

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P(C). No. 4937 of 2022

Salimar Chemical Works (P) Ltd. ***Petitioner***
Mr. S. Banerjee, Advocate and
Mr. Satya Ranjan Pati, Advocate
-versus-

State of Odisha and Others ***Opposite Parties***
Mr. Sidharth Sankar Padhy, Advocate

CORAM:
JUSTICE JASWANT SINGH
JUSTICE M.S. RAMAN

ORDER

08.03.2022

Order No.

- 01.** **1.** This matter is taken up by virtual/physical mode.
- 2.** Assailing the notice bearing No.352/CT, dated 09.02.2022 for recovery of arrear demand issued by Joint Commissioner of CT and GST, CT & GST Circle, Cuttack-I Central, Cuttack for an amount of Rs.42,34,209/- under the Odisha Value Added Tax Act, 2004 (“OVAT Act”, for brevity) pertaining to the tax periods from 01.04.2013 to 30.09.2015, the Petitioner sought to invoke the extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India with the following prayers:

“*** *** *** *** *** ***

It is therefore, humbly prayed that this Hon’ble Court may graciously be pleased to admit this writ petition, issue rule nisi calling upon the Opposite Parties as to;

(A) why the recovery of Arrear demand notice dated 09.02.2022 under Annexure-1 shall not be quashed and

P.T.O.

(B) why the assessment order dated 14.07.2017 under Annexure-2 shall not be quashed. And

(C) why the Opposite Party No. 2 shall not be directed to dispose of the Revision within a stipulated period.

If the opposites fail to show cause or show insufficient cause the Hon'ble Court may be pleased to make the rule absolute by quashing the Annexure-1 and 2.

And/or pass any other order/orders as this Hon'ble Court may deem fit and proper in the ends of justice."

3. Mr. S. Banerjee, Advocate for the Petitioner submits that recovery of arrear demand pertaining to the tax periods from 01.04.2013 to 30.09.2015 raised in the assessment order dated 14.07.2017 formulated U/s 42 of the OVAT Act should not have been issued inasmuch as the question whether Jasmine Coconut Oil is to be treated as Ayurvedic hair oil is pending consideration before this Hon'ble Court in STREV No. 49/2015, which was relating to tax periods from 01.04.2005 to 30.09.2009. Placing reliance on the interim order dated 10.12.2015 passed in Misc. Case No.161 of 2015 arising out of STREV No. 49/2015, the counsel for the Petitioner further submits that since the Petitioner has challenged the assessment order dated 14.07.2017 (Annexure-2) by way of revision invoking Section 79(2) of the OVAT Act before the Opposite Party No. 2, i.e., Deputy Commissioner of Commercial Taxes, Cuttack-I Central Circle, Cuttack, the Joint Commissioner of CT&GST Circle, Cuttack-I should have awaited outcome of sales tax revision pending before this Court. Said Authority committed illegality in proceeding with the recovery of arrear demand by issue of notice *vide* Annexure-1.

4. Mr. Sidhartha Shankar Padhy, Advocate appearing for the Opposite Parties vehemently objected to the contention of the Petitioner. He submits that the interim order passed in STREV No. 49/2015 relating to the tax periods from 01.04.2005 to 30.09.2009 does not reveal that this Court has granted stay of operation of order passed by the Odisha Sales Tax Tribunal in the second appeal while admitting the STREV bearing No.49/2015. Essentially, therefore, he contends that the finding and observation of the Tribunal are very much binding on the Revenue Authorities so long as the same is not overturned.

The counsel for the Opposite Parties further advanced argument that as per Section 77(1) of the OVAT Act, aggrieved by the assessment order passed U/s 42, dealer-assessee has the remedy of appeal. Since specific provision of appeal being provided in the statute to challenge the assessment order, revision U/s 79(2) is not the recourse available for the petitioner. The counsel for the Opposite Parties has taken us to Annexure-3 wherein the petitioner has stated thus:-

“Revision under Section 79(2) of the Orissa Value Added Tax Act, 2004 challenging the assessment order dated 14.07.2007 for the period 01.04.2013 to 30.09.2015 of Shalimar Chemical Works Pvt. Ltd. Assessed under Tin No. 21891201533 passed by the Sales Tax Officer Cuttack-1, Central Circle Cuttack.”

The counsel for the opposite parties has referred to the following reason cited by the Joint Commissioner of CT&GST in the notice for recovery of demand *vide* Annexure-1:

“*** The correct remedy was to go for appeal with pre-deposit. However, you have no stay order in your favour. So, kindly reply by 17.02.2022 why recovery proceedings will not be initiated against you in the given circumstances. ***”

Therefore, Mr. Padhy, counsel for the Opposite Parties submits that since revision petition U/s 79(2) is not maintainable to question the assessment framed U/s 42 of the OVAT Act, 2004, the demand raised in the assessment *vide* order dated 14.07.2017 (Annexure-2) stands. For the said reason, no infirmity or invalidity can be attributed to the notice dated 09.02.2022 (Annexure-1).

5. At this juncture it is fruitful to notice sub-section (1) of Section 77 and sub-section (2) of Section 79 which are reproduced hereunder:-

Section 77(1):

“(1)Any dealer aggrieved by an order passed under **Section** 34, 40, **42**, 42A, 43, 44, 45, 49 or 52 may prefer an appeal to such authority as may be prescribed.]

Section 79(2):-

“(2)Subject to rules and for reasons to be recorded in writing, the Commissioner may, upon application filed within the prescribed period, revise any order, other than an order of the Tribunal, passed by any person appointed under sub-section (2) of Section 3 to assist the Commissioner.”

Reading both the provisions as extracted above would manifest that against the assessment order passed U/s 42, the aggrieved assessee is conferred with the right to appeal U/s 77(1).

The provisions contained in Section 77(1) and Section 79(2) operate in different fields. It is trite that where a statute provides for a thing to be done in a particular manner, then it is to be done in that manner, and in no other manner [*Chandra Kishore Jha vrs. Mahavir Prasad*; AIR 1999 SC 3558 and *Dhananjaya Reddy vrs. State of Karnataka*; AIR 2001 SC 1512]. When the State Legislature says that the word 'prescribed' means prescribed by the Rules then whatever is to be prescribed for making each and every section or any section of the Act workable must be prescribed under the Rules. The Odisha Value Added Tax Rules, 2005 provides for modalities for filing, entertainment and disposal of appeal.

6. Be that as it may, turning to attack made to the notice dated 09.02.2022 for recovery of arrear demand along with the prayer to quash the assessment order dated 14.07.2017 under Annexure-2 to the writ petition, it is to be stated that such a prayer is unwholesome, more so when the petitioner-assessee has filed the revision petition under Section 79(2) of the OVAT Act challenging the assessment order. Nothing is brought on record even to suggest that the petitioner has at any point of time moved the competent authority for grant of stay of the demand raised in the impugned assessment order dated 14.07.2017.

7. Matter would have been different had the petitioner invoked provisions of Section 77 of the OVAT Act to ventilate its grievance by way of filing appeal before the proper authority. The provisions of sub-sections (4) and (5) thereof after amendment by virtue of the OVAT (Amendment) Act, 2017 stand as follows:

“(4)No appeal against any order shall be entertained by the appellate authority, unless it is accompanied by satisfactory proof of payment of admitted tax in full and ten per centum of the tax or interest or both, in dispute.

(5) On admission of appeal, realization of the balance tax, interest or penalty, as the case may be, under dispute shall be deemed to be stayed in full till disposal of the appeal.”

8. Even otherwise, it is a well known principle of law established that appeal shall not operate as a stay of proceeding or an order unless the Appellate Authority or Court passes an order of stay during the pendency of the appeal. This principle of law is also incorporated in the provisions of Rule 5(1) of Order 41, of the Code of Civil Procedure, 1908 which stipulate that an appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate Court may order, nor shall execution of a decree be stayed by reason of only an appeal having been preferred from the decree. Reference may be had to *IPISTEEL Ltd. Vrs. Central Electricity Supply Company of Orissa Ltd.*, 2004 (II) OLR 523. In the instant case, it is not the case of the petitioner that it had obtained stay of demand raised in the assessment order dated 14.07.2017 (Annexure-2) from the competent authority.

9. The impugned Notice dated 09.02.2022 *vide* Annexure-1 further reveals that the petitioner has not deposited any amount *qua* the demand of Rs.42,34,209/- raised in the assessment *vide* order dated 14.07.2017 (Annexure-2). Since no stay order is operating against said demand, there is no constraint on the part of the Joint Commissioner of CT&GST to call upon the petitioner to file its

reply as regards recovery is concerned. It may be necessary to notice relevant provisions contained in sub-sections (4), (5), (6) and (7) of Section 50 which are to the following effect:

“(4)The amount of—

(a) tax due where returns have been filed without full payment of tax due; or

(b) tax assessed under Sections 39, 40, 42, 42A, 43, 44, or 45 less the sum already paid in respect of any tax period, together with interest required to be paid and the penalty, if any, imposed under Section 42, 43 or Section 44; or

(c) penalty imposed under any provision of this Act not covered by clause (b); or

(d) any other dues under this Act,

shall be paid by the dealer in the manner provided under sub-section (2) within thirty days from the date of service of the notice issued by the assessing authority for the purpose.

(5) Where a dealer fails to make payment of the tax assessed, interest payable or penalty imposed or any other amount due from him under this Act within thirty days of the date of service of the notice of demand, the assessing authority shall, after giving the dealer a reasonable opportunity of being heard, direct that such dealer shall pay, in addition to the amount due for payment, by way of penalty, a sum equal to two per centum of such amount of tax, interest, penalty or any other amount due, for every month for which payment has been delayed by him after the date on which such amount was due to be paid:

Provided that where any appeal under Section 77 or 78 or revision under Section 79 has been filed,—

(i) such penalty shall be payable from the date so specified on the amount ultimately found due from the dealer; and

(ii) if the tax or penalty, if any, is enhanced in such appeal or revision, such penalty on the excess amount shall be payable from the date by which the dealer is required to pay such excess amount.

(6) When a dealer is in default in making the payment of any amount payable by him under sub-sections (4) and (5) he shall be liable to pay simple interest on such amount at the rate of two per centum per month with effect from the date of such default till the payment of the amount.

(7) All amounts that remain unpaid after the due date of payment in pursuance of the notice issued under sub-section (4) and sub-section (5) shall be recoverable as arrears of public demand or in accordance with the provisions contained in Schedule E.”

Since no stay is shown to have been in operation restraining the recovery of demand of Rs.42,34,209/- pertaining to the tax periods from 01.04.2013 to 30.09.2015 raised in the assessment *vide* order dated 14.07.2017 (Annexure-2), we are not inclined to entertain the writ petition and interfere in the matter.

10. Looking at the matter in different angle, it is apt to say that writ petition is not entertainable against the Show Cause Notice in view of parameters laid down in *Union of India Vrs. Coastal Container Transporters Association*, (2019) 20 SCC 446; *Star Paper Mills Ltd. Vrs. State of Uttar Pradesh*, (2006) 148 STC 144 (SC); *South India Tanners & Dealers Association Vrs. Deputy Commissioner of Commercial Taxes*, (2008) 23 VST 8 (SC); *Supreme Paper Mills Limited Vrs. Assistant Commissioner of*

Commercial Taxes, (2010) 11 SCC 593; Bhubaneswar Development Authority Vrs. Commissioner of Central Excise, 2015 SCC OnLine Ori 53; National Aluminium Company Ltd. Vrs. Employees State Insurance Corporation, 2012 SCC OnLine Ori 90.

This Court in the case of *National Aluminium Company Ltd. Vrs. Employees State Insurance Corporation, 2012 SCC OnLine Ori 90* has observed as follows:

“24. This Court in the case of *Rohit Kumar Behera vs. State of Orissa, 2012 (II) ILR-CUT-395*, held as under:

‘21. Law is well settled that unless it is shown that the notice to show cause has been issued palpably without any authority of law, the show cause notice cannot be quashed in exercise of writ jurisdiction under Articles 226 and 227 of the Constitution.’ ”

It may be noteworthy to have glance at the notice for recovery which has directed as follows:

“*** However, you have no stay order in your favour. So, kindly reply by 17.02.2022 why recovery proceedings will not be initiated against you in the given circumstances. If you fail to give any reply by 17.02.2022, it will be assumed that you have nothing to say in this regard in your favour and recovery proceedings will be made without any further communication to you. ***”

From the aforesaid it is clear that the writ petition challenging the notice in Annexure-1 is premature inasmuch as the notice impugned in the writ petition is a notice contemplating initiation of recovery proceeding. Thus, it is open for the petitioner to appear before the Joint Commissioner of CT&GST-opposite

party No.3 and file its reply/objection, and participate in the proceeding for recovery, in case the same has not yet been concluded.

11. With the aforesaid observation, the writ petition is disposed of.

Issue urgent certified copy as per rules.

(Jaswant Singh)
Judge

(M.S. Raman)
Judge



Laxmikant

March 8th, 2022
Cuttack