IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (C) DIARY NO. 29294 OF 2018

COMMISSIONER OF SALES TAX ODISHA AND ORS. ...PETITIONER(S)

VERSUS

M/S. ESSEL MINING AND INDUSTRIES LTD AND ANR. ...RESPONDENT(S)

WITH
SPECIAL LEAVE PETITION (C) NO. 21140 OF 2021

WITH
SPECIAL LEAVE PETITION (C) NO. 21104 OF 2021

WITH
SPECIAL LEAVE PETITION (C) NO. 2468 OF 2022

WITH
SPECIAL LEAVE PETITION (C) NO. 2466 OF 2022

ORDER

1. The Five Special Leave Petitions arising from the orders of the High Court of Orissa are taken up for hearing on pure questions of law.

2. The questions arise in the context of Section 42(6) of the Orissa Value Added Tax Act, 2004[1]. The first question is whether the power of the Commissioner to allow further time of six months to the Assessing Authority to complete the audit

[1] hereinafter referred to as 'the Act'.

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assessment must be exercised before the Assessing Authorities time to conclude the proceedings expire. The second question is whether an Assessing Authority could pass the assessment order after the period of six months in expectation of the Commissioner extending the time. The third and the last question is whether a Commissioner could grant *post-facto* extension, ratifying the assessment order passed beyond the period of six months. We may clarify here itself that it is nobody's case that the powers could be exercised by the Commissioner after one year (initial period of six months for Assessing Authority coupled with the power of the Commissioner to allow further six months).

Statutory Position

3.1 For proper appreciation of the issue, it is necessary to refer to the relevant provisions of the Act. Section 41 prescribes the procedure for conducting the assessment proceeding. Section 41(2) empowers the Commissioner to direct that a tax audit be conducted in respect of certain dealer(s) as selected by him. Section 41(4) provides that after completion of the tax audit, the officer authorized to conduct such audit shall, within seven days from the date of completion of the audit, submit an Audit Visit Report[2] to the Assessing Authority, along with the relevant statement/documents.

[2] hereinafter referred to as 'the AVR'.

3.2 Section 42, with which we are concerned in this case relates to audit assessment. Under Sub-section (1), the Assessing Authority may, when the tax audit conducted under Section 41 results in the detection of suppression of certain purchases, sales etc., issue a notice to the dealer with a copy of the AVR and require him to appear in order to give an explanation. Under Sub-section (4), the Assessing Authority may after causing such enquiry, assess the tax due from the dealer. Sub-section (6), which falls for our consideration and interpretation is also followed by a Proviso. While the sub-section provides for the audit assessment to be completed by the Assessing Authority within a period of six months, the Proviso, on the other hand, empowers the Commissioner, if for any reason the assessment is not completed by the Assessing Authority within the time stipulated in the section, to allow such further time not exceeding six months for completion of assessment proceeding.

3.3 Section 42 is as under: -

> *"42.* ***Audit assessment,***
> *(1) Where the tax audit conducted under sub-section (3) of section 41 results in the detection of suppression of purchases or sales or both, erroneous claims of deductions including input tax credit evasion of tax or contravention of any provision of this Act affecting the tax liability of the dealer, the assessing authority may, notwithstanding the fact that the dealer may have been assessed under section 39 or section 40, serve on such dealer a notice in the form and manner prescribed along with a copy of the Audit Visit Report, requiring him to appear in person or through his*

authorised representative on a date and place specified therein and produce or cause to be produced such books of account and documents relying on which he intends to rebut the findings and estimated loss of revenue in respect of any tax period or periods as determined on such audit and incorporated in the Audit Visit Report.

(2) Where a notice is issued to a dealer under sub-section (1), he shall be allowed time for a period of not less than thirty days for production of relevant books of account and documents.

(3) If the dealer fails to appear or cause appearance, or fails to produce or cause production of the books of account and documents as required under sub-section (1), the assessing authority may proceed to complete the assessment to the best of his judgement basing on the materials available in the Audit Visit Report and such other materials as may be available and after causing such enquiry as he deems necessary.

(4) Where the dealer to whom a notice is issued under sub-section (1), produces the books of account and other documents, the assessing authority may, after examining all the materials as available with him in the record and those produced by the dealer and after causing such other enquiry as he deems necessary, assess the tax due from that dealer accordingly.

(5) Without prejudice to any penalty or interest that may have been levied under any provision of this Act, an amount equal to twice the amount of tax assessed under sub-section (3) or sub-section (4) shall be imposed by way of penalty in respect of any assessment completed under the said sub-sections.

(6) Notwithstanding anything contained to the contrary in any provision under this Act, an assessment under this section shall be completed within a period of six months from the date for receipt of the Audit Visit Report:

> *Provided that if, for any reason, the assessment is not completed within the time specified in this sub-section, the Commissioner may, on the merit of each such case, allow such further time not exceeding six months for completion of the assessment proceeding.*
>
> *(7) No order of assessment shall be made under sub-section (3) or sub-section (4) after the expiry of one year from the date of receipt of the Audit Visit Report."*

3.4 In the year 2010, an amendment was carried out to the sub-section. After the said amendment, Section 42(6) reads as follows: -

> *"(6) Notwithstanding anything contained to the contrary in any provision under this Act, an assessment under this section shall be completed within a period of six months from the date* ***of service of notice issued under sub-section (1) along with*** *the Audit Visit Report:"*

3.5 Another amendment to Section 42(6) was brought in the year 2015. This amendment introduced a second Proviso to Section 42(6) and also deleted sub-section (7) to Section 42. Though it is not necessary to refer to the second Proviso, as it has no bearing on the facts of the cases, for having a complete idea of the legislative changes, we may just take note of it and proceed further. The Proviso is as under: -

> *"Provided further that if the Commissioner feels it necessary to do so for good and sufficient reasons, he may allow such further time not exceeding another six months beyond the time allowed under the first proviso for completion of the assessment proceeding."*

Facts in the case of Essel Mining and Industries Ltd.

4.1 The AVR was made on 20.04.2007 and the notice of the same was received by the Assessee on 14.05.2007. It is now settled that the date of receipt of the AVR by the assessee should be the date for reckoning the period of six months.[3] So, the six months period calculated from 14.05.2007 ended on 13.11.2007. Before the expiry of the said period, the Assessing Authority made an application dated 24.10.2007 to the Commissioner seeking extension of time by six months under the Proviso to Section 42(6). The extension was granted on 16.11.2007, that is three days after the initial period of six months. Thereafter, the Assessing Authority, proceeded further and passed the assessment order on 31.12.2007. We may note that the assessment order dated 31.12.2007 is in any event within a period of one year commencing from 14.05.2007. The assessment order found tax due amounting to Rs. 4,67,96,731/-.

4.2 It is this assessment order which was challenged before the High Court and the High Court allowed the Writ Petition on the sole ground that the extension of time was granted by the Commissioner over telephone. Disapproving this method of extending time, High Court held that the Commissioner was obliged to consider

[3] By a series of orders passed by the High Court of Orissa (M/s. Tata Sponge Iron Ltd. v. Commissioner of Sales Tax, Orissa & Ors., (2011) SCC OnLine Ori 49; M/s. Lalchand Jewellers Pvt. Ltd. v. Assistant Commissioner of Sales Tax, Puri, W.P. 11864 of 2017), it is settled that the date of receipt of AVR by the Assessee shall be the date for reckoning the period of six months of Section 42(6). In fact, in one of the orders impugned before us being, *M/s Cobra Instalaciones Y Servicios S.A.*, the High Court has also calculated the six-month period from the date of receipt of the AVR by the Assessee.

the request for extension on case-to-case basis depending on merit of each case which necessarily postulates the assigning of reasons. In view of these findings, the High Court allowed the Writ Petition, and the assessment order dated 31.12.2007 was quashed. The issue raised in these Special Leave Petitions was not argued before the High Court in this case.

4.3 The Review Petition was filed stating that the conclusion of the High Court that the extension granted telephonically is erroneous and in fact the order of the Commissioner dated 16.11.2007 granting extension was produced. On interpretation, it was also stated that the Commissioner's power under Proviso to Section 42(6) cannot be restricted to exercising it before the expiry of the period of six months. The High Court dismissed the Review Petition, unfortunately after a decade i.e., on 08.02.2018 on the ground of delay. The issue argued before us was not considered even in the Review Petition. The first Special Leave Petition is against this order.

Facts in the case of M/s Shreem Electric Ltd.

5. In this case, the AVR was served on the Assessee on 22.05.2014 and therefore, the six months period for passing the assessment order was to expire on 22.11.2014. The Assessing Authority sought extension of time by letter dated 29.11.2014. There is no indication about the date or any order of extension of time by the Commissioner. Eventually, the assessment order was passed on 19.05.2015.

This is the order challenged in the Writ Petition before the High Court. We may note that the assessment order, even in this case is within a period of one year commencing from 22.05.2014. It was argued that the assessment order passed after the mandatory period of six months has no validity, particularly when the Commissioner did not even exercise the power to extend the time. High Court allowed the Writ Petition on the simple ground that the matter is covered by the decision of the same Court in the case of *M/s Cobra Instalaciones Y Servicios S.A.*, which in turn followed the decision of this Court in *State of Punjab v. Shreyans Industries Ltd.*[4]. *M/s Cobra Instalaciones Y Servicios S.A.*, is also listed before us, we will now note the facts of that case.

Facts in the case of M/s Cobra Instalaciones Y Servicios S.A.

6. In *M/s Cobra Instalaciones Y Servicios S.A.*, the AVR dated 20.06.2012 was received by the Assessee on 01.10.2012 and therefore the six months period to complete assessment expired on 31.03.2013. The order of assessment was not passed within that date, but an application for extension was made before the expiry of the six months period i.e., on 25.03.2013. Eventually, the assessment order came to be passed on 15.05.2013, which nevertheless, is within a period of one year commencing from 01.12.2012. It is after the said order that the Commissioner in

[4] 2016 (4) SCC 769.

exercise of his powers under the Proviso to Section 42(6) granted *post-facto* extension by six months on 20.07.2013. The assessment order dated 15.05.2013 was challenged in the Writ Petition. The High Court considered the matter in detail and held that the Assessing Authority could not have presumed that the Commissioner would grant an extension and, therefore, could not have passed the assessment order in advance. Further, it was held that the Commissioner has to exercise the power after applying its mind to the facts of the case before mechanically granting an extension. Importantly, the High Court found no difficulty in applying the decision of this Court in the case of *Shreyans* (supra) and held that the Commissioner should have exercised the power of extension before the original period of limitation expired on 31.03.2013. The third Special Leave Petition is against the order.

Facts in the two cases of M/s Swastik Ingot (P) Ltd.

7. The AVR was made on 31.05.2013 and the same was received by the Assessee on 02.07.2013. Therefore, the assessment order was to be passed by 01.01.2014, however, the same was passed only on 31.03.2014. It is for this reason that the assessment order was challenged on the ground that it was not passed within a period of 6 months from the date of receipt of AVR by the Assessee. Further, it was also contended that the permission for extension was also sought after the expiry of the six-month period. The High Court allowed the Writ Petitions by

placing reliance on the decision in *M/s Cobra Instalaciones Y Servicios S.A.* The fourth and fifth Special Leave Petitions are from these orders.

Submission before this Court

8.1 We have heard Shri Rakesh Dwivedi and Shri Ravi Prakash Mehrotra, Senior Advocates assisted by Ms. Deepti R. Mehrotra, Shri Apoorv Srivastava, Shri Prasenjit K. Chakravarti, Shri Jogy Scaria (AoR), Ms. Kirti R. Mishra (AoR), Ms. Sansriti Pathak, Ms. Apurva Upmanyu, Mr. Aryan Tripathy and Ms. Monika Dwivedi, Advocates appearing on behalf of the Petitioners. Shri Gopal Jain, Senior Advocate, assisted by Ms. Vanita Bhargava, Shri Ajay Bhargava, Ms. Shweta Kabra, Ms. Prerna Singh and M/s Khaitan & Co. (AoR) for the Respondents.

8.2 Learned counsels have addressed us only on the interpretation of Section 42(6), and its Proviso and on the issue as to whether the Commissioner could exercise the power to grant extension of time after expiry of the initial period of six months provided to an Assessing Authority for passing the order of audit assessment.

9. While reserving the judgment, we had ordered that we will take up the first matter for disposal and on the basis of the decision in the first matter, the other cases will be listed for appropriate orders. However, in the first matter, as noticed earlier, the issue argued before us was neither raised nor considered by the High Court. The

decision of the High Court is confined only to the question as to whether extension could be granted on telephone and whether there is an obligation on the part of the Commissioner to give reasons before granting further time for the completion of the assessment. Even in the order disposing of the Review Petition, the High Court has not considered the issue that is raised and argued before us. For this reason, we have to necessarily decide the issue in other Special Leave Petitions.

10. In all the Special Leave Petitions, apart from the first case of *Essel Mining*, we have noticed that the High Court disposed of the Writ Petitions by following the decision of this Court in the case of *Shreyans Industries* (supra). The most important question for consideration is whether the issue arising for consideration in these Special Leave Petitions are covered by the decision of this Court in *Shreyans Industries* (supra). It is therefore necessary for us to consider the ratio in *Shreyans Industries* (supra) and to see if it covers the issues arising in these batch of cases.

11. Decision in *Shreyans Industries* (supra) is by a Bench of three judges. The case arose out of proceedings under the Punjab General Sales Tax Act, 1948. The issue was whether the power to extend time is to be necessarily exercised before the normal expiry of the said period of three years ran out.

12. Before we proceed further to appreciate the ratio, it is necessary to refer to Section 11 of the Punjab General Sales Tax Act, 1948 which fell for consideration in *Shreyans Industries* (supra). The Provision is as under: -

> ***"11. Assessment of tax.*** *–*
> *(1) If the Assessing Authority is satisfied without requiring the presence of [dealer] or the production by him of any evidence that the returns furnished in respect of any period are correct and complete, [he shall pass an order of assessment on the basis of such returns within a period of three years from the last date prescribed for furnishing the last return in respect of such period.*
> *....*
> *(3) On the day specified in the notice or as soon as afterwards as may be, the Assessing Authority shall, after hearing such evidence as the dealer may produce, and such other evidence as the Assessing Authority may require on specified points, [pass an order of assessment within a period of three years from the last date prescribed for furnishing the last return in respect of any period.*
> *....*
> *(10) The Commissioner may, for reasons to be recorded in the writing, extend the period of three years, for passing the order of assessment for such further period as he may deem fit."*

13. After considering rival submissions, the Court considered similar provisions of the Karnataka Sales Tax Act,1957 as well as the Gujarat Sales Tax Act,1969 and after approving and following a decision of the High Court of Karnataka, this Court observed as under: -

> *"21. Clause (b) of sub-section (6) indicates that Joint Commissioner, in appropriate cases, may pass an order for deferment of assessment order to be passed by the assessing authority and once such an order is passed, that period has not to be counted while computing the period of limitation. Significantly, this provision also mandates the Joint Commissioner to record reasons for deferring the orders of assessment. In essence, therefore, the purport and objective behind the provisions in the Punjab Act as well as in the Karnataka Act remains the same. By making*

any order of deferment under sub-section (6) of Section 12 of the Karnataka Sales Tax Act, the Joint Commissioner is, in fact, achieving the same purpose of granting more time to the assessing officer to pass the assessment order. Same is the purpose behind sub-section (11) of Section 10 of the Punjab Act. In view thereof, it may not be appropriate to go into the nuanced distinction between "deferment" and "extension" as per the definitions contained in Black's Law Dictionary in the given situation, which is dealt with in the instant appeals.

22. Even otherwise, it is important to understand the ratio laid down in the judgment of the Karnataka High Court in BHEL [BHEL v. CCT, (2006) 143 STC 10 (Kar)]. The issue in the said case before the Karnataka High Court was as to whether the power to pass a deferment order is to be exercised even after the expiry of the period of limitation which was answered in the negative. The reasons given in support of this conclusion are as follows: (STC pp. 15-16, para 8)

> *"8. ... Deferment of assessment has the effect of enlarging the period of limitation which did not expire by the time the deferment order is contemplated to be passed. When once the period of limitation expires, the immunity against being subject to assessment sets in and the right to make assessment gets extinguished. Resort to deferment provisions does not retrieve the situation. There is no question of deferring assessment which had already become time-barred. The provision for exclusion of time in computing the period of limitation of deferment of assessment is meant to prevent further running of time against the Revenue if the limitation had not expired."*
>
> *(emphasis supplied)*

It was also observed that upon the lapse of the period of limitation prescribed, the right of the Department to assess

an assessee gets extinguished and this extension confers a very valuable right on the assessee.

23. If one is to go by the aforesaid dicta, with which we entirely agree, the same shall apply in the instant cases as well. In the context of the Punjab Act, it can be said that extension of time for assessment has the effect of enlarging the period of limitation and, therefore, once the period of limitation expires, the immunity against being subject to assessment sets in and the right to make assessment gets extinguished. Therefore, there would be no question of extending the time for assessment when the assessment has already become time-barred. A valuable right has also accrued in favour of the assessee when the period of limitation expires. If the Commissioner is permitted to grant the extension even after the expiry of original period of limitation prescribed under the Act, it will give him right to exercise such a power at any time even much after the last date of assessment. In the instant appeals itself, when the last dates of assessment were 30-4-2004, 30-4-2005, 30-4-2006 and 30-4-2007, orders extending the time under Section 11(10) of the Act were passed on 17-8-2007, 17-8-2007, 17-8-2007 and 25-5-2007 respectively. Thus, for Assessment Year 2000-2001, order of extension is passed more than three years after the last date and for Assessment Year 2001-2002, it is more than two years after the last date. Such a situation cannot be countenanced as rightly held by the High Court. When the last date of assessment in respect of these assessment years expired, it vested a valuable right in the assessee which cannot be lightly taken away. As a consequence, sub-section (11) of Section 10 has to be interpreted in the manner which is equitable to both the parties. Therefore, the only way to interpret the same is that by holding that power to extend the time is to be exercised before the normal period of assessment expires. On the aforesaid interpretation, other arguments of Mr. Ganguli lose all significance."

14. It is necessary to restate the principle laid down by the three-Judge Bench in *Shreyans Industries* (supra): Even where a statute uses varied expression such as 'deferment' or 'extension', the purpose is only to grant further time to the Assessing Authority to complete the assessment. Therefore, there is no purpose in drawing a distinction in the power of extension by referring to the specific expressions used in different statutes provisioning extending the time. The ratio of the judgment is that, upon the lapse of period provided for the AO to make the assessment, the right of the department to assess gets extinguished. This extinguishment also gives rise to a valuable right to the assessee. Once the right to make assessment extinguishes there is no question of extension of time when the assessment has become time barred. This is the broad principle laid down in *Shreyans Industries* (supra) decided by the three Judges Bench.

15. Shri Rakesh Dwivedi, learned Senior Counsel advanced submissions on behalf of the Petitioner-State and has also filed written submissions. It is his case that the decision in *Shreyans Industries* (supra) cannot be made applicable to these batch of cases for the following reasons:

(i) While all these cases arise under Section 42(6) of the Orissa Value Added Tax Act, 2004, the decision in *Shreyans Industries* (supra) concerns the interpretation of Section 11 of the Punjab General Sales Tax Act, 1948.

(ii) Under the Punjab General Sales Tax Act, 1948 a very long period of 3 years from the date of filing of last return had been given for completing

original assessment and a period of 5 years was given for making best judgment assessment, where return was not filed. This is not the case here.

(iii) The power to grant extension under Section 11(10) of the Punjab General Sales Tax Act, 1948 did not contain any outer limit for extension. This is also not the case here.

(iv) The power of extension under Section 11(10) of the Punjab General Sales Tax Act, 1948 required recording of reasons in writing. There is no obligation to record reasons here.

(v) The judgment in the case of *Shreyans Industries* (supra) was in the context of original assessment, and not to cases pertaining to escapement of tax found in audit or fraud, which is the case here.

(vi) The judgment of the Supreme Court in *CIT v. Ajanta Electricals*[5] was distinguished in *Shreyans Industries's* case as it was based on the interpretation of the words '*it has not been possible*' occurring in Section 139(2) of the Income Tax Act. In these cases, the expression under proviso to Section 142(6) is the assessment is not completed within the time specified, *Ajanta Electricals* (supra) must apply here.

(vii) In *Shreyans Industries* the assessing officer has sent notices to the assessee after the expiry of 3 years. The issue pertained to extension of time for issuing notice, and not for completing assessment as in these cases. Further, the order of extension was under challenge in *Shreyans Industries's* case.

[5] 1995 (4) SCC 182.

16. Since the decision in *Shreyans Industries* (supra) is based not merely on the interpretation of the Section but on a principle of law, it is difficult to distinguish the judgment on the facts or wordings of the statute. We cannot easily brush aside the submissions made by the Respondents that the principle laid down in *Shreyans* is equally applicable to the provisions of the Act. Following *Shreyans*, it could be argued that after expiry of six months under Section 42(6) of the Act, the right to make an assessment gets extinguished and therefore the Commissioner cannot exercise the right of extension of time. The distinction made by Shri Rakesh Dwivedi is therefore, not so glaring and so fundamental that we can straightaway disapply *Shreyans Industries* to the facts of the present case. The principle laid down in *Shreyans Industries* is wide enough and requires a critical and detailed consideration. As we are sitting in the strength of two judges, we consider it appropriate that the matter be taken up by a Bench of an equal strength and therefore refer the matter to a three Judge Bench where there will be a possibility to hear the parties on the applicability of *Shreyans Industries*. There is yet another reason.

17.1 There are certain alternative perspectives based on the *interpretation*, as well as on the *principle of administrative law*.

17.2 On interpretation, the following perspectives may be noted:

(i) While sub-section (6) of Section 42 relates to the power of the Assessing Authority, Proviso to sub-section (6) relates to the power of the

Commissioner. These are two distinct officers, exercising different powers. As we are to examine the power of the Commissioner, the scope and ambit of such power must be located within the proviso, which alone speaks of the power of the Commissioner.

(ii) In the said Proviso, there is no limitation upon the commissioner to exercise such power before the original period of six months. By inferring such a limitation, Court could be supplying words to the Act by providing "the commissioner may *before the expiry of the initial period of six months*" allow such further time not exceeding six months for completion of the assessment proceedings.

(iii) Even on a combined reading of the provision in Section 42(6) along with the proviso, it may be difficult to infer a conclusion that the intendment of the Section is to render the assessment proceedings to be terminated before the expiry of the period of one year.

(iv) There is no provision which extinguishes the power of the Commissioner if it is not exercised during the subsistence of the initial period of six months. Such an extinguishment is neither in sub-section (6) nor in the Proviso.

(v) A plain and a simple reading of the sub-section, coupled with the proviso is intended to oblige the 'Assessing Authority' to complete the assessment within six months and if it is not possible, the Commissioner would grant an extension of another six months. To complete the assessment proceedings within a period of one year seems to be the mandatory intendment of law. It is necessary to read the statutes as a whole keeping in mind the *text* and the *context* of the provisions.

17.3 Further, there are similar provisions under the Income Tax Act,1961 i.e., Section 139(2) where this Court in *Ajanta Electricals* (supra) has taken a view that the power of extension can be granted by an Income Tax officer even after the expiry of the prescribed period.

17.4 Considering this from the perspective of administrative law, the time limitations are restrains placed by the legislature to regulate exercise of administrative power. They are intended to enforce discipline in governance and could therefore be compelling guidelines or even mandatory prescriptions. The Court must therefore, examine the provisions in the context of balance between need for executive flexibility and the quest against arbitrariness. It is the duty of the Court to synthesize these competing claims keeping in mind the public interest of good governance. This Court has traditionally drawn a distinction between statutes prescribing no time limit while performing public duties and statutes providing a time limit. Even with the statutes providing for the time limit, there is a distinction between statutes providing for consequence for not acting with the time limit and statutes not providing for any such consequences. Examination of these factors become necessary for appreciating the procedural ultra vires in the executive action. For the present, we need not say anything more.

17.5 The points of distinction brought about by Shri Rakesh Dwivedi and the perspectives that we have indicated on interpretation and also on principles of administrative law may be considered by a bench of three-Judges. The necessity for referring the matter to three-Judges is to have consistency and clarity in the law of precedents and certainly to avoid having multiple judgements drawing subtle distinction between one another.

18. For the reasons stated above, we are of the view that these matters must be placed before a three Judge bench for a consideration of the principle in *Shreyans Industries* (supra) and also on the applicability of the said judgment to the proceedings arising under the Act.

…….J.
[UDAY UMESH LALIT]

…….J.
[PAMIDIGHANTAM SRI NARASIMHA]

NEW DELHI;
JULY 11, 2022