

(1973) 04 OHC CK 0005

In the Orissa High Court

Case No : Special Jurisdiction Cases No's. 112 and 113 of 1971

State of Orissa

APPELLANT

Vs

Desraj Jagadish Prasad

RESPONDENT

Date of Decision : 17-04-1973

Acts Referred:

Orissa sales Tax Act, 1947 — Section 12(5), 24(1)

Citation : (1974) 33 STC 576

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

Bench : Division Bench

Advocate : N.N. Bhattacharya, for the Respondent

Judgement

R.N. Misra, J.—At the assessee's instance, the Member, Additional Sales Tax Tribunal, Orissa, u/s 24(1) of the Orissa Sales Tax Act (hereinafter referred to as the Act) has referred the following questions for determination of this court:

(i) Whether, in the facts and circumstances of the case, admission of fresh evidence by the Tribunal is according to law?

(ii) Whether, in the facts and circumstances of the case, the Tribunal has come to the right conclusion?

2. The assessee, an unregistered dealer in timber was assessed to sales tax u/s 12(5) of the Act for the quarters ending 30th September, 1958, and 31st December, 1958. In spite of notices served by the assessing officer, he failed to comply with the terms of such notices and, therefore, the assessment had been completed according to best of judgment after local enquiry.

The assessee's appeal was disposed of by the first appellate authority without the assessee participating in the hearing of the appeal and the assessments were affirmed. The second appeals were heard by the Member, Additional Sales Tax Tribunal, on 26th February, 1970. On the date of hearing at the camp, a petition was filed by the assessee along with a memorandum. The memorandum is to the

following effect:

Before the Additional Tribunal, Sales Tax, Orissa, Cuttack.

Desraj Jagadish Prasad, Kesinga -- Reference -- C.S.T. appeal for 30th September, 1958, and 31st December, 1958.

With due respect and humble submission, the undersigned Advocate begs to submit as follows:

1. That he is filing herewith, three copies of invoices, received from the Chief Commercial Superintendent, S.E. Rly., dated 1st August, 1963, to the effect that the consignments in question were despatched by one Jagannath Prasad Agarwal who is in no way connected with the appellant.

2. That no consignment has been booked either in the name of Desraj or in the name of Jagadish Prasad and hence the consignments are in no way connected with the business of the firm.

Hence it is prayed that the copies of invoices submitted herewith may kindly be perused and be treated as evidence in support of the non-liability for the alleged transactions and oblige.

Yours faithfully, Bolangir, 26th February, 1970. Sd. T.R. Agarwal, Advocate for Desraj Jagadish Prasad, Kesinga.

The petition which was affixed with a court-fee stamp of Re. 1 read as follows:

...In the above-mentioned appeals the undersigned begs to state as follows:

1. That the undersigned has been informed by the appellant that the consignments in question have been despatched by one Jagannath Prasad Agarwal.

2. That Jagannath Prasad Agarwal is a resident of Dharamgarh and he has obtained forest permit for export from the D.F.O., Kalahandi, and he is being connected with a firm called "Jagannath Rambilash". It is said that the firm is registered under the O.S.T. and C.S.T. Acts.

3. That Jagannath Prasad Agarwal is in no way connected with the business of Desraj Jagadish "Prasad.

Hence it is prayed that while disposing of the appeals, the above facts may kindly be taken into consideration and oblige.

Yours faithfully, Bolangir, 26th February, 1970. Sd. T.R. Agarwal, Advocate for Desraj Jagadish Prasad.

Copy of the petition and the memorandum does not seem to have been served on the Additional State Representative, who appeared for the State of Orissa on the date of hearing as would appear from the appellate order of the Member, Additional Tribunal. In paragraph 2 of the statement of the case, it has been

stated: "...Thus, practically the appeals have been disposed of by the Tribunal on such fresh evidence.

Mr. Bhattacharya for the assessee does not dispute that fact.

3. The contention on behalf of the revenue advanced by the learned standing counsel is that the Member, Additional Tribunal, could not have received the documents produced before him on the date of hearing and could not have allowed the appeals relying on those documents as Rule 61 of the Orissa Sales Tax Rules (hereinafter referred to as the Rules) has not been complied with. Rule 61 provides:

(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 assessee has not indicated in his petition that any of the circumstances provided in Rule 61 was satisfied in the case. The order sheet of the date of hearing does not show that the documents were received as additional evidence under any of the three clauses of Sub-rule (1) of Rule 61. It has been stated by this court in the case of Commissioner of Sales Tax v. Bhima Palo [1961] 12 S.T.C. 785, that the provisions of Rule 61 are on the pattern of Order 41, Rule 27, of the Code of Civil Procedure. It is true, Sub-rule (2) of Order 41, Rule 27, of the Code requires the court receiving additional evidence to state the grounds while in Rule 61 of the Rules, there is no such requirement. But we have no doubt in our mind that the rule contemplates reasons to be stated. There is a bar against receipt of fresh evidence before the Tribunal. No such bar has been provided up to the first appellate stage. Fresh evidence is receivable only under three contingencies as provided in Clauses (a), (b) and (c) of Sub-rule (1) of Rule 61. Additional evidence can be received only if one of the three alternatives is satisfied. There are two parties before the Tribunal. It is for the Tribunal to

indicate as to which of the clauses applies so that additional evidence can be received. Mr. Bhattacharya's contention that discretion is vested in the Tribunal under the rule and once the Tribunal is satisfied and allows its discretion to be exercised, that exercise itself is not open to dispute because reasons are not indicated, does not appeal to us at all. On the other hand, in view of the fact that the discretion of the Tribunal is conditioned upon existence of special circumstances as enumerated in the aforesaid three clauses, we would hold that indication of reasons is implicit in the scheme of the rule.

The assessee did not make out a case with reference to the clauses of the rule and the Tribunal did not indicate in the order sheet or in the second appellate order any justification for receiving additional evidence.

4. It has been indicated by their Lordships of the Supreme Court in the case of *State of U.P. Vs. Manbodhan Lal Srivastava*, , with reference to the relevant provision in the CPC relating to additional evidence:

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....

In our view, the same rule applies while the Tribunal exercises appellate jurisdiction and is asked to receive additional evidence in terms of Rule 61 of the Rules. Receipt of additional evidence in this case is, therefore, not in accordance with law. Our answer to the first question, therefore, shall be:

In the facts and circumstances of the case, admission of fresh evidence by the Tribunal was not in accordance to law.

5. The second question does not really arise for answer. Once we hold that the fresh evidence is to be ruled out, it would be for the Tribunal to find out whether on the residue of the materials on record, the conclusion which has been reached is to be sustained or a different conclusion has to be arrived at. In the case of *Arjan Singh v. Kartar Singh*, (1951) 2 SCR 258 , their Lordships stated:

...If the additional evidence was allowed to be adduced contrary to the principles governing the reception of such evidence, it would be a case of improper exercise of discretion, and the additional evidence so brought on the record will have to be ignored and the case decided as if it was nonexistent....

That situation indeed arises in this case. Once we hold that fresh evidence has to be eschewed out of the record as non est, the second appeal has to be disposed of without considering this evidence and it would be for the Tribunal to find out whether, in the facts and circumstances of the case, the conclusion which has been reached is justified or a different conclusion has to be reached. We decline to answer the second question for these reasons. We direct the parties to bear their own costs of these references.

B.K. Ray, J.

6. I agree