

(2018) 04 OHC CK 0088
In the Orissa High Court
Case No : S.A. No.182 of 1988

STATE OF ORISSA AND OTHERS

APPELLANT

Vs

MAA KURAI SHUNI BRICK INDUSTRIES AND OTHERS

RESPONDENT

Date of Decision : 16-04-2018

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 3, 9, 9C, 9B(3), 11(3), 12, 12A, 12-B, 12(4a),
23, 23(1), 23(1), 23(1)(4), 22, 27
Code of Criminal Procedure, 1973 — Section 80
Code of Civil Procedure, 1908 — Section 9
Orissa Sales Tax Rules, 1947 — Rule 36
Central Sales Tax (Orissa) Rules, 1967 — Rule 22

Citation : (2018) 04 OHC CK 0088

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

Bench : Single Bench

Advocate : P.P. Mohanty, R.P. Kar, A.N. Ray

Final Decision : Dismissed

Judgement

Dr. A.K. Rath, J.Â Â

1. This is a defendantsâ?? appeal against confirming judgment.Â Â

2. Plaintiffs-respondent nos.1 to 3 instituted the suit for realization of Rs.9996/- with 18% interest. The case of the plaintiffs is that plaintiff no.1 is a

registered partnership firm carrying on business in the manufacturing and sale of bricks in the name and style of â??MAA KURAI SHUNI BRICK

INDUSTRIESâ?. Since the firm did not have its transport facility, it used to engage the transport service from 16.12.1982 to 29.01.1983. The sales of

the firm did not exceed the non-taxable limit of turnover of Rs.50,000/-. The Additional Sales Tax Officer, Berhampur, defendant no.6, arbitrarily

collected sales tax @Rs.51.00 on each transit amounting to Rs.9996/- in spite of

the protest of the plaintiffs. The defendant no.4 issued receipts for Rs.5304/- in favour of the purchasers for the transits made between 16.12.1982 to 21.10.1983, even though the way bills and other documents stood in the name of the firm, plaintiff no.1. Subsequently, the defendant no.6 issued receipts for Rs.5304/- in favour of the purchasers for the transits made between 12.01.1983 to 29.04.1983. The plaintiffs filed a petition before the defendants on 05.01.1983 for refund of the sales tax amounting to Rs.9996/-. But then, no refund was made. The firm applied for registration under Sec.9 of the Orissa Sales Tax Act (in short, 'OST Act') with effect from 29.01.1983 as its gross turnover exceeded Rs.50,000/-. The firm was registered. The plaintiff no.1 paid sales tax on turnover for the turnover of the year ending 1982-83. The defendant no.4 allowed deduction of tax collected under Rule 36 of the Orissa Sales Tax Rules, 1947. But then, the defendant no.6 did not deduct the tax collected during the period from 16.12.1982 to 29.01.1983. With this factual scenario, they instituted the suit seeking the reliefs mentioned supra after issuing notice under Sec.80 C.P.C.Â Â Â

3. The defendant nos.1 to 5 entered contest and filed written statement stating, inter alia, that the purchasers had voluntarily paid tax through their respective truck drivers amounting to Rs.5304/-. The said amount is not refundable to the plaintiffs. The firm having not applied for provisional registration under Sec.9-C of the OST Act, is not entitled for refund of sales tax amounting to Rs.4692/-. The jurisdiction of the civil court is barred under Sec.22 of the OST Act to entertain the suit. The suit against the defendant no.6 is barred under Sec.27 of the OST Act. Defendant no.6 is *sex exparte*.

4. Stemming on the pleadings of the parties, learned trial court struck six issues. Parties led evidence, oral and documentary, to substantiate their respective cases. Learned trial court decreed the suit in part holding inter alia that the plaintiff-firm had hired trucks for marketing its product and had produced way bills. The firm as hire purchaser was for the time being in charge of the vehicles and as such tax collected from the drivers amounts to collection from the firm. Since the firm had already paid the tax assessed for the assessment year ending period 1982-1983, it is entitled to refund of the tax collected at the check gate. However, some transit way bills for Exts.33,

41, 46, 49, 57, 70, 77, 78, 80, 107, 118 and 132 for the transits covered the period between 16.12.1983 to 21.01.1983. The plaintiff-firm is liable for a refund of Rs.9333/-. Since the tax has been collected twice, the same amounts to wrongful enrichment of the defendants. Civil court has jurisdiction to try the suit. Felt aggrieved, the plaintiff filed appeal before the learned District Judge, Berhampur, which was subsequently transferred to the court of the learned Ist Additional District Judge, Berhampur and renumbered as M.A. No.9/87. The defendants also filed cross objection. Learned lower appellate court concurred with the findings of the learned trial court and dismissed the appeal.

5. The second appeal was admitted on the substantial question of law enumerated in ground no.5 of the appeal memo. The same is:

â??5. Whether in view of Sec.22 of the Orissa Sales Tax Act, the civil court has jurisdiction to entertain and decide the suit for refund of sales tax under the said Act ?â??

6. Heard Mr. P.P. Mohanty, learned A.S.C. (C.T.) for the appellants and Mr. R.P. Kar, learned counsel, along with Mr.A.N. Ray, learned counsel for the respondents.

7. Mr. Mohanty, learned A.S.C. (C.T.) for the appellants, submitted that Sec.22 of the OST Act provides bar to certain proceedings. Any person

aggrieved by the order of assessment for a direct payment of interest or penalty may file appeal under Sec.23(1) of the OST Act within thirty days.

Thus the jurisdiction of the civil court is barred. He placed reliance on the decisions of the apex Court in the case of Dhulabhai etc. and others vs.

State of Madhya Pradesh and another, AIR 1969 SC 78 and this Court in the cases of State of Orissa and others vs. Orissa Cement Ltd., (1988) 68

STC 334 Orissa and Secretary to Government of Orissa, Finance Department vs. Straw Products Limited, (1987) 67 STC 284 Orissa.

8. Per contra, Mr. Kar, learned counsel for the respondents, submitted that the gross turnover of the plaintiffs had not exceeded Rs.50,000/-. Plaintiff-

firm was not a registered dealer at the relevant point of time, when tax was collected in the check gate. The plaintiff was not liable to pay tax. There

is no provision in the Act to file appeal. Secs.22 and 23 of the OST Act cannot be pressed into service. The civil court has jurisdiction to entertain the

suit. There is no infirmity in the impugned judgment.

9. Before advertng into the contentions raised by the parties, it will be necessary to set out the provisions of Secs.22 and 23(1)(4) of the OST Act.

22. Bar to certain proceedings:- Save as is provided in Section 24 no assessment made or purporting to have been made and no order passed or purporting to have been passed under the provisions of this Act and the rules made thereunder by the Commissioner, Tribunal or Additional Tribunal, as the case may be or any person appointed under Section 3 to assist the Commissioner shall be called in question in any court and save as is provided in Section 23, no appeal or application for revision shall lie against any such assessment or order, as the case may be.

23. Appeals and Revision-

(1) Within thirty days from the date of receipt of the copy of-

(a) an order of assessment with or without penalty under section 12, 12-A or 12-B; or

(b) an order directing payment of interest under sub-section (4-a) of section 12; or

(c) an order imposing penalty under sub-section (3) of section 9-B or under sub-section (3) of section 11. any dealer or person, as the case may be,

may, in the prescribed manner appeal to the prescribed authority against such order.

(4)(a) Subject to such rules as may be made for reasons to be recorded in writing, the Commissioner may, upon application by a dealer (or person) or

on his own motion revise any order made under this Act or the rules made thereunder by any person other than the Tribunal appointed under sub-

section (3) of section 3 to assist him.

10. In Dhulabahi etc. and others (supra), the Constitution Bench of the apex Court laid down the principles regarding exclusion of jurisdiction of the

Civil Court. The apex Court held :

(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.Â

(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??

11. In Smt. Ganga Bai vs. Vijay Kumar and others, AIR 1974 SC 1126, the apex Court held that a suit for its maintainability requires no authority of

law and it is enough that no statute bars the suit.Â

12. In Most. Rev. P.M.A. Metropolitan and others, etc. vs. Moran Mar Marthoma

and another, etc., AIR 1995 SC 2001, the apex Court held:

27. xxx xxx xxx One of the basic principles of law is that every right has a remedy. Ubi jus ibi remedium is the well known maxim. Every civil suit

is cognisable unless it is barred, 'there is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute one

may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue' Smt.

Ganga Bai vs. Vijay Kumar & Ors., AIR 1974 SC 1126. The expansive nature of the Section is demonstrated by use of phraseology both positive and

negative. The earlier part opens the door widely and latter debars entry to only those which are expressly or impliedly barred. The two explanations,

one existing from inception and latter added in 1976 bring out clearly the legislative intention of extending operation of the Section to such religious

matters where right to property or office is involved irrespective of whether any fee is attached to the office or not. The language used is simple but

explicit and clear. It is structured on the basic principle of a civilised jurisprudence that absence of machinery for enforcement of right renders it

nugatory. The heading which is normally key to the Section brings out unequivocally that all civil suits are cognisable unless barred. What is meant by

it is explained further by widening the ambit of the Section by use of the word 'shall' and the expression, 'all suits of a civil nature' unless 'expressly of

impliedly barred'.

28. Each word and expression casts an obligation on the court to exercise jurisdiction for enforcement of right. The word 'shall' makes it mandatory.

No court can refuse to entertain a suit if it is of description mentioned in the Section. That is amplified by use of 'expression, 'all suits of civil nature'.

The word 'civil nature' is wider than the word 'civil proceeding'. The Section would, therefore, be available in every case where the

dispute has the characteristic of affecting one's rights which are not only civil but of civil nature.

13. On the anvil of the decisions cited supra, the instant appeal may be examined. Sec.22 of the OST Act provides that no assessment made or

purporting to have been made and no order passed or purporting to have been passed under provisions of this Act and the rules made thereunder by

the Commissioner, Tribunal or any persons appointed under Sec.3 to assist the

Commissioner shall be called in question in any court and save as is provided in Sec.23, no appeal or application for revision shall lie against any such assessment or order, as the case may be.Â

14. Sec.23 of the OST Act provides appeals and revision. Sec.23(1) of the OST Act comes into play when there is an order of assessment with or without penalty under Secs.12, 12-A or 12-B; or an order directing payment of interest under sub-section (4-a) of Sec.12; or an order imposing penalty under sub-section (3) of Sec.9-B or under subsection (3) of Sec.11. Any dealer or person, as the case may be, may, in the prescribed manner appeal to the prescribed authority against such order. In the instant case, neither there is any order of assessment or order directing payment of interest or order imposing penalty. Thus, Sec.23 cannot be pressed into service.

15. Under Section 9 C.P.C., 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 view of the same, both the courts perfectly justified that the civil court has jurisdiction to entertain the suit. The substantial question of law has been answered in affirmative.

16. Reliance placed on Orissa Cement Ltd. (supra) and Straw Products Limited (supra) is totally misplaced. In Orissa Cement Limited (supra), the plaintiff was a registered dealer under the Central Sales Tax Act. He instituted the suit for realization of money with P.L and F.I. According to the plaintiff, it paid tax under the Act for the years 1962-63, 1963-64 and 1964-65 on which it is entitled to rebate under Sec.13(3) of the OST Act, 1947, which was not allowed by the defendants. The defendants took the plea that the suit was barred under Sec.22 of the OST Act, 1947. A question arose before this Court was as to whether the orders rejecting applications for refund have been passed. Counsel for the State submitted that the applications of the plaintiff had been rejected. This Court held that the order is revisable and no suit is lie. The decision is distinguishable on facts.

17. In Straw Products Limited (supra), the plaintiff filed the suit for realization of Rs.42,176.74 paise. The plaintiff claimed the amount as due to it as rebate under the provisions of Sec.9(3) of the Central Sales Tax Act, 1956 read with Sec.13(8) of the OST Act, 1947 as it stood at the relevant time. According to the plaintiff, they had paid the tax due from it regularly in due time for the financial years 1963-64 to 1968-69 the last such payment

being made on 30th April, 1969 for the month ending 31st March, 1969. The plaintiff filed application for refund on 11th November, 1969 which was rejected by the Assistant Commissioner on 28th January, 1970. The plaintiff carried a revision before the Commissioner of Commercial Taxes, Orissa under Rule 22 of the Central Sales Tax (Orissa) Rules, 1967 read with Sec.23(4) of the State Act as against the order of assessment passed by the Sales Tax Officer, but no revision was made against the order of Assistant Commissioner refusing to allow the rebate. The Commissioner rejected the revision against the assessment as not admissible since he held that proceedings of assessment under the Act are appealable after which a reference lies to this Court and hence the revision was not entertainable. This Court held that the question of rebate is one relating to the assessment process itself. A rebate is to be allowed on the basis of the return submitted by the dealer and if not so allowed, it is open to challenge in appeal and thereafter in reference to the High Court. The plaintiff did not pursue such remedies. The decision is also distinguishable on facts.

18. Before parting with the case, this Court observes that for a paltry amount, the plaintiff is running from pillar to post since 1983. No litigant has a right to unlimited drought on the Court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be misused as a licence to file misconceived or frivolous petitions as held by the apex Court in the case of Dr. Buddhi Kota Subbarao vs. K. Parasaran and others, AIR 1996 SC 2687. State is a virtuous litigant. About 60 years back in the case of Firm Kaluram Sitaram vs. The Dominion of India, AIR 1954 Bombay 50, Chief Justice Chagla (as he then was) speaking for the Bench stressed that when the State deals with a citizen it should not ordinarily rely on technicalities, and if the State is satisfied that the case of the citizen is a just one, even though legal defences may be open to it, it must act, as has been said by eminent judges, as an honest person. The claim of the plaintiff was denuded on jejune grounds.

19. As a sequel to the above discussion, the appeal is dismissed with cost of Rs.25,000/- (rupees twenty-five thousand).