1970-71 was also passed under s. 12(4) of the said Act. The respondent filed appeals in respect of both these orders. The appeals were defective. The requisite Court fees were not paid and the memo of appeal did not contain grounds of appeal. The respondent was called upon to remove these defects by

the office of the Sales-tax Department. But despite reminders and notices, the respondent did not remove these defects; with the result that the appeals were summarily rejected under r. 49 of the Orissa Sales-tax Rules.

2. By notices dt. 15th of March, 1975 issued under r. 80 of the Orissa Sales-tax Rules, the CST in exercise of his powers under s. 23(4) of the said Act proposed revising the assessment orders dt. 27th May, 1972 for asst. yrs. 1969-70 and 1970-71. The CST proposed a suo motu revision of the said orders because in his opinion the respondent had been under assessed and a large amount of turnover had escaped assessment. These notices were served on the respondent on 21st March, 1975. Pursuant to the said notices, the respondent appeared before the CST. After taking several adjournments the respondent requested the CST for reasons for issuing the notice of suo motu revision. The reasons were thereupon communicated to the respondent on 2nd May, 1975. Hearing of the case was fixed on 7th May, 1975. The respondent made his submissions in writing before the CST. These submissions were considered by the CST. The respondent, however, did not explain the accounts or the entries appearing in the seized documents. By a detailed order dt. 26th May, 1975, the CST after considering the submissions made by the respondent, revised the assessment orders and demanded excess taxes to the tune of Rs. 1,12,620 for the asst. yr. 1969-70 and Rs. 79,710 for the asst. yr. 1970-71.

3. The respondent filed writ petitions before the High Court of Orissa being OJC Nos. 1680 and 1681 of 1975 challenging the said orders of the CST. The challenge was two-fold. The respondent challenged the jurisdiction of the CST under s. 23(4) of the said Act r/w r. 80 of the Orissa Sales-tax Rules to revise the assessment. The respondent also submitted that it had not been given a reasonable opportunity of hearing before the CST. Both these contentions were upheld by the High Court which quashed the impugned orders dt. 26th May, 1975. The present appeals are from the judgment and order of the High Court dt. 28th April, 1977.

4. Sec. 23(4) of the said Act is as follows :

"23(4)(a) Subject to such rules as may be made and for reasons to be recorded in writing the CST, may, upon application by a dealer or on his motion revise any order made under this Act or the rules made thereunder by any person other than the Tribunal or Additional Tribunal, as the case may be, appointed under sub-s. (3) of s. 3 to assist him :

Provided that the CST shall not entertain any such application for revision if the dealer filing the same having a remedy by way of appeal under sub-s. (1), or sub-s. (3) did not avail of such remedy or the application is not filed within the prescribed period."

Rule 80 of the Orissa Sales-tax Rules is as follows :

"80. The CST may of his own motion, at any time within three years from the

date of passing of any order by the Asstt. STO or by the STO and within two years from the date of passing of any order other than an appellate order by the Addl. CST, DJ CST or the Asstt. CST, as the case may be, call for the record of the proceedings in which such order was passed and revise any such order."

5. The respondent has contended that the CST has no power to suo motu revise the orders dt. 27th May, 1972 of the STO because in the present case appeals were preferred by the respondent from the said orders of the STO before the Asstt. CST. These appeals were rejected on account of the respondents failure to cure various defects. It is the contention of the respondent that under r. 80 a suo motu power of revision by the CST cannot be exercised in respect of an appellate order. Since in the present case the orders of the STO have merged in the orders passed in the two appeals the power of revision cannot be exercised by the CST under r. 80.

We have, therefore, to consider whether in the present case the CST is seeking to revise any appellate order passed by the Asstt. CST within the meaning of r. 80. The notices which have been issued by the CST under r. 80 seek to revise the assessment orders passed by the STO, Undoubtedly, the respondent preferred two appeals from these assessment orders before the Asstt. CST. These appeals, however, were rejected under r. 49 of the Orissa Sales-tax Rules. Rule 49 which deals with summary rejection of appeal is as follows :

"49. Summary Rejection of Appeal :

(1) If the memorandum of appeal is not in the specified form or if all the requirements of the form are not fully complied with, the appellate authority may reject the appeal summarily, after giving the appellant such opportunity as it may think fit to rectify the defects.

(2) The appeal may also be summarily rejected on other grounds which shall be reduced to writing by the appellate authority :

Provided that before an order rejecting an appeal is passed the appellant shall be given a reasonable opportunity of being heard."

6. In the present case the appeals have been rejected under r. 49(1). This is clearly a rejection at the initial stage of filing of an appeal which is defective. Such rejection is before the appeal is taken up for consideration by the appellate authority. An order rejecting the appeal on the ground that it is not in the specified form or that all the requirements of the form are not fully complied with cannot be considered an appellate order within the meaning of r. 80. Rule 49(1) clearly provides that such summary rejection can take place after giving the appellant an opportunity to rectify the defects. This is not a rejection or dismissal of an appeal after hearing the appellant on merit. Such an order would not qualify as an appellate order under r. 80. The purpose of a revision by the CST suo motu is to ensure that the assessee is correctly assessed relating to his tax liability. If there is an appellate authority which has considered the assessment

order then the CST cannot suo motu revise the order. The Department would then have to follow the procedure laid down for challenging the appellate order. When, however, an appeal is not accepted for consideration at all because of defects there is no question of the Department being required to follow the procedure laid down for challenging such an order. Rule 80, when it refers to the CST exercising a suo motu power of revision in respect of orders other than appellate orders, clearly contemplates an appellate order which has considered the original assessment order on merit in some form or the other. An order rejecting an appeal at the stage of filing cannot be considered as an appellate order in the context of r. 80.

7. Our attention has been drawn by learned advocate of the respondent to somewhat similar provisions of s. 263 of the IT Act, of 1961, and cases relating to it. We will refer only to a few of those cases. Under that section the CIT has the power to suo motu revise any order passed by the ITO if it is erroneous in so far as it is prejudicial to the interests of the Revenue.

In cases where the appellate authority had passed an order disposing of the assessee's appeal against the assessment order of the ITO but had not dealt with all the points arising from the ITO order, a question arose whether the CIT could exercise his power of revision in respect of those points which were not considered in the appeal. Prior to the amendment of s. 263 in 1988, there was a conflict of opinion among different High Courts on this question. Some High Courts were of the view that even if all the points arising from an ITO order were not considered in appeal, or even if in appeal the order of the ITO was confirmed, the order of the ITO merged in the appellate order and, therefore, the CIT could not exercise his power of revision in respect of any point arising out of the ITO order once an appellate order had been passed. Some other High Courts, however, held that the power of revision could not be exercised only in respect of those points which were urged and decided in the appeal. In respect of points not so urged or decided in appeal, the power of revision could be exercised by the CIT. It is not necessary to examine this question here.

This issue is now taken care of by an amendment made in 1988 in s. 263 of the IT Act. Expln. (c) to s. 263(1) after amendment provides that where any order referred to in this sub-section and passed by the AO had been the subject-matter of any appeal filed on or before or after the first day of June, 1988, powers of the CIT under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.

Prior to this amendment, however, in the case of *Commissioner of Income-Tax, Bombay v. Amritlal Bhogilal & Co.* (1958 [34] ITR 130) this Court was required to consider a composite order passed by the ITO granting registration to a firm under s. 26A of the Indian IT Act, 1922 along with an order of assessment of the firm. The firm had filed an appeal against the order of assessment which had been decided by the AAC. The Court was required to consider whether the order of the ITO registering the firm can be revised by the CIT under s. 33B if he

considers that as erroneous and prejudicial to the Revenue. This Court held that he could. The order of registration was a separate non-appealable order. While so holding, this Court said that if an appeal is provided against an order passed by a Tribunal, the decision of the appellate authority is the operative decision in law if the appellate authority modifies or sets aside the decision of the Tribunal. It is obvious that it is the appellate decision that is effective and can be enforced. In law the position would be just the same even if the appellate decision merely confirmed the decision of the Tribunal. As a result of the confirmation or affirmation of the decision of the Tribunal by the appellate authority, the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement. The respondent strongly relies on these observations. However, in that case the Court was not required to consider whether the power of revision could be exercised in a case where the appeal was rejected at the threshold without any application of mind by the appellate authority on the issues arising therein.

8. In the case of *State of Madras v. Madurai Mills Co. Ltd.* (AIR 1967 SC 681) this Court, however, observed that the doctrine of merger was not a doctrine of rigid and universal application. The application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provision conferring the appellate or revisional jurisdiction. Basically, therefore, unless the appellate authority has applied its mind to the original order or any issue arising in appeal while passing the appellate order, one should be careful in applying the doctrine of merger to the appellate order.

9. The respondent strongly relied upon a decision of this Court in *Gojer Brothers Pvt. Ltd. v. Ratan Lal Singh* (1975 [1] SCR 394) . In that case a decree for possession in favour of the plaintiff was passed by the Munsifs Court. It was confirmed in appeal and the second appeal was dismissed by the High Court. The Court said that the judgment of an inferior Court if subjected to an examination by the superior Court ceases to have existence in the eye of law and is treated as being superceded by the judgment of the superior Court. In other words the judgment of the inferior Court loses its identity by its merger with the judgment of the superior Court. This was clearly a case where at each stage the appeal was decided on merit. It has no relevance here. The other case relied upon by the respondent is of *Sheodan Singh v. Daryao Kunwar* (AIR 1966 SC 1332) . In that case the trial Court had decided two suits having common issues on merit. There were two appeals therefrom. One of them was dismissed on the ground of limitation and the other on account of default in printing, with the result that the trial Courts decision stood confirmed. This Court said that the decisions of the appeal Court will be *res judicata* as the appeal Court must be deemed to have heard and finally decided the matter. The entire controversy before the Court related to the application of the doctrine of *res judicata*.

10. The power to revise in a taxing statute, however, will have to be examined in the context of the statute. We have to consider whether an order rejecting the

appeals under r. 49(1) precludes the CST from exercising power under s. 23(4) r/w r. 80. Under s. 23(4) the CST can, inter alia, on his own motion revise any order made under this Act or the Rules by any person other than a Tribunal or an Additional Tribunal. Therefore, under this sub-section the CST is not expressly prevented from revising an appellate order if made by any person other than the Tribunal or an Additional Tribunal. Under r. 80, however, the CST may, of his own motion revise any order passed by the Asstt. STO or the STO within three years. The CST can also suo motu revise within two years any order other than an appellate order passed by the Addl. CST, the Dy. CST or the Asstt. CST. In the context of s. 23(4) where the words "any order other than an appellate order" are absent, the prohibition against revising an appellate order in r. 80 should be taken as applying only to an appellate order in its full sense i.e. an order which is passed after considering any issue arising in appeal. It would not cover an order of rejection under r. 49(1), when the appeal is not entertained at the threshold for consideration.

11. It is next contended that the respondent was not given an opportunity to be heard by the CIT. From the facts as set out, it is apparent that the respondent was served with a notice of proposed revision on 21st March, 1975. The reasons for such revision were communicated to the respondent on 2nd May, 1975. The respondent had furnished written submissions to the CST which were considered at the hearing of the case. After furnishing the grounds of revision the hearing of the case was fixed on 7th May, 1975. There is nothing on record to show that the respondent wanted more time or had asked for more time. The respondent appeared through his advocate on 7th May, 1975 and submitted his written arguments. Thereafter the CST has passed a detailed order on 26th May, 1975. Looking to these facts it cannot be said that a reasonable opportunity of hearing was not given to the respondent.

12. In the premises the appeals are allowed and the impugned judgment and order of the High Court is set aside. There will, however, be no order as to costs.