Master Construction Co. (P) Ltd.

Vs

State of Orissa and Another

Civil Appeal No. 92 of 1965

(K. Subha Rao, J.C. Shah, S.M. Sikri JJ)

16.12.1965

JUDGMENT

SUBBA RAO, J. -

This appeal, by special leave, raises the scope of jurisdiction of the Commissioner of Sales Tax under Rule 83 of the Orissa Sales Tax Rules, 1947.

The facts may be briefly stated. The appellant is a private limited company carrying on business mainly as building contractors in the State of Orissa. He was a registered dealer under the provisions of the Orissa Sales Tax Act, 1947, hereinafter called the Act. He was assessed to sales tax under s. 12 sub-s. (4) of the Act in respect of all quarters ending on and in between June 30, 1949 to March 31, 1954. He was also assessed to sales tax under s. 12 sub-s. (8) of the Act in respect of all quarters ending on and in between the dates of September 30, 1949 to March 31, 1950. Towards the said assessment between December 6, 1950 to June 1954, he paid by way of sales tax sums amounting to Rs. 53,220-14-0. On August 27, 1954, on the basis of the decision of the Supreme Court in the case of State of Madras v. Gannon Dunkerley & Co. ((1959) S.C.R. 379.) the appellant filed a petition in the High Court of Orissa under Art. 226 of the Constitution of India for a writ of certiorari to quash the said assessments. On April 22, 1958 the said High Court quashed the said assessment and directed refund of that portion of the tax which was not barred by limitation on the date of the filing of the said application.

On July 9, 1958 the appellant field an application before the Sales Tax Officer for the refund of the amounts payable to him in view of the said decision. On May 15, 1961 the Sales Tax Officer, while holding that the appellant was entitled to the refund of the amounts paid by him, rejected his application on the ground that it was filed only by one of the directors whereas it should have been filed jointly by all the parties. On May 15, 1962 the Commissioner of Sales Tax, respondent No. 2 in this appeal, in a revision filed against the said order set aside the order of the Sales Tax Officer and held that the appellant was entitled to the refund applied for and directed the said Officer to issue refund payment orders as early as possible. On January 5, 1963 the said Commissioner issued a notice to the appellant under r. 83 of the said Rules calling upon him to show cause why the order dated May 15, 1962 should not be reviewed. On September 24, 1963 the said Commissioner reviewed his previous order and held that the appellant would be entitled to refund of the taxes paid subject to the disallowance made in his order. Hence the present appeal.

Mr. Mahajan, the learned counsel for the respondents, raised a preliminary objection to the maintainability of the appeal on the ground that the appellant could not file the appeal unless it had exhausted the remedy under Art. 226 of the Constitution of India. There are no merits in this

contention. Art. 136 confers a discretionary appellate jurisdiction on this Court against any order passed by any Tribunal in the territory of India. The said jurisdiction is not subject to any condition that the party who seeks special leave of this Court to appeal from such order should exhaust all his other remedies. The existence of a statutory remedy to such a party may persuade this Court not to give leave to appeal to the party. In the present case, the Act does not provide for a further remedy against the order made by the Commissioner in revision. Under Art. 226 of the Constitution of India, the High Court's jurisdiction is discretionary and the scope of the jurisdiction, in view of the decisions of this Court, is rather limited. In the circumstances, we do not see any justification to throw out this appeal on the ground that the appellant has not exhausted all his remedies.

On the merits, Mr. Viswanatha Sastry appearing for the appellant, raised before us two points : (1) under r. 83 of the Rules the jurisdiction of the Commissioner is very limited in that he can only correct arithmetical and clerical mistakes and errors apparent on the face of the record arising from an accidental slip or omission. But the Commissioner in the instant case, practically reheard the revision and came to a conclusion different from that which he had arrived on the earlier occasion. (2) The conclusions arrived at by the Commissioner are not correct both on law and on facts.

Mr. Mahajan contended that the order made by the Commissioner was within the scope of his jurisdiction for he had only reviewed the previous order in respect of the amounts not paid by the appellant to the Sales Tax authorities and in respect of those amounts directed to be repaid under a misapprehension that the said amounts were the subject matter of the appeals against the orders of assessment, and the application in respect thereof was within time.

Mr. Mahajan attempted to take us through the particulars and details of such payments, but we did not permit him to do so as nothing would turn upon the said details to show whether the Commissioner had jurisdiction or not in reviewing his own order. If he had not, the fact that his order was not correct on facts would be quite irrelevant for the disposal of this appeal.

The material part of r. 83 of the said Rules reads :

> "The Commissioner of Sales Tax..... may at any time correct any arithmetical or clerical mistakes or any error apparent on the face of the record arising or occurring from accidental slip or omission in an order passed by him, or it."

Rule 83 provides a summary remedy within a narrow compass. The jurisdiction of the Commissioner under this rule is limited and is confined only to the correction of mistakes or omissions mentioned therein. An arithmetical mistake is a mistake of calculation; a clerical mistake is a mistake in writing or typing. An error arising out of or occurring from an accidental slip or omission is an error due to a careless mistake or omission unintentionally made. There is another qualification namely, such an error shall be apparent on the face of the record, that is to say, it is not an error which depends for its discovery, on elaborate arguments on questions of fact or law. The accidental slip or omission is an accidental slip or omission made by the court. The obvious instance is a slip or omission to embody in the order something which the court in fact ordered to be done. This is sometimes described as a decretal order not being in accordance with the judgment. But the slip or omission may be attributed to the Judge himself. He may say something or omit to say something which he did not intend to say or omit. This is described as a slip or omission in the judgment itself. The cause for such a slip or omission may be the Judge's inadvertence or the advocate's mistake. But, however wide the said expressions are construed, they cannot countenance a re-argument on merits on questions of fact or law, or permit a party to raise new arguments which

he has not advanced at the first instance. If that was the scope of r. 83, the question is, whether the Commissioner's order is within its scope.

On May 15, 1961, the Sales Tax Officer dismissed the application filed by the dealer for refund. Though he held that the appellant was entitled for refund, he dismissed the application on the ground that it was signed only by one of the directors. In the appeal filed by the appellant against the said order to the Commissioner, the Commissioner by his order dated May 15, 1962 came to the conclusion that the appellant was entitled to the refund applied for and the Sales Tax Officer went wrong in rejecting the said application for refund. A perusal of the order shows that the Commissioner had looked into the connected assessment record and came to the conclusion that, in view of the Supreme Court judgment and the order made by the Sales Tax Tribunal, Orissa, the appellant was entitled to the refund. But, in his order dated September 24, 1963, he practically re-heard the entire matter both on facts and on law and came to the conclusion that a part of the money, directed to be refunded by his earlier order, should not be refunded. He has dealt with five items. Item (a) relates to the assessment for the quarters ending 30-9-1949 made under s. 12(1) of the Act and the assessment made under s. 12(7) for the quarters ending 31-12-1949 to 31-3-50. He made a distinction between assessments made under s. 12(1) and s. 12(7) of the Orissa Sales Tax Act and held the period of limitation would commence from the date of the orders made thereunder respectively. So holding, he came to the conclusion that the assessments under s. 12(7) were made final by November 1951; and an application for refund of the said amounts covered by the said assessments was barred by limitation. In respect of assessment made under s. 12(1), except in regard to Rs. 299-11-0, he held the claim was barred by limitation. In regard to item (b), as it is a clear mistake, the learned counsel for the assessee conceded both in the court below and before us that the amount covered by that item may be disallowed. Item (c) relates to the assessments made for the quarters ending 31-3-52, 30-6-53, 30-9-53, 13-12-53 and 13-2-1954. Those assessments were set aside by the first appellate authority by its order dated May 28, 1958. But the Commissioner held that the admitted tax paid before the orders of assessment was not the subject matter of appeals and therefore the amount paid towards the admitted tax was not refundable. The contention of the assessee was that as the appellate authority had set aside the entire assessment, the assessee would be entitled to a refund of the entire tax, whether paid before or after the order of assessment.

Item (d) relates to the assessment for the quarters ending 30-9-50 to 31-12-51 and 30-6-52 to 31-3-53 (10 quarters excepting quarter ending 31-3-52). On the same reasoning adopted by the Commissioner in respect of item (c), he held that, in regard to the amounts paid before the assessment, the assessee was not entitled to a refund of the same. On behalf of the assessee, it was contended that as the assessment orders were set aside he was entitled to refund of the amounts whether paid before or after the orders setting aside the assessments. Item (e) relates to refund of taxes paid in respect of Puri II and Cuttack II Circles. That part of the order was not questioned before us.

It is therefore clear that the Commissioner reviewed his previous order which was passed on merits mainly on two grounds : (i) that the application for refund in respect of certain amounts was barred by limitation; and (ii) the assessee was not entitled to a refund of the amounts paid before the assessment orders were made on the ground that the said amounts were not the subject matter of the appeals wherein the assessments were set aside. Both the question of limitation as well as the question of construction of the appellate orders and the impact of those orders on the amounts paid towards tax before the assessments, were arguable questions of fact and law. The Department should have raised the said questions before the Commissioner at the time he first made the order directing refund of the amounts claimed by the assessee. The wrong conclusion, if any, arrived at by the

Commissioner in his earlier order, because of the fact that the said two arguments were not advanced before him, cannot be said to be errors apparent on the face of the record arising or accruing from an accidental slip or omission. The errors, if any, arose because the Department did not raise those points before the Commissioner. They were also errors not apparent on the face of the record for the decision depends upon consideration of arguable questions of limitation and construction of documents. Indeed the Commissioner re-heard arguments and came to a conclusion different from that which he arrived on the earlier occasion. This is not permissible under r. 83 of the Rules.

In this view, it is unnecessary to consider the argument advanced by Mr. Sastry that the application for refund was not barred by limitation as the final orders in regard to the assessments was made by the Tribunal only in the year 1958.

In the result, the order of the Commissioner is set aside, except in regard to items (b) and (e) mentioned in paragraph 7 of his order. In the circumstances, there will be no order as to costs.

Appeal allowed.

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