

(1987) 12 OHC CK 0010
In the Orissa High Court
Case No : First Appeal No. 44 of 1976

State of Orissa and Others

APPELLANT

Vs

Orissa Cement Limited

RESPONDENT

Date of Decision : 02-12-1987

Acts Referred:

Central Sales Tax Act, 1956 — Section 9

Citation : (1988) 68 STC 334

Hon'ble Judges : S.C. Mohapatra, J

Bench : Single Bench

Advocate : G. Rath, -General, for the Appellant; D.P. Mohanty and S.K. Das, for the Respondent

Final Decision : Allowed

Judgement

S.C. Mohapatra, J.—Plaintiff, a dealer registered under the Central Sales Tax Act, 1956 (hereinafter referred to as "the Central Act") filed the suit for Rs. 20,806.32 and interest for Rs. 3,745.13 as interest for three years with pendente lite and future interest. Its case is that it paid tax under the Act for the years 1962-63, 1963-64 and 1964-65 on which it is entitled to rebate u/s 13(8) of the Orissa Sales Tax Act, 1947 (hereinafter referred to as "the Orissa Act") which has not been allowed to it by the defendants. Defendants filed three separate written statements in which, while not disputing the facts, they urged, amongst others, that the suit is barred u/s 22 of the Orissa Sales Tax Act, 1947 and is barred by limitation. Trial court having decreed the suit rejecting the plea of the defendants, this appeal has been filed.

2. Learned Advocate-General reiterated the legal contentions and urged that in view of the specific bar u/s 22 of the Orissa Act, the suit is not maintainable. To appreciate the contentions of the learned Advocate-General, Section 22 of the Orissa Act is to be kept in the forefront which reads as follows:

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 u/s 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.

A plain reading of this provision leaves no room for doubt that an order of assessment made under the Orissa Act and any other order passed or purported to have been passed either under the Orissa Act or Rules made thereunder shall not be called in question in any court except u/s 24 and the statutory remedies as provided u/s 23 are alone to be availed of. Thus, the question for consideration is--

Whether the non-payment of the rebate admissible u/s 13(8) of the Orissa Act is cognizable by a civil court ?

3. It is worth quoting Section 13(8) of the Orissa Act since both the parties do not dispute that tax under the Central Act is to be assessed, reassessed, collected and enforcement for payment of tax including any penalty payable by a dealer by the authorities under the Orissa Act as if the tax or penalty is one under the Orissa Act and the provision of the Orissa Act including the provisions relating to returns, provisional assessments, advance payment of tax, appeals, reviews, revisions, references, refunds, penalties and rebate shall be applicable. In *Orissa Cement Ltd. Vs. State of Orissa and Another*, it has also been held that rebate for payment of the tax levied within the time prescribed by the Orissa Act is a stimulus for prompt payment which has been offered to facilitate and expedite collection and thus being a part of the process of collection is available to payments under the Central Act as provided in Section 9(3) thereof. Section 13(8) of the Orissa Act reads as follows:

13. Payment and recovery of tax and penalty.--(1) to (7)....

(8) A rebate of one per centum on the amount of tax payable by a dealer shall be allowed, if such tax is paid by the dealer on or before the due date of payment.

It is clear from the language of this provision that on payments of tax by a dealer on or before the due date for payment rebate is to be allowed by the authorities under the Act. Method of payment of tax has been provided in Rules 36 and 37 made under the Orissa Act which would indicate that the payments are to be made to the Sales Tax Officer concerned. Thus, the Sales Tax Officer is to allow the rebate. There is no provision either under the Act or in the Rules regarding the manner in which rebate is to be allowed. Since the precondition for allowing rebate is payment on or before the due date, the Sales Tax Officer is to examine before allowing rebate if the condition has been satisfied. Rebate being a right of the dealer created under the statute, an order is necessary to that effect which is an order under the Act. Allowing rebate is thus, not a ministerial act. It is quasi-

judicial in character since while considering the question of satisfaction of the precondition, the dealer who has a right is to be given an opportunity of being heard. No right of appeal is provided against an order refusing to allow rebate. Therefore, such an order is revisable at the instance of the dealer. Where rebate is wrongly allowed by the Sales Tax Officer, the Commissioner can exercise the suo motu power of revision. Right of appeal is provided u/s 23(4) of the Orissa Act against the order in revision passed in exercise of suo motu power. Thus, in respect of rebate relating to tax paid under the Orissa Act, exhaustive machinery has been provided thereunder and Section 22 would be directly attracted excluding the jurisdiction of the civil court to question an order not allowing rebate. Since the tax paid under the Central Act shall be treated as if the same is the tax paid under the Orissa Act as provided in Section 9(3) of the Central Act, the refusal to allow rebate would also be subject to scrutiny by the same statutory machinery and is not cognizable by the civil court. In the decision reported in [1987] 67 STC 284 (Ori) (Secretary to Government of Orissa, Finance Department v. Straw Products Limited) it has been held that Section 22 is not applicable to the recovery of rebate under the Central Act but it has been held that the suit is impliedly barred. With great respect, I am not able to accept the reasons given. However, the conclusion being the same that the suit is barred, the question is not required to be referred to a larger Bench more so because Section 13(8) of the Orissa Act is no more in the statute book and the question would be of academic interest only. However, I must make it clear that the jurisdiction of the civil court is not completely barred. If a suit comes within the scope of the principles laid down by the Full Bench in the decision reported in ILR (1975) Cut 789 (Magulu Jal v. Bhagaban Rai) in paragraph 20, a suit shall be cognizable by the civil court. It reads as follows:

20. The following principles may be laid down as well settled by the aforesaid authorities:

(i) Exclusion of the jurisdiction of the civil court is not to be readily inferred. Such exclusion must either be explicitly expressed or clearly implied.

(ii) Even if jurisdiction is so excluded, civil courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure. Civil court would interfere if it finds the order of the special tribunal is unfair, capricious or arbitrary.

(iii) Where a liability not existing at common law is created by statute which at the same time gives a special and particular remedy for enforcing it, a remedy provided by the statute must be followed and the civil court's jurisdiction is ousted. The scheme of the particular Act is to be examined to see if remedies normally associated with actions in civil suits are prescribed by the statute.

(iv) The legislature may entrust the special tribunal or body with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of

facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or to do something more. The legislature shall have to consider whether there shall be an appeal from the decision of the tribunal as otherwise there will be none. In cases of this nature, the tribunal has jurisdiction to determine all facts including the existence of preliminary facts on which-exercise of further jurisdiction depends. In the exercise of the jurisdiction the tribunal may decide facts wrongly or if no appeal is provided therefrom there is no appeal from the exercise of such jurisdiction.

(v) Even in a case when the civil court would have jurisdiction on a finding that the special tribunal has acted beyond the scope of its authority as in point No. (ii), it cannot substitute its own decision for that of the tribunal but would give a direction to dispose of the case in accordance with law.

4. Learned Advocate-General submitted that the application for allowing the rebate u/s 13(8) of the Act is to be made u/s 14 of the Act and no such application having been made within the time stipulated, the same has become barred. The rebate is allowed in respect of tax paid. Thus, on rebate being allowed, it becomes the tax paid in excess than is due. Thus, Section 14 of the Orissa Act is attracted. Mr. Mohanty submitted that rebate is not excess of amount due from a dealer for which refund is to be made u/s 14 of the Act. It is submitted by Mr. Mohanty that there is no machinery provided under the Act under which a dealer who has paid the tax can avail of the rebate when Section 14 is not attracted. On consideration of the rival contentions, I am inclined to hold that Section 13(8) creates a right to get back the amount of rebate from out of the tax paid. The legislature did not permit adjustment of the rebate by the dealer while filing return. It also did not intend that a dealer from whom arrear is due shall get back the amount towards rebate. Thus, though entitled to rebate, the same is to be adjusted. This can be possible if the provision for refund of excess tax in Section 14 is made applicable. The application for refund form XII can also be applicable to such cases. Besides, legislature never intended that a dealer who is to get the benefit of rebate for prompt payment is to enter into litigation in a civil court to get that benefit. If the machinery provided under the Act would not have been attracted, the only other remedy would have been to file a suit since no right can be frustrated without a remedy. In that view also Section 22 of the Orissa Act would be directly attracted.

5. There is controversy as to whether orders rejecting applications for refund have been passed. I need not delve into the matter. If, as claimed by Mr. Mohanty, applications are yet pending, appropriate steps can be taken to compel the authorities to pass necessary orders on the applications. This is possible in a suit in the civil court for mandatory injunction. The present suit is not for the same relief. Accordingly, I need not go into the said question. In case the applications have been rejected, as claimed by the learned Advocate-General, the same would be revisable and no suit would lie for correcting the mistakes in the order unless the same come within the scope of the principle laid down in ILR

(1975) Cut 789 [FB] (Magulu jal v. Bhagaban Rai).

6. Mr. D. Mohanty, the Learned Counsel for the respondent, strongly relied upon the decisions reported in K.S. Venkataraman and Co. Vs. State of Madras, and in Dhulabhai and Others Vs. The State of Madhya Pradesh and Another, . Those decisions have laid down the principles under which civil court can entertain a suit. Considering the decision reported in Dhulabhai and Others Vs. The State of Madhya Pradesh and Another, , the Full Bench in ILR (1975) Cut 789 (Magulu Jal v. Bhagaban Rai) has laid down the principle for the scope of a suit even where the jurisdiction of the civil court is specifically or impliedly barred. To make out such a case to come within the said principle, necessary averments are to be made in the pleading. Mr. Mohanty has not been able to indicate any such pleading. Accordingly, on my finding that there is adequate machinery for the purpose of mitigating the grievance of an assessee in relation to getting back the amount of rebate to which he is entitled to u/s 13(8) of the Act, no suit would lie. Section 22 would be a specific bar for the purpose.

7. In the result, the appeal is allowed. However, parties shall bear their own costs.