

(1986) 02 MP CK 0011

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 2868 of 1984

Babulal Agarwal

APPELLANT

Vs

Commissioner of Sales Tax and Others

RESPONDENT

Date of Decision : 18-02-1986

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (1987) JLJ 224 : (1986) 31 MPLJ 398 : (1986) MPLJ 398 : (1987) 66 STC 164

Hon'ble Judges : J.S. Verma, Acting C.J.;B.M. Lal, J

Bench : Division Bench

Advocate : H.S. Shrivastava, for the Appellant; M.V. Tamaskar, Additional Advocate-General, for the Respondent

Final Decision : Dismissed

Judgement

B.M. Lal, J.

This is a petition under Articles 226 and 227 of the Constitu-tion of India.

The petitioner, a registered dealer under the Madhya Pradesh General Sales Tax Act, 1958 (hereinafter referred to as the "Act") is challenging the validity of the orders passed by respondent No. 2, Divisional Deputy Commissioner of Sales Tax, Bilaspur, contained in annexures F-1 and F-2 dated 23rd April, 1984.

The facts leading to this petition are as under: The petitioner-firm carries on business of quarry lease at villages Nawalpur and Kathari in Bilaspur District by manufacturing metal (gitti) by stone-crusher. According to him the year of assessment is from Diwali to Diwali. The firm had filed all the quarterly returns for Diwali ending 1980-81, but did not file any return for the period after Diwali,i.e., 1980-81 and 1981-82.

On 18th December, 1981, the place of business of the petitioner was raided by the Sales Tax Flying Squad and during the raid certain incriminating documents,

i.e., registers, lease papers, loose bills, passes issued to the truck drivers for transport of material, etc., were seized.

The Sales Tax Officer of the Flying Squad on the basis of the seized documents estimated the sales for the year 1980-81 at Rs. 4,37,119.65 and that for the year 1981-82 at Rs. 61,298,00 and recommended for assessment.

On the basis of the best judgment assessment u/s 18 of the Act, the taxable turnover was assessed at Rs. 4,50,000 for the period 1980-81 and Rs. 2,30,000 for the period 28th October, 1981 to 23rd April, 1982 and as such penalty of Rs. 30,000 u/s 43(1) of the Act for concealment of the turnover income and for the period 1980-81 an amount of Rs. 15,000 was imposed. Similarly, penalty u/s 17(3) of the Act for not furnishing return in time for first default Rs. 125 and for second default Rs. 1,500 was also imposed by the Sales Tax Officer, Bilaspur, by his two separate orders dated 31st March, 1983, against which the petitioner, instead of preferring appeals, filed revisions before respondent No. 2 who by his orders dated 23rd April, 1984 (annexures F-1 and F-2) maintained the assessment and penalty except reducing the penalty of Rs. 1,500 to Rs. 1,000.

Against these two orders (annexures F-1 and F-2) passed by respondent No. 2, the present petition has been filed.

Shri H.S. Shrivastava, learned counsel appearing for the petitioner, submitted that (i) while making assessment by the Sales Tax Officer, no opportunity was given to the petitioner and behind its back the assessment was made and in this connection submitted that Dayanand was not acting as an agent/ manager duly appointed by the petitioner and, therefore, any service of notice effected on him by the department, will not be deemed to be valid service of notice on the petitioner; (ii) that penalty under both the provisions, i.e., u/s 17(3) and Section 43(1) of the Act, cannot be imposed simultaneously, specially in an admitted position that the petitioner-firm has not submitted return and under such circumstances the question of concealment of taxable turnover does not arise; and (iii) that the assessing authority committed an error of law in including the transportation charges of the material in the total turnover of sale price.

On the other hand, the learned counsel Shri M.V. Tamaskar, Additional Advocate-General, appearing for the respondents, while supporting the orders passed by the respondents submitted that the petitioner-firm has made false averments based on affidavit and suppressed the material facts, therefore, the petitioner is not entitled to get any relief by invoking the extraordinary jurisdiction of this Court.

After hearing the rival contentions of the parties, we have reached the conclusion that this petition must be dismissed.

As regards the first contention of the petitioner regarding not affording opportunity to the petitioner and behind its back assessment was done, it appears from the perusal of the record that the proceedings for assessment for

the period 1980-81 and 28th October, 1981 to 23rd April, 1982, were started on 25th August, 1982 and completed on 31st March, 1983 for which a notice was given to the petitioner for appearance and after receiving the same, its proprietor Babulal Agarwal appeared on 30th September, 1982 and sought an adjournment. The next date was fixed for 18th October, 1982 but instead of furnishing any explanation, he remained absent. However, the department again issued a memo dated 19th October, 1982 asking him to appear on 27th November, 1982. This memo was received by the father of the proprietor, Shri Jwala Prasad on 21st November, 1982. On this date Babulal's real brother Dayanand who was also acting as his manager, appeared and took a date for 27th December, 1982, stating that his brother Babulal had gone to Delhi; On 27th December, 1982 the proprietor himself appeared and took a last chance for filing explanation against the show cause notice. The case was again adjourned for 31st December, 1982. On this date neither he appeared nor did he send any intimation. The department again by affording sufficient opportunity issued a fresh show cause notice on 31st December, 1982 and fixed the case for 18th January, 1983 on which date the proprietor appeared and again took time and then the case was adjourned to 3rd February, 1983. Again, on 3rd February, 1983 the proprietor remained absent. However, the department again issued a show cause notice fixing the case for 23rd March, 1983, but the same was received unserved and, therefore, the department repeated the notice for 31st March, 1983. This notice was received by his real brother Dayanand who was also looking after the business as the manager of the petitioner-firm. On 31st March, 1983 none appeared on behalf of the petitioner. Thus, under the compelling circumstances, after giving the opportunities to the petitioner-firm, the case was closed on 31st March, 1983 and it was on 11th April, 1983 the Sales Tax Officer passed the orders, vide annexures C-1 and C-2, assessing tax to his best of judgment and also imposed fine/penalty u/s 17(3) and Section 43(1) of the Act, as stated aforesaid.

Therefore, from the aforesaid facts it does not lie in the mouth of the petitioner to say that no opportunity was afforded in assessment proceedings; on the other hand, it is clear as daylight that it is the petitioner which had not co-operated with the department in assessment proceedings. Therefore, we are of the opinion that full opportunity was given to the petitioner but its proprietor deliberately on one pretext or the other, for the obvious reasons, remained absent.

As to the point that Dayanand was not an authorised agent or manager of the petitioner and the service of notice effected on 26th March, 1983 on him for appearance on 31st March, 1983, was not a valid service on the petitioner-firm, the proprietor of the petitioner-firm, Babulal Agarwal, admitted in his statement (annexure R-6) that-

*Mai Babulal Agarwal, S/o Shri Jwala Prasad Agarwal, umra 35 varsh sahi sahi bayan kartha hun ki mere manager Shri Dayanand ki upasthiti men vikraya kar adi. u. da. ko janch ke dauran men apne crusher men pahuncha.

Similarly, Dayanand made his statement on the same day (vide annexure R-4) that-

*Mai Babulal Agarwal ko nam se jyanth crusher ko vyavasayi ka manager hun.

Despite the aforesaid statements, the proprietor of the petitioner-firm has made a false statement of fact on oath in the petition that Dayanand was not manager or agent of the petitioner-firm. From these averments in the petition it appears that the proprietor of the petitioner-firm has no respect for the truth at all. We shall deal with this aspect after discussing the point raised by the petitioner, in the succeeding paragraphs.

As regards third point that no imposition of penalty could be made simultaneously under both the provisions, i.e., Section 17(3) and Section 43(1) of the Act, while making this submission the petitioner failed to point out any legal impediment to this effect that penalty under both the provisions could not be imposed.

Section 17(3) of the Act lays down:

17. Returns.-(1)...

(1-A)...

(2)...

(3) If-

(a) a dealer fails without sufficient cause to comply with the requirements of a notice issued under Sub-section (1); or

(b) a registered dealer...

(c) a registered dealer fails to furnish return,

the Commissioner may, after giving such dealer a reasonable opportunity of being heard, direct him to pay, by way of penalty-

(i) in the case referred to in Clause (a), in addition to any tax payable by him a sum not exceeding fifty rupees for each occasion of default, subject to a maximum of five hundred rupees in each case ;

(ii) in the cases referred to in Clause (b)...

(iii) in the case referred to in Clause (c), a sum not less than 15 per cent and not exceeding 35 per cent of the tax assessed.

Section 43(1) of the Act runs thus:

43. Power of Commissioner or appellate authority to impose penalty.-(1) If the Commissioner or the appellate authority in the course of any proceedings under this Act is satisfied that the dealer has concealed his turnover or the aggregate amount of purchase prices in respect of any goods or has furnished inaccurate

particulars of such sales or purchases, as the case may be, or furnished a false return, the Commissioner or the appellate authority, as the case may be, after giving the dealer a reasonable opportunity of being heard, may direct that the dealer shall, in addition to the tax payable by him, pay by way of penalty a sum, which shall not be less than 20 per cent but shall not exceed one and one half times the amount of the tax, if any, which would have been avoided if the returns furnished by the dealer had been accepted as correct or the concealment of the sales or purchases or inaccurate particulars of sales or purchases had not been detected.

(2) If the total tax...

Thus, this position is not disputed that the petitioner-firm being a registered dealer under the Act, has not complied with the mandatory requirement of Section 17(3)(c) of the Act and in this way the petitioner-firm has made itself liable to be penalised u/s 17(3)(c)(iii) of the Act and so also u/s 43(1) for concealment of turnover.

In best judgment assessment, where the return has not been filed, the moment it is found that the dealer has transacted business and his turnover is taxable, then the provisions of Section 43 (1) of the Act are attracted and penalty can certainly be imposed. The provisions of both sections, i.e., Section 17(3) and Section 43(1) of the Act are quite independent of each other. In case of non-filing of return Section 17(3)(c) is attracted and even in best judgment assessment u/s 18(4) of the Act, if total turnover is found to be taxable, then the element of concealment of turnover would be there and penalty u/s 43(1) of the Act, could independently be imposed apart from the imposition of penalty u/s 17(3) of the Act. Therefore, we do not see any illegality or irregularity in the imposition of the two penalties.

In this context, the Division Bench of this Court while relying on "the ratio laid down by their Lordships of the Supreme Court in Jain Bros. and Others Vs. The Union of India (UOI) and Others, and The Commissioner of Income Tax, West Bengal 1, Calcutta Vs. Vegetables Products Ltd., , held in Jawaharlal Ramcharan v. Sales Tax Officer, Circle Bhopal [1978] 41 STC 459, that both the provisions, i.e., Section 17(3) and Section 43(1) of the Act are attracted mutatis mutandis in the case of imposition of penalty. Therefore, in our opinion, there is no substance in the argument that under both the provisions, penalty could not be imposed simultaneously, or, since the return is not filed, therefore, no penalty could be imposed u/s 43(1) of the Act.

Lastly, it contended that transport charges have been wrongly included in the total turnover. The learned counsel submitted that according to the definition of "sale price" given in Section 2(o) of the Act, at the relevant time, the transportation charges when charged separately in the bills, the same cannot be included in the sale price of the goods (gitti) and hence, the freight charges had to be excluded from the sale price of gitti. It is further submitted that the

delivery of the metal was given at the stone-crusher site, for which the rate was much lower and thereafter it was transported to its destination at purchaser's cost. But, in assessment the rates of sale have been adopted inclusive of transport charges, which is illegal.

In our opinion, there is no foundation to advance this argument. On the other hand, the rates are given in the loose account books which were seized by the Flying Squad and those rates do not give any indication that cost of "gitti" has been charged separately or that the delivery was given by the site of the stone-crusher and thereafter it was transported and transport charges have been included in the sale price of gitti. In the return filed by the respondent, vide para 21 thereof, in reply to para 6 of the petition, it has been specifically stated that the bill books are in the possession of the petitioner-firm and it may be asked to produce the same before this Court. Long back, the petitioner had received copy of the return, but despite that neither the bill books have been produced nor has any counter reply been filed that it is not in possession of any bill book. Therefore, in our opinion, there is no substance in the petitioner's contention that the transport charges have been included in the sale price of the gitti; otherwise it would have definitely produced the bill books either before this Court or before the revisional authority.

The averments made in the petition, the reply thereto and the documents filed by the respondents demonstrate that the petitioner appears to have acted in a dubious manner, inasmuch as against the order of the Sales Tax Officer, appeal u/s 38 of the Act has been provided, but instead of preferring an appeal, a revision was filed, to avoid deposit of tax and penalty amount as per Section 38(3) of the Act. But despite that the revisional authority, i.e., respondent No. 2, had entertained the revision and decided it on merit. In such cases, where appeal is provided, the revisional authority should be slow to entertain the revision petition so that by circumventing the mandatory provisions of appeal, which are of stringent in nature, the party concerned may not misuse the provisions of Section 39 of the Act.

This is not all. The petitioner-proprietor, Babulal Agarwal, who it appears from the statement in the petition and the return filed by the respondent, has expertised himself in making false statement on oath. He has stated that Dayanand, his brother, was not the manager, whereas, as stated, he himself had admitted on 18th December, 1981, that he was his manager. Similarly, he made a very emphatic statement that no opportunity of being heard was afforded to him before the Sales Tax Officer, whereas the record demonstrates that full opportunity was given, but he deliberately avoided to appear before the Sales Tax Officer. For invoking extraordinary jurisdiction of this Court under Articles 226 and 227 of the Constitution of India, it is a fundamental principle that one should come with clean hands without suppressing the material and relevant facts and also not to make false statement on oath and if such things are discovered at the time of the final hearing, then, not only the petition deserves

to be dismissed but also, in such circumstances, the petitioner makes himself liable to be prosecuted for making false statement on oath, which is, in law, receivable as evidence.

In the instant case, as stated earlier, the proprietor of the petitioner-firm is the author of making false statements on oath in the petition and his statements, as stated, are wholly false and inspired by vexatious motive. Therefore in such a case deterrent action is warranted. However, we think that instead of directing proprietor Babulal Agarwal's prosecution, awarding of exemplary cost which would be an eye-opener to others, would meet the ends of justice;

From the discussion aforesaid this petition fails and is hereby dismissed with costs. We further direct that apart from bearing ordinary costs, the petitioner shall pay exemplary cost Rs. 1,000 (one thousand) which shall be payable to the department. Counsel's fee Rs. 750 if certified. The security amount, if any, shall be refunded to the petitioner.

*Words in hindi are transliterated in English.