(2018) 01 PAT CK 0054

In the Patna High Court

Case No : 3576 of 2017

Alstom Bharat Forge Power Pvt. Ltd — APPELLANT

Vs

The State of Bihar & Ors — RESPONDENT

Date of Decision : 15-01-2018

Acts Referred:

Constitution of India, Article 226, Article 286 - Power of High Courts to Issue certain writs - Restrictions as to imposition of tax on the sale or purchase of goods
<a href=3702>Centra

Citation : (2018) 01 PAT CK 0054

Hon'ble Judges : Anil Kumar Upadhyay

Bench : Single Bench

Advocate : Ganeshan, Tushar Jaiswal, Satyabir Bharti, Rahul Sateeja, Aparna Arun, S K Kapoor, Anand Sen, Vikash Kumar, Sriram Krishna

Final Decision : Allowed

Judgement

1. In both these writ petitions filed by the petitioner-assessee two different orders of assessment passed for the financial years 2014-15 and 2015-16 on the same date, i.e. on 09.03.3017 imposing liability under the Bihar Value Added Tax Act, 2005 (hereinafter referred to as the BVAT Act) are challenged and as the facts and questions of law are identical both the petitions are being disposed of by this common order.

2. Petitioner is a Company incorporated under the provisions of the Companies Act, 1956 having its registered office at NTPC Campus, Sivanpur, Nabinagar, Bihar. Petitioner is a registered dealer under the BVAT Act with Registration No. TIN 10176270092 registered with the Commercial Taxes, Aurangabad Circle, Aurangabad. Petitioner is setting up a Super Thermal Power Project of 3x660 MW in Nabinagar in the State of Bihar.

3. It is stated that in the execution of the Project petitioner has entered into three separate contracts (i) for supply of goods procured from outside India (ii)

indigenous supply of goods procured within India and (iii) their installation and commissioning. It is said that the petitioner supplied imported goods to Nabinagar Power Generating Company Pvt. Ltd. by transferring the title in goods on high seas, the title of indigenous goods is transferred while the goods are inter-state movement. It is said that the petitioner is not liable to pay sales tax on high seas sales in view of Section 5 of the Central Sales Tax Act, 1956 (hereinafter referred to as CST Act) read with Article 286 of the Constitution of India so also in view of Section 6 of BVAT Act. That apart, for the indigenous sales the petitioner claimed exemption under Section 3(b) read with Section 6(2) of the CST Act.

4. Be that as it may, the fact remains that the petitioner was issued show cause notices in the matter of payment of duty by the authorities of the BVAT Act for the periods in question and according to the petitioners, they received notices for the relevant periods, vide notice Annexure-6 dated 13.01.2017 in the record of CWJC No. 3576 of 2017. Petitioners were directed to appear before respondent no. 4 on 07.02.2017 at 11 A.M. Petitioners are said to have appeared on the date and through their representatives and it is said that documents were produced to show that high sea sales total turnover came to Rs.307 crores for the year 2014-15 and the inter-state sale came to Rs.27.89 crores. It is said that time was sought to produce the Form -C certificate which, according to the petitioners, were not issued by the Department to the petitioners and also by the Power Generating Company. On 07.02.2017, again another notice was issued vide Annexure-1 for appearing on 18.02.2017 and it is stated that the petitioners'' representatives and Advocate appeared and they pointed out all the relevant facts and in the Haziri and the documents produced vide Annexure-8 on 07.02.2017 sought for time to produce certain documents, particularly Form-C for the relevant period which, according to them, were not issued.

5. Grievance of the petitioners primarily are that without hearing them and without granting them adequate opportunity to produce relevant documents and materials the impugned assessment orders have been passed in both the writ petitioners, in CWJC No. 3661 of 2017, from paragraphs-13 onwards up to paragraph-19 specific averments are made in this regard to say that inspite of the representatives of the petitioners, namely, Shri Anjan Ganguly, Advocate and their Consultant Shri Anjani Tripathi, appearing and filing documents and making prayer for producing relevant documents like Form-C certificate, the impugned order has been passed by holding that inspite of opportunity granted the assessee has not produced the relevant documents and therefore they have been saddled with tax liability amounting to Rs.100 crores which are not transit sales but on high sea sales and inter-state sale and the entire transaction is exempt from payment from duty.

6. Accordingly, the first and foremost ground canvassed by Shri Ganeshan, Senior Counsel representing the petitioner-assessee is that the impugned assessment order has been passed without granting adequate and reasonable

opportunity of hearing to the petitioner, without considering the relevant documents and even without granting them sufficient opportunity to produce Form-C certificate. Shri Ganeshan, apart from referring to the pleadings made as indicated from paragraphs-13 onwards in CWJC No. 3661 of 2017 referred to Haziri the document recording the memorandum of proceeding held vide Annexure-8 in the records of CWJC No. 3576 of 2017 to show that papers and documents of high seas sales were produced and time was sought for to produce and receive Form-C from the Department and the customer concerned. He further referred to Annexures-9 and 10 i.e. the affidavit filed by Shri Anjanee Tripathi, departmental representative, namely, Indirect Tax Analyst of the petitioner and Shri Anjan Ganguly, Advocate who appeared on 07.01.017 and 18.02.2017 and argued that the assessment order passed only because the relevant documents were not produced, is arbitrary and unreasonable and it is a fit case where matter should be remanded and adequate opportunity granted to the petitioners to establish their claim that they are not liable to pay the duty. Shri Ganeshan also argues that the averments made by the petitioners in this regard going unrebutted, there being no specific denial of the averments made in the affidavit and the pleadings, therefore, the same should be deemed as admitted and there being no dispute now that adequate opportunity has not been granted it is a fit case where the matter should be remanded back for consideration.

7. Shri Ganeshan argues that the objection of the respondent that statutory remedy of appeal and revision are available under the BVAT Act cannot be the ground for rejecting the prayer of the petitioner once the petitioners have demonstrated before this Court that they were not afforded adequate opportunity of hearing before passing the impugned orders of assessment, which is passed in violation to the principles of natural justice.

8. Shri S K Kapoor, learned Senior Counsel appearing for the Government, assisted by Shri Vikash Kumar, vehemently argued and opposed the aforesaid prayer and it was their contention that it is a case where serious disputed questions of fact are involved in the matter. Learned counsel for the Revenue took us through the impugned orders passed by the Assessing Officer and tried to demonstrate that in spite of repeated opportunities being granted the petitioner-assesses failed to avail the opportunity and, therefore, they cannot make any complaint now. He argues that the fact as to whether opportunity was granted or denied is itself a dispute and once there is a dispute on facts, jurisdiction of this Court, extra-ordinary in nature under Article 226 of the Constitution should not be exercised and instead referring to Sections 72, 73, 74, and 76 of the BVAT Act, learned Senior Counsel for the Revenue argued that the petitioner should be relegated to the alternative statutory remedy available and in support thereof to say that when statutory remedy for appeal is provided, indulgence in the writ petition is not called for, relies upon the following judgments of the Supreme Court:- (i) Zunaid Enterprises vs. State of Madhya Pradesh [(2012) 4 SCC 211]

(ii) C.I.T. vrs.Chhabi Dass Agrawal [(2014) 1 SCC 603]

9. In rebuttal to the aforesaid contention of there being existence of statutory remedy, Shri Ganeshan, learned Senior Counsel for the petitioners invites out attention to the judgments of the Supreme Court in the case of Whirlpool Corpn. Vs. Registrar of Trade Marks [(1998)8 SCC 1] and A B L International Limited vs. Export Credit Corpn. [(2004) 3 SCC 55] to submit that when violation of principles of natural justice is writ large, relegating the petitioner to take recourse to the alternative remedy is not required, and in such cases in exercise of writ jurisdiction under Article 226 of the Constitution this Court can interfere.

10. Apart from the aforesaid submissions, learned Senior Counsel for both the parties made various arguments and submissions to indicate that on merits also the rival contentions are correct. However, at this stage, it is not necessary for us to go into these aspects of the matter. At the very outset, we are required to consider as to whether the contention of the petitioner that order has been passed without granting them the adequate opportunity is correct, and, therefore, we can exercise our jurisdiction to interfere into the matter or to relegate the petitioners to take recourse of the statutory remedy available.

11. Having bestowed our anxious consideration to the questions in issue particularly to the effect that the impugned order has been passed without adequate opportunity of hearing, we find that in both the writ petitions specific averments have been made by the petitioner with regard to the facts at the manner in which the proceedings were held on 07.02.2017 and thereafter on 18.02.2017.In both the writ petitions and in particular in CWJC No. 3661 of 2017 from paragraphs -13 onwards and paragraphs- 15, 16, 17, 18 and 19 it is clearly stated that the petitioners'' counsel Shri Anjan Ganguly along with two authorized representatives appeared in the matter and submitted their reply vide Annexure-4. Thereafter in paragraph -16 it is stated that time was sought and request was made for obtaining time to produce Form-C certificate. Specific assertions are made to say that in the proceedings held on 07.02.2017 Haziri was recorded vide Annexure-6 and submitted in the proceedings wherein documents have been produced pertaining to high sea sales and transactions and time was sought for producing Form-C certificate. Annexure-8 in the record of CWJC No. 3576 of 2017 is the memorandum of Haziri produced in the proceeding held on 07.02.2017 and Annexure-6 in the record of CWJC No. 3661 of 2017 is the Haziri and proceeding submitted on 18.02.2017 and both the Haziris are for the relevant periods 2014-15 and 2015-16, respectively. In Annexure-8 filed in the record of CWJC No. 3576 of 2017 it is stated that the dealer along with their representatives are present today, i.e. on 07.02.2017 and are submitting the documents as are indicated in paragraphs -1 and 2 and in paragraph-3 request is made for one month''s time to submit the remaining papers and documents for both the assessment years as the petitioners have not received Form-C from the Department and the customer and also Form-C issued by the vendor. In fact, the Haziri filed on 17.02.2017 Annexure-8 reads as follows:- HAZIRI

The above named dealer is present today i.e. 07.02.17 to attend the hearing for the year 2014-15.

In this connection the following documents are submitted.

1) Papers & documents related to High-Sea Sale for Rs. 3074951881,

like

High Sea Sale agreement, Bills raised to customers, Bill raised by foreign suppliers, Bill of Lading, Packing list, Bill of Entry etc MDCC from NTPC

2) List of Purchase along with copy of ''E-1''.

3) We are also requesting to your good self to allow us one month''s time for submission of rest papers & documents in connection with assessment for the year 2014-15 & two months'' time for 2015-16 as we have not yet received Form ''C'' from the department & from customer also. As no ''C'' is issued to vendors ''E-1'' is also not received.

Sd/ 07.02.2017"

12. Similarly, the Haziri available at Annexure-6 in the record of CWJC No. 3661 of 2017 is the Haziri for 18.02.2017 again for both the years and in this also similar assertions as are made on 07.02.2017 are made with regard to production of documents and the same reads as follows:- HAZIRI

The above named dealer is present today , i.e. 18.02.17 to attend the hearing for the year 2014-15 & 2015-16. In this connection we are submitting the letter issued by Nabinagar Power Generating Co. P. Ltd. regarding issuance of Form ''C'' to the dealer for the year 2014-15 Letter dated 17-02-17 A copy of dummy PDF of Form ''C'' is also enclosed.

Under the circumstances we request to your goodself to allow us three wks. time to submit the Form ''C''. It is pertinent to mention here that Nabinagar Power Generation Co. P. Ltd. is also registered under your esteemed circle.

For the Year 2015-16, we have not yet received Form ''C'' so far onward issuance to our vendors from your good office. Naturally, we have received no Form ''E-I''/ E-II from our vendors. The application for issuance of Form ''C'' is made for more than a month.

Considering all these we request to your goodself to allow us 2 (two) months time for 2015-16.

13. Thereafter affidavits of both the Advocate and the Representative who appeared have been brought on record.

14. As indicated hereinabove, the aforesaid facts are specifically pleaded in the writ petition and in the counter affidavit of the Department in spite of all these specific averments being made there is no whisper as to whether these facts are

correct or not, whether the proceedings held on 07.02.2017 and 18.02.2017 were in conformity with the averments made in the writ petitions, the documents produced and the assertions made in the affidavits of Shri Anjan Ganguly and Shri Anjanee Tripathi, the Counsel and the authorized Representative are correct. The counter affidavit maintains a meticulous silence in this regard and when specific queries were made at the time of hearing it was argued that in the impugned order it is clearly stated that the documents were not produced in spite of opportunity and, therefore, presumption should be drawn that the contentions are not correct. However, surprisingly in the counter affidavit filed document-C has been produced at page -23 by the departmental authorities which is nothing but Haziri produced and available on record as Annexure-8 in CWJC No. 3576 of 2017.

15. Be that as it may, the fact remains that specific averments made in the writ petitions as are detailed hereinabove are not denied or rebutted, and there is no specific denial to this assertion in the counter affidavits. In the case of Smt. Naseem Bano vs State of U.P. (AIR 1993 SC 2592), it has been held by the Hon''ble Supreme Court that when certain averments are made in the writ petition by a petitioner and if they are not controverted by the respondents, the High Court should proceed on the assumption that averments are admitted by the respondents. In paragraph -11 of the aforesaid judgment it has been held that presumption has to be drawn that averments are admitted. In this case, the respondents have miserably failed to rebut the contention made in the petition and if the aforesaid contentions are correct, we have no hesitation in holding that it is a case wherein relevant documents which are produced are not considered and with regard to Form-C document, proper opportunity has not been granted for the submission, in the proceedings were held on 07.02.2017 and 18.02.2017 time was sought for producing Form-C document, month''s time was sought for on 18.02.2017 and without passing any order on this prayer, on 25.02.2017 the impugned order of assessment has been passed.

16. Accordingly, in our considered view it is a case wherein assessment has been done without granting adequate opportunity to the petitioners without giving them opportunity to furnish further document as prayed for, and the impugned order also does snot record the proceedings correctly as the assertions made in the writ petitions are not rebutted either by filing affidavit or producing documents to rebut the same by the competent officer to say that the contentions of the petitioner are not correct. Even in the counter affidavit as indicated hereinabove, there is a complete silence in this regard.

17. Now in the backdrop of the entire aspects of the matter we are required to consider the question of existence of alternative remedy and exercise of our jurisdiction in the matter. Even though as vehemently argued by the learned counsel representing the Revenue in the case Zunaid Enterprises (supra) and again in the case of Chhabi Dass (supra) it is held by the Supreme Court that once statutory alternative remedy is available exercise of jurisdiction under

Article 226 of the Constitution is not called for. If we take note of the principles in the aforesaid case, we find that if the statutory authorities have proceeded and passed an order in violation of the principles of natural justice, interference can be made. In the case of A B L International (supra) and again in Whirlpool Corpn. (supra) the principles laid down is that the power to issue prerogative writ under Article 226 of the Constitution is plenary in nature, the power can be exercised when it is found that it is for enforcement of fundamental right or where there have been violation of principles of natural justice. In the case of State of H.P. vs. Gujarat Ambuja Cement Ltd. [(2005) 6 SCC 499] it has been held by the Hon''ble Supreme Court that the doctrine of availability of alternative remedy has two well recognized exception, in that the doctrine would not have the application where the impugned order has been made in violation of the principles of natural justice. If we analyze the case in hand and the procedure followed by the Assessing Officer, we find that in this case the principles of natural justice is violated inasmuch as the time sought for on justifiable ground for producing relevant documents like Form-C has been denied as also for production of document with regard to high sea sales have not been considered. Even though it was argued that that no such documents are available and no high sea sale has taken place.

18. Taking into account all aspect of the matter, we are of the considered view that it is a fit case where instead of relegating the petitioner to take recourse to the statutory alternative remedy interest of justice would be made if it is remitted to the Assessing Officer with a direction to proceed with the assessment afresh in accordance with law. In view of the above we allow both the writ petitions, quash the orders passed by the Assessing Officer and issue the following directions:- (1) Petitioner shall appear before the Assessing Officer along with a certified copy of this order on 6th of March, 2018, produce all relevant document and materials in support of their contention and thereafter the Assessing Officer shall proceed with the assessment and conclude the proceeding in accordance with law after affording opportunity to the petitioner, within a reasonable period of time.

(2) It is made clear that it shall be incumbent upon the petitioners to produce all relevant documents in support of their contention on 6th of March, 2018 itself and thereafter it would be in the discretion of the Assessing Officer to permit production of any further document or evidence if required during the pendency of the proceedings.

19. Needless to emphasize that even though various aspects touching merits of the liability to pay duties were referred to at the time of hearing by the parties concerned, we have not gone into any of the aspects of the matter including genuineness or otherwise of the documents that may be produced and we leave it to the Assessing Officer to proceed in accordance with law. We allow these writ petitions on the ground that adequate opportunity was not afforded to the petitioner as was required and requirement of the principles of natural justice has

not been followed. Apart from the aforesaid, we have not dwelt upon any other issue.

20. The writ petitions are allowed accordingly.

