

(2013) 04 RAJ CK 0037

In the Rajasthan High Court

Case No : Civil Writ Petition No"s. 4761 and 4762 of 2000

Amarjyoti Granites (I) Ltd.

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 02-04-2013

Acts Referred:

Citation : (2013) 3 CDR 1647 : (2014) 1 RLW 774

Hon'ble Judges : Vineet Kothari, J

Bench : Single Bench

Advocate : Arvind Shrimali on behalf of Mr. D.D. Thanvi, for the Appellant; R.K. Soni, Govt. Counsel for the Mining Department, for the Respondent

Judgement

Dr. Vineet Kothari, J.—These two writ petitions are being decided by this common judgment and the facts of CW No. 4762/2000-Amarjyoti Granites (I) Ltd vs. The State of Rajasthan & Ors. are taken illustratively. The Assessing Authority i.e. the Assistant Mining Engineer, passed reassessment order under Rule 41 of the Rajasthan Miner Mineral Concession Rules, 1986 (for short, hereinafter referred to as MMCR, 1986) after serving a show cause notice on the petitioner vide Annex. 5 dt. 27.10.1999 for the past four years (1994-95 to 1997-98) on account of difference found in the weighment slips produced for assessment by the assessee, who is the mining lease holder and the payment and assessment of royalty by the petitioner was found to be incorrect and, therefore, the previous assessment was reopened and re-assessment orders were required to be passed.

2. In the show cause notice given to the petitioner by the Assessing Authority i.e. the Assistant Mining Engineer, Rishabhdeo, vide Annex. 5, the following details were given by the Assessing Authority in the said notice:--

3. Upon such huge difference found in 8 cases of various trucks passing through various check posts and upon weighment of goods at different weigh-bridges by the departmental authorities, it was found, prima-facie, that the assesses was always under- weighing the mineral, namely, the granite excavated by the

petitioner from his mining lease area and on weight taken at different weight-bridge, the difference was found in each cases to be in the range of 4 to 10 tons each truck carrying the excavated mineral. Therefore, the Assessing Authority called upon the petitioner to show cause as to why the re-assessment be not done on the basis of weight of total excavated material disclosed by him taking the highest of the correct assessment of the weight at the weigh-bridge by the departmental authorities at 24.270 tons for each truck.

4. The assessee filed a detailed reply to the said show cause notice vide Annex.6 dt. 15.07.1997, and the Assessing Authority, passed the re-assessment order vide Annex.7 dt. 11.05.2000 raising demand of Rs. 2,87,498/- towards the difference of royalty against the petitioner and the recovery notice was sent vide Annex.9 dt. 22.06.2000. The petitioner is said to have since paid this disputed demand to the respondent- Mining Department.

5. Even though a regular appeal lied before the Director Mines under Rule 43 of the MMCR, 1986, against such re-assessment order, however, the petitioner preferred a revision petition against the assessment order under Rule 47 of the MMCR, 1986 before the Deputy Secretary, Government of Rajasthan, which came to be dismissed by the impugned order Annex. 12 dt. 12.07.2000 and aggrieved by the same, the petitioner has approached this Court by way of present writ petitions.

6. Mr. Arvind Shrimali, learned counsel for the petitioner, vehemently submitted that the revisional authority has erred in holding that no record was required to be summoned and in view of clear evasion of royalty payment by the petitioner on the basis of weighment slips, details of which were given in the show cause notice, there was no error in the impugned re-assessment order and no revision of the same was called for. He further argued that this cannot be said to be in compliance with Rule 47 and consequently the impugned revisional order deserves to be quashed and set aside.

7. On the other hand, Mr. R.K. Soni, Government Counsel appearing for the Mining Department, urged that all requisite details of deficiencies or difference in weight truck-wise, found in the case of the petitioner were given in the show cause notice itself, which prima facie, indicated that the petitioner had indulged in huge evasion of royalty payment and on each occasion on various dates between 18.12.1997 to 24.01.1998, the difference in the weight of various truck carrying the mineral was found to be huge between the range of 4-10 tons each truck and, therefore, the learned Assessing Authority was justified in taking the highest found weight of 24.270 tons and applying the same for the past period of four years, the reassessment was done, which was within the limitation period prescribed under Rule 41 of the MMCR, 1986. He submitted that on the basis of evidence collected by the authorized officers, the re-assessment for the entire period of four years was permissible and no valid exception to the same could be taken. He also supported the impugned revisional order on the ground that since no illegality or impropriety in the impugned re-assessment order was found by

the revisional authority, and therefore, no interference with the same is called for even by this Court in the extraordinary jurisdiction under Art. 226 of the Constitution of India, since on the principle of best judgment assessment in the circumstances was perfectly justified and was rather the only course open to the Assessing Authority to undertake such best judgment assessment as the record produced by the assessee was unreliable in view of aforesaid consistently under-weight disclosed by the assessee.

8. He also submitted that the relevant record was produced by the petitioner before the Assessing Authority, and also along-with the revision petition memo, and such record produced was perused by the revisional authority; and after hearing the learned counsel for the revisionist (petitioner), the impugned order was passed by the learned revisional authority. He also submitted that since the disputed demand has already been paid by the petitioner, no refund of the said difference amount of royalty paid by the petitioner can now be made and the conduct to the petitioner-assessee of huge evasion of royalty dis-entitles him from any relief in the extraordinary jurisdiction of this Court. He, therefore, prayed that the writ petitions deserve to be dismissed.

9. The relevant provisions of Rules 38 to 47 of MMCR, 1986 dealing with the assessment, re-opening of assessment, re-assessment, appeals and revisions are quoted below for ready reference:--

38. Assessment of royalty.--(1) Assessment and determination of royalty due from an assessee during an assessment year or as required shall be made by assessing authority after the returns in respect of that year have been filed by the assessee as required under terms and conditions of the lease deed or the statement" of production, dispatches or consumption has been submitted by the person concerned or upon checking the stock of the mineral dealer:

Provided that the assessing authority may make provisional assessment for a particular period during the assessment year after the receipt of statistical returns in respect of that period.

39. Assessment on the basis of best judgment in case of failure to submit monthly and annual returns or in case of likely evasion of royalty.--If the assessee fails to submit the returns within the period prescribed in sub rule (2) of Rule 38 or the returns submitted are incorrect or the assessing authority has reasons to believe that the assessee had evaded or avoided any royalty, the assessing authority may after giving to assessee a reasonable opportunity of being heard and after making such inquiry, as it considers necessary, assess the royalty for the period to the best of its judgment. The amount so assessed shall be payable by assessee forthwith and in case of default in payment, the amount so assessed shall be recoverable as an arrear of land revenue:

Provided that no such royalty assessment shall be made on best judgment basis without obtaining prior approval of the next higher authority.

40. Reopening of cases of best judgment of assessment.--Where an assessment has been made to the best of judgment of the assessing authority and the assessee makes an application to the assessing authority within 30 days from the date of service of notice of demand in consequence of assessment for the cancellation of the assessment on the ground:

(a) That he did not receive the summons or notice issued to him for the purpose of assessment; or

(b) That he was prevented by sufficient cause for complying with any summons or notices.

The assessing authority shall if satisfied about the existence of such ground cancel the assessment and proceed to make a fresh assessment in accordance with the provisions of Rules 38 and 39 as the case may be:

Provided that the assessing authority of its own motion may also reopen the assessments made on the basis of best judgment if it has sufficient reasons to do so.

41. Assessment of royalty incorrectly assessed.--(1) If for any reason, the whole or any part of despatches of mineral from the leased area or consumption of mineral within the leased area, escaped royalty or was assessed at a low rate in any year, the assessing authority may serve a notice upon the assessee in the Form No. 13 and may proceed to assess or reassess the correct amount of royalty.

Provided that nothing in this sub-rule shall be deemed to prevent the assessing authority from making an assessment to the best of its judgment.

(2) No notice under sub-rule (1) above shall be issued in respect of despatch and consumption of mineral for any year after expiry of five years from the date of relevant assessment:

Provided that this rule shall not apply for any assessment or re-assessment made in consequence of or to give effect to any finding or direction contained in an order of appeal or revision or in an order of any competent Court.

42. Delegation of Powers.--The State Government may, by notification in the official Gazette direct that any power exercisable by it under these rules may in relation to such matters and subject to such conditions, if any, as may be specified in the notification be exercisable also by such officer or authority subordinate to the State Government.

43. Appeal.--(1) Any person aggrieved by any order of the Superintending Mining Engineer, Superintending Mining Engineer (Vigilance), Mining Engineer (Vigilance), Mining Engineer or Assistant Mining Engineer passed under these rules shall have the right of appeal to the Director.]

(2) Any person aggrieved by any order passed in appeal under sub-rule (1) or

any other order passed by the Director under these rules shall have the right of appeal to the Government.

(3) Any person aggrieved by any order of the Director by virtue of the powers delegated or otherwise exercised under these rules on the matters mentioned in sub-rule (1) shall have the right of appeal to the Government.

(4) The orders passed by the Government in appeal shall be final.

44. Form of Appeal and Fees.--(1) An appeal under Rule 43 shall be in the form of memorandum of appeal in duplicate numbered in paragraphs stating concisely and precisely the grounds of objection and relief demanded.

(2) The memorandum of appeal shall be accompanied by a challan of [Rs. 2000/-] deposited as fee in the Government treasury under the [relevant] head of Account.

45. Limitation.--An appeal under Rule 43 shall be filed within three months of the date of [communication of] the order appealed against:

Provided that an appeal may be admitted after the said period if the appellant satisfies the appellate authority that he has sufficient cause for not filing the appeal within the said period.

46. Procedure of appeal.--(1) Upon receipt of memorandum of appeal satisfying requirement of Rules 44 and 45 the appellate authority shall fix a date for hearing. It may, if it thinks fit, call for the relevant records and other information from the officer whose order is the subject of appeal.

[Provided that the concerned Mining Engineer/Assistant Mining Engineer shall send the parawise comments factual report and relevant record of the case within 30 days from the receipt of intimation of appeal in his office.]

(2) The appellate authority may confirm/modify or set aside the order under appeal, after giving the appellant an opportunity of being heard and considering any comments that might be offered by the officer who gave the order under appeal.

47. Revision.--(1) The State Government in respect of any order, whether in appeal or otherwise passed under these rules by the Director, [/Additional Director (Mines),/Superintending Mining Engineer, (Superintending Mining Engineer (Vigilance), Mining Engineer (Vigilance),] Mining Engineer, or Assistant Mining Engineer may on an application by an aggrieved party made within 3 months of [communication of] such order in this behalf or of its own motion call for and examine the connected records for the purpose of satisfying itself as to the correctness, legality or propriety of the order and may confirm, modify or rescind such order:

Provided that an application for revision may be admitted by the Government after the said period of 3 months if the Government is satisfied that the applicant

had sufficient cause for not filing the revision application in time.

(2) Every application for revision shall be made in Form No 14 in duplicate and shall be accompanied by a treasury challan of [Rs. 2000/-] deposited as fee in the Government Treasury under the [relevant] head of Account.

10. Having heard the learned counsel for the parties at length, this Court is of the opinion that the best judgment assessment in these circumstances by the Assessing Authority, namely, Assessing Mining Engineer, Rishabhdeo, was perfectly justified. Over a period of one month, 8 trucks were checked by the authorized officer of the Mining Department, and on all the occasions, difference in weight at the private weigh-bridges at Rishabhdeo, the slips of which were produced by the assessee along-with his returns compared with the weight at Sukher Industrial Area, which weight was taken under the supervision of authorities of the Mining Department, such difference as given out in the show cause notice, as quoted above, is prima-facie huge; and this, prima-facie, even established the tendency of the petitioner; assessee to disclose the under-weight of the mineral excavated by him and transported through the authorized check post.

11. It is not a case of solitary difference of weight, which was found once as a stray case, but it appears to be a consistent practice of the petitioner-assessee. The re-assessment of past four years, the permissible period of such re-assessment as per the limitation prescribed under Rule 41, quoted above, could very well be made on the said basis. Obviously, the past transactions of carrying such mineral excavated could not be weighed again by the Assessing Authority after such discrepancies were found for which the show cause notice was served on the petitioner assessee.

12. It also well settled that best judgment assessment in such circumstances for the past period covered within the period of limitation, is justified and no valid exception to the same could be taken. The very reason of passing of the best judgment assessment arose because the record including the weighment slips of the private weigh-bridges produced by the petitioner along-with his returns could not be obviously relied upon and that is why, the best judgment assessment was undertaken by him and royalty so.

13. In the case of Kailash Talkies Vs. State of Rajasthan and Another, this Court held in a case of entertainment tax evasion by a cinema theatre, who ran duplicate series of ticket books, while upholding the revisional order, against the best judgment assessment order of assessing authority in para 24 and 25 as under:--

24. The last submission of the learned counsel for the petitioner before me is to the effect that the best judgment assessment passed by the Assessing Authority in present case is rather worse judgment assessment. In support of the aforesaid argument, learned counsel invited my attention towards the factual controversy involved between the parties. Suffice it to say, that this Court in exercise of its

extraordinary jurisdiction under Art. 226 of the Constitution of India cannot afford to enter into the factual controversy involved between the parties. As a matter of fact, the factual controversy cannot be gone into under Art. 226 of the Constitution of India, therefore, I am unable to enter into the factual controversy involved between the parties.

25. The revisional Court has recorded a categorical finding of fact on the basis of material available on record that the petitioner was issuing tickets from two series with the object of evading tax. The explanation that the different series was used because the rate were not fixed and new tickets were not got printed, is found by the revisional Court neither logical nor worth credence. In the appellate order itself, it is admitted by the appellate authority that the ticket books, which were used up to 29.8.88 were got authenticated, The Appellate Authority has failed to consider that those ticket books, which were got authenticated, were not exhausted and still tickets in those ticket-books were left, which could meet the immediate requirement of the petitioner. In my considered opinion, the basis given by the Appellate Authority that on the day of survey, no additional person was found, is not a proper explanation. As a matter of fact, the authentication with the object of prevention of tax evasion if non-use of authenticated tickets is lenient viewed, the object of prevention of tax evasion would be trusted. The petitioner has also deliberately avoided to produce authenticated records which were authenticated by the Assessing Authority either before the Assessing Authority at the time of assessment or before the revisional Court. Number of notices had been issued to the petitioner by the Assessing Authority but he always preferred to remain absent except on one or two occasions. The revisional Court has not committed any manifest error of law in drawing adverse inference against non-production of material documents in support of his explanation which were in the custody of the petitioner.

14. The Division Bench of Gujarat High Court also similarly in a case of cinema house repelled almost similar contentions, as are being raised before this Court in the present case. The relevant portion of the said judgment, which this Court would respectfully follow, in the case of Hanjar Cinema Vs. State of Gujarat, held as under:--

Facts:

2.1. The petitioner cinema theater (who has filed the petition through its administrator) is liable, under the provisions of Gujarat Entertainment Tax Act, 1977 (hereinafter referred to as the "Act"), to pay entrainment tax, in the manner and at the rate and within time tune prescribed under the Act and the rules framed thereunder

2.2. Upon having received report about irregularities being committed in the matter of entertainment tax with a view to avoiding tax liability, the respondent authorities examined the matter and found discrepancies in the details declared in the prescribed form No. 17 and the rate of tickets printed on the tickets and

the actual amount which was being charged from the cine-goers. Therefore, an employee of the respondent authority attended first show on 9.12.1998 of a film being run in the petitioner theater. He purchased two tickets of upper stall bearing No, 10900 and 11016. He was required to pay Rs. 12/- per ticket whereas the rate printed on the said tickets was Rs. 8/- per ticket.

2.3 Thereafter; further inquiries were made which included the inquiry about the printing press where the tickets were being printed. Another round of inspection was carried out on 23.12.1998 when it was noticed that though the tickets for balcony were being sold at Rs. 15/- per ticket and the upper stall tickets were being sold Rs. 12/- per ticket, the rates mentioned in the tickets was old rate which reflected the rate at Rs 8/-.

2.4 In pursuance of such information, the authority asked the petitioner to furnish the details pertaining to the changes in the rates effected by the petitioner from time to time during the period from 7.04.1998 to 21.12.1998.

Arguments of Assessee's Counsel:-

3. Mr. M.B. Gandhi, learned advocate has appeared to the petitioner. Though, all conceivable contentions against the impugned orders, including the ground of non-application of mind, arbitrariness, violation of principle of natural justice, lack of jurisdiction etc. have been stated in the petition memo, the learned advocate has restricted his grievance essentially on only two grounds viz (a) since the last checking was carried out on 18.10.1988, the impugned demand and recovery for period prior to the said date is not justified and the petitioner cannot be asked to make payment of tax for period prior to the date of the last checking; (b) on the strength of tickets of one show, and that too only of upper stall, the difference for entire capacity for period of more than three months cannot be raised.

Decision of Court:--

10. The contention raised by the petitioner ignores the fact that in present case the assessment is made in exercise of Sec. 9 of the Act and that too on the basis of the returns filed by the petitioner and not merely on the basis of tickets purchased by the employee on 09.12.2008 and/or not merely on the basis of the last date of checking but the demand is raised upon the authority being satisfied that it was due to misstatement and suppression of relevant facts the assessment had escaped as a result of which the tax was not paid and/or was not levied and collected at the rate of which it should have been paid and/or levied and collected. Therefore, in the facts of the case, the said orders relied upon by the learned advocate would not be applicable.

It is clear that Sec. 9 of the Act and Rule 15 of the Rules framed under the Act, authorizes the competent authority upon being satisfied that any assessment has escaped or tax has been levied and collected the rate lower than the rated which tax should have been paid to assess, to the best of his judgment, the tax due

and demand the payment. The provision not only permits assessment but also reassessment for past 3 years. Thus, even completed assessment can be revisited. The provision also expressly authorizes the authority to make such assessment in respect of period past three years, and neither provides nor contemplates, even impliedly, any restriction other than of short of the limit prescribed by the rules and that therefore, in such cases, any restriction much less the restriction of not traveling beyond the last date of inspection cannot be read into the provision. An attempt to read such restriction into the provision would amount to adding words which is impermissible. Further, such construction i.e. reading restriction into the Section would render the term reassessment, nugatory. In present case, the notice and the order make it clear that the demand was raised under the provision of Sec. 9 of the Act and that therefore, the contention of the petitioner is not sustainable.

11. It emerges from the impugned orders that the authorities detected several discrepancies and anomalies between the rates actually charged/collected by the petitioner vis-?-vis. the detailed mentioned in the form No. 17 and in the accounts maintained by the petitioner, The last date of checking in the facts of present case cannot be equated with the assessment or reassessment procedure contemplated under Sec. 9 of the Act undertaken in present case.

12. It emerges from the record that the assessment is based on documentary evidence placed before the authority. It has been concluded that in several instances though intimations about reduction in rates were given, actually any reduction was not made and the original the rate i.e. rate higher than the rate intimated to the authority was charged and collected whereas in certain cases rate higher than the rate printed on the tickets was charged and intimation about the increased was given subsequently and thereby, actual payment of entertainment tax required to be made was avoided and entertainment tax was paid at lesser rate or was not paid. Such findings of facts do not deserve to be and cannot to be interfered with in exercise of writ jurisdiction, more so when it calls for reapplication of evidence and also to disturb concurrent orders passed by three authorities.

13. The learned counsel for the petitioner has not been able to demonstrate that the findings of the facts and the conclusions are not based on and supported by evidence and are perverse. The contentions raised by the learned counsel for the petitioner have been made on the premise that the demand came to be made only on the basis of the visit by the employee on 9th December, 2008 who purchased of two tickets of upper stall on the said date and the said contentions overlook the facts that the demand in question came to be made upon being satisfied about assessment having escaped (due to misstatement and/or suppression) as a result of verification and assessment of accounts in exercise of the power under Sec. 9 of the Act, which permits such assessment as well as reassessment for escaped payments for period upto last three years.

13.1 In this view of the matter and in light of the facts of the case, we do not

find any merits in the challenge against the impugned orders when findings of facts and conclusions by the adjudicating authority are examined and reappreciated by two authorities i.e. appellate and revisional authorities who after close scrutiny confirmed the findings. In exercise of jurisdiction under Art. 227 of the Constitution, do not see any reason to interfere with the concurrent orders. The petitioner has failed to show any material to hold that the findings are perverse. We also do not find any justification to interfere with concurrent orders and findings of facts, Further, in absence of any apparent error of jurisdiction we are not inclined to disturb such concurrent orders.

Therefore, both these judgments in the case of evasion of entertainment tax in similar circumstances deserves to be followed in the present case of evasion of royalty in mining case as well and the principles enunciated therein, fully apply here as well.

15. The scope of the revisional jurisdiction is apparently limited one and is circumscribed by the words "satisfying itself as to the correctness, illegality or propriety of the order", therefore, unless the revisional authority would satisfied that the impugned order is incorrect, illegal or improper or lacks propriety, the revisional authority cannot interfere with the impugned order before it in revisional jurisdiction under Rule 47 of the MMCR, 1986.

16. The power of revisional authority to confirm, modify or rescind such order would naturally, therefore, be governed by the words "correctness, legality or propriety of the order" preceding these words. There is no quarrel in the present case that the Assessing Authority had given due and reasonable opportunity of hearing to the petitioner assessee by giving this show cause notice (Annex.5) dt. 27.10.1999, to which the petitioner-assessee himself filed a detailed reply and produced the relevant record before the Assessing Authority, which was duly examined by him; and thereafter only the re-assessment order (Annex. 7) was passed by the Assessing Authority on 11.05.2000 raising the demand in question.

17. Learned counsel for the petitioner also submitted that since the impugned re-assessment order was passed with the approval of higher authority in Directorate vide Letter No. 808 dt. 28.08.1999, referred to in the impugned show cause notice Annex.5 dt. 27.10.1999, therefore, the petitioner stood advised to avail the revisional jurisdiction before still a higher authority, namely, the State Government or the Deputy Secretary, Mines, State Government, while the regular remedy by way of appeal under Rule 43 lies before the Director of Mines. Neither the said letter No. 808 dated 28.08.1999 is placed on record so as to ascertain as to whether such a letter could at all interference with the discretion of the appellate authority under Rule 43 or not: nor it appears from the perusal of the impugned re-assessment order itself that the same was passed at the behest or with the approval of the higher authority, namely, the Director, Mines. The reference of said letter No. 808 dt. 28.08.1999 in the impugned show cause notice Annex.5 dt. 27.10.1999, prima-facie, could not prevent the availing of remedy by way of appeal before the Director, Mines. It appears that the

impugned show cause notice itself was issued with reference to the said letter calling upon the petitioner to show cause as to why re-assessment of the royalty be not done in view of details of discrepancies found in the weight of mineral excavated and transported by him; and therefore, on account of internal administrative approval of undertaking necessary re-assessment procedure, could not have barred the availment of regular remedy by way of appeal.

18. Be that as it may, since the two remedies were simultaneously available to the petitioner viz, by way of appeal under Rule 43 and revision under Rule 47, it was a matter of his choice. Though the appellate jurisdiction naturally is of wider amplitude and the powers of the appellate authority, obviously are co-extensive with that of the Assessing Authority, a wider and closer scrutiny of the record could be made by the appellate forum as against which the remedy with the narrower scope by way of revision was chosen by the petitioner. To this Court, it clearly appears that the revisional authority acted fully with its parameters of the powers delineated under Rule 47 of the MMCR, 1986, quoted above, and as justifiably found that there was no illegality or impropriety in the impugned re-assessment order, the same deserved to be upheld and no interference with the same was called for. The rejection of the revision petition therefore, without summoning the record of the Assessing Authority cannot be to be faulted and on this ground alone as contended by the learned counsel for the petitioner-assessee, the revisional order cannot be set aside.

19. Moreover, this Court finds considerable force in the contention of the learned counsel for the Mining Department that in view of difference of royalty amount having already been deposited by the petitioner-assessee (lessee), in the circumstances of the case, obviously no mandamus can be issued to refund back the amount of royalty which stands paid by the petitioner-assessee at this stage, nor this Court finds any justification for remanding the case back to the revisional authority itself for examining the record of the assessee in the aforesaid circumstances. In view of above discussion and observations, both the writ petitions filed by the petitioner are hereby dismissed with no order as to costs. A copy of this order be sent to the concerned parties forthwith.