

(1998) 06 PAT CK 0007
In the Patna High Court
Case No : C.W.J.C. No. 9473 of 1988

Bharat Sugar Mills Limited and Another	APPELLANT
Vs	
The State of Bihar and Others	RESPONDENT

Date of Decision : 29-06-1998

Acts Referred:

Agricultural Produce Markets Act, 1960 — Section 27, 27A, 27AA, 27AA(8), 29
Bihar Agricultural Income Tax Act, 1948 — Section 19(2), 29
Bihar Agricultural Produce Markets Rules, 1975 — Rule 82
Limitation Act, 1963 — Article 113, 136, 23

Citation : (1998) 3 PLJR 262

Hon'ble Judges : D.S. Dhaliwal, J;Aftab Alam, J

Bench : Division Bench

Advocate : Y.V. Giri, Jyoti Saran and M.N. Parbat, for the Appellant; R.B. Mahto and A.K. Keshri for Board and S.D. Yadav and N.K. Prasad, for the Respondent

Judgement

Aftab Alam and D.S. Dhaliwal, JJ.—These ten writ petitions, filed at the instance of three sugar mills, are inter-related and arise from the same set of facts and circumstances. These writ petitions were, therefore, heard together and are being disposed of by, this common judgment.

2. Bharat Sugar Mills Limited (in CWJC No. 3982 of 1988), M/s. Vishnu Sugar Mills Limited (in CWJC No. 4464 of 1988) and M/s. Sasa Musa Sugar Works Private Limited (in CWJC No. 7137 of 1988) came to this Court seeking a declaration that the provisions of the Agricultural Produce Markets Act, 1960 (hereinafter to be referred as "the Act") in-their application to sugar industry, were ultra vires the provisions of the Constitution, illegal and inoperative; another relief which was sought vaguely was a direction to refund the market fees (without indicating the exact amount) realised from the Petitioners. No notice(s), order(s) or demand(s) came under challenge in those three writ petitions as filed originally.

3. At this stage, it may be noted that long before the filing of these three writ

petitions in the year, 1988, the Market Committee, Gopalganj on 31.1.1984 had issued a notice (Annexure "A" to the counter affidavit in CWJC No. 9936 of 1992) to M/s. Vishnu Sugar Mills Limited initiating an assessment proceeding for the market fees payable for the years, 1975-76 to 1982-83. Similar notices were sent to the other two sugar mills as well on or about the same date. In the proceedings thus initiated, assessment orders were finally passed (in the case of Vishnu Sugar Mills Limited on 15.2.1988, in the case of Sasa Musa Sugar Works Private Ltd. on 14.3.1988 and in the case of M/s. Bharat Sugar Mills Limited on 8.4.1988) determining the liability of the three sugar mills to pay market fee, along with penalty, for the years, 1978-79 to 1982-83 on the purchase of sugar canes made by them. It is, thus, to be seen that though the assessment orders too were finally passed before the filing of the three writ petitions, those orders were not brought on record along with the writ petitions originally filed, to be assailed before this Court.

4. M/s. Bharat Sugar Mills Limited, however, filed a separate writ petition being CWJC No. 9473 of 1988, seeking to challenge the assessment order, dated 8.4.1988 determining its liability to pay market fee, along with penalty, on the sugar canes purchased by it during the years, 1978-79 to 1982-83. In this writ petition, it also challenged the demand notice, dated 11.4.1988 issued on the basis of the assessment order.

5. M/s. Sasa Musa Sugar Works Private Limited did not file any separate writ petition to challenge the assessment order passed against it. It, however, filed a stay petition in the writ petition earlier filed by it (CWJC No. 7173 of 1988) bringing on record the assessment order, dated 14.3.1988. Still later it filed an amendment petition praying to be allowed to challenge the assessment order passed against it.

6. From the Court's record it appears that M/s. Vishnu Sugar Mills Limited neither brought on record the assessment order (dated 15.2.1988) passed against it nor did it make any formal prayer, in CWJC No. 4464 of 1988, to be allowed to challenge the assessment order.

7. Though the Petitioners in these three writ petitions were able to obtain some interim orders from this Court concerning the realisation of market fee on the sale of sugar manufactured by them, this Court did not pass any order staying the operation either of the assessment orders passed against them or the demands issued on the basis of those orders. In the absence of any stay order, the authorities under the Act initiated proceedings under the provisions of the Bihar and Orissa Public Demands Recovery Act for the realisation of the market fee payable by the three sugar mills on the purchase of sugar canes for the years, 1978-79 to 1982-83 and certificates against them were filed on 12.12.1989. The Petitioners tried to resist the certificate proceedings primarily on the ground of limitation. The Certificate Officer by order dated 20.8.1990 upheld the Petitioners' objection partially. He took the view that Sub-section (Ka) of Section 27AA of the Act allowed the assessing authority to go back for a period

not exceeding six years. Taking then the dates of the assessment orders (15.2.1988, 14.3.1988 and 8.4.1988) as the point of reference he found and held that the years 1978-79 and 1979-80 fell beyond the six years period of limitation and the market fees for those two years, therefore, were not recoverable from the three sugar mills. As regards the years, 1980-81 to 1982-83 the Certificate Officer held that there was no legal impediment in making recovery of the market fees for those years from the three sugar mills.

8. Against this order passed by the Certificate Officer, appeals were preferred both by the Market Committee and the three Petitioners. The six appeals were disposed of by a common order dated 18.9.1990 passed by the Collector, Gopalganj in his capacity as the appellate authority under the Public Demands Recovery Act. The appellate authority also took the dates on which the assessment orders were passed as the material date for calculating the period of limitation. He, however, left aside Section 27AA of the Act and strayed into the provisions of the Indian Limitation Act. He rejected the Petitioners' claim that the demand for the entire period was barred by limitation by virtue of Article 23 or Article 113 and went on to hold that the demands against the Petitioners would be governed by Article 136 of the Schedule to the Limitation, Act, providing for a period of limitation of 12 years. Thus saving the demands for the entire period (1973-79 to 1982-83) the appellate authority allowed the three appeals preferred. by the Market Committee and dismissed the three appeals filed by the three Petitioners.

9. This led to the filing of six more writ Petitioner, two each at the instance, of the three Sugar Mills. These are CWJC Nos. 9936 and 9940 of 1992 filed at the instance of M/s. Vishnu Sugar Mills Limited, CWJC Nos. 9937 and 9939 of 1992 filed by M/s. Bharat Sugar Mills Limited and CWJC Nos. 9978 and 9979 of 1992 filed on behalf of Sasa Musa Sugar Works Private Limited. In each of these six writ petitions, the common order dated 18.9.1990 passed by the Collector, Gopalganj In his capacity as the appellate authority under the Public Demands Recovery Act comes under challenge.

10. Before proceeding further, it has to be noted that the Petitioners' challenge to the constitutional validity of the Act in its application to sugar industry stands concluded by a Bench decision of this Court in Delhi Cloth and General Mills Co. Ltd. and Others Vs. The Agricultural Produce Market Committee and Others (to which one of us Aftab Alam, J. was a party). We accordingly declined to hear Mr. Y.V. Giri, learned Counsel for the Petitioners on that aspect of the matter. Following the decision in the case of Delhi Cloth and General Mills and Co. Limited we hold that CWJC No. 3982 of 1988 is to be dismissed in its entirety and CWJC Nos. 4464, 7137 and. 9473 of 1988 in so far as they seek to challenge the constitutional validity of the Agricultural Produce Market Act, 1960. This leaves the Petitioners to assail the demands on the ground of limitation and the assessment orders to the limited extent of imposition of penalty.

11. Mr. Y.V. Giri submitted, with reference to the charging provision contained in

Section 27 of the Act read with Rule 82 (II) of the Bihar Agricultural Produce Market Rules that the liability to pay market fee accrued on the expiry of one week from the date of the sale or purchase of the agricultural produce. He then referred to Articles 23 and 113 of the Schedule to the Indian Limitation Act to contend that the period of limitation for realising the market fee would be three years from the date of accrual of the liability. Mr. Giri submitted that the three years" period of limitation expired long before the assessment orders were passed against the three Petitioners and, therefore, the demands for market fees for the years in question were clearly barred by limitation.

12. In our view the submission is to be noted simply to be rejected for the simple reason that it overlooks the special provisions contained in Section 27A and 27AA of the Act which provide the period of limitation for initiating assessment proceeding to determine market fee the levy of which might have escaped the attention of the authorities. In our considered view the provisions of Articles 23, 113 or 136 of the Schedule to the Indian Limitation Act have no application to these proceedings and the appellate authority mis-directed itself in entering into those provisions to determine the question of limitation for realisation of market fee.

13. Mr. Giri then submitted that even if the provisions of Section 27AA are to be made the basis of calculating the period of limitation, the period of six years from the date of passing of the assessment order would come to an end in the year, 1980-81 and, therefore, the Certificate officer was correct in holding that the demands for the market fees for the earlier two years, 1978-89 and 1979-80 were barred by limitation and non-realisable for that reason. In other words,. Mr. Giri tried to fall back upon the order passed by the Certificate Officer. We find that this submission too suffers from a fallacy and the order passed by the Certificate Officer was to that extent erroneous.

14. In terms of Section 27AA, the relevant date for calculating the period of limitation would not be the date on which the final order of assessment was passed but the relevant date would be the date on which the proceeding was initiated. It is noted above that in the case of M/s. Vishnu Sugar Mills Limited, notice in form "C" was given on 31.1.84 and similar notices were given to the other sugar mills on or about the same date. A plain reading of Section 27AA thus makes 31.1.1984 the relevant date for calculating the period of limitation and not the dates on which the assessment orders were finally passed more than four years later.

15. Having thus determined the relevant date for calculating the period of limitation, the next question that arises for consideration is whether the period of limitation would be six years or four years as provided under the two Sub-sections of Section 27AA of the Act. At this stage, it would be useful to have a look at Section 27AA of the Act which is as follows in Hindi:

16. Sub-section (Ka) of Section 27AA thus fixes a period of six years" limitation

where the assessing authority is satisfied that the trader had concealed, omitted or failed to furnish full details or had filed a return showing a lower amount of transaction. In all other cases the period of limitation as provided by Sub-section (Kha) of Section 27AA is four years. It is not in dispute that none of the three Petitioners had filed any return for the years in question or in fact ever prior to the issuance of the notice.

17. Mr. Ram Balak Mahto, learned senior counsel appearing for the Market Committee in all the cases of this batch strongly argued that non-filing of return would amount to omission and failure to give full particulars on the part of the trader and would, therefore, be fully covered by the provision contained in Sub-section (ka) of Section 27AA of the Act and the period of limitation in these cases would, therefore, be six years.

18. Mr. Giri, however, submitted that the filing of return must be held to be a pre-condition for the application of Sub-section (Ka) of Section 27AA of the Act providing for a period of limitation of six years. In support of his submission, he relied upon a Bench decision of this Court in *Hazari Sah v. Agricultural Income Tax Officer, Sitamarhi and Ors.* 1977 P.L.J.R. 361. In that decision, this Court dealt with a case arising from the Bihar Agricultural Income Tax Act, 1948 Section 29 of which has a similar provision as contained in Section 27AA of the Act. In para 9 of that decision, it was held as follows:

9. It is an undisputed fact that the Petitioner has not filed any return for any of the assessment years in question so much so that he had never been assessed under this Act. We have extensively extracted the relevant provision contained in Clause (a) and the conditions which entitle the Agricultural Income Tax Officer to fall within that provision are, as mentioned in that clause itself, whether the Assessee has (i) concealed, (ii) omitted, (iii) failed to disclose fully the particulars of his income or (iv) has furnished incorrect particulars of such income and thereby returned figures below the real amount. In our considered opinion, any of the four contingencies contemplated by Clause (a) would arise where an Assessee had filed a return, and while doing so, he might have committed any of the four acts mentioned in this clause, namely, had concealed any income (ii) omitted any income, (iii) failed to disclose fully the particulars of income, and (iv) furnished incorrect particulars. Any one of the conditions must appear from the return, if any, that might be filed, and the cases which are not covered by this clause, necessarily are put under the succeeding Clause (b) providing a smaller period of three years limitation. All the above four conditions in the context in which they are used in Clause (a) necessarily contemplate the filing of a return. But that apart, the expression used in this clause is, in our opinion, very explicit, when it says that on account of those omissions or commissions on the part of the Assessee, he had returned a figure of taxable income below the real amount.

19. In our view, the Bench decision of this Court in the case of *Hazari Sah* fully applies to the facts of these cases. Section 29 of the Bihar Agricultural Income Tax Act, 1948 is in pari materia with Section 27AA of the Act which can be easily

seen by re-producing here Section 29 of the Act:

29. Income escaping assessment. Notwithstanding anything contained in this Act, if upon information which has come into his possession, the Agricultural income tax Officer is satisfied that reasonable ground exist to believe that any agricultural income chargeable to agricultural income tax in any year has for any reason escaped assessment, or has not been assessed, or has been under-assessed, or has been assessed at too low a rate, or has been made the subject of excessive relief or deductions under the Act, the Agricultural income tax Officer may:

(a) within six years of the end of that years where he has reasons tq believe that the Assessee has concealed, omitted or has failed to disclose fully the particulars of such income or has furnished particulars of such income and thereby returned figures below the real amount, or

(b) within three years of the end of that year in any other case, serve on the Assessee a notice containing all or any of the requirements which may be included, in a notice under Sub-section (2) of Section 19 and proceed to assess or re-assess such income to tax; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that Sub-section:

Provided that the agricultural income tax shall be charged at the rate at which it would have been charged had the agricultural income been assessed or fully assessed in that year.

20. On a careful comparison of the two provisions, we find that Section 27AA of the Act is in reality a perfect Hindi translation of Section 29 of the Bihar Agricultural Income Tax Act which is an. earlier enactment having its text in English.

21. This being the position, the earlier division Bench decision of this Court constitutes a binding precedent for us and we are bound to follow it regardless of its criticism by Mr. Mahto and notwithstanding certain reservations that we might entertain about it. It must, therefore, be held that the period of limitation of six years as provided under Sub-section (Ka) of Section 27AA would apply only in cases where the trader had filed a return but in other cases, such as the present, where the trader had omitted to file any return, the period of limitation would be four years as provided in Sub-section (Khaj of Section 27AA of the Act.

22. It has been held above that the material date for calculating the period of limitation would be the date on which the assessment proceeding was initiated by issuing a notice to the trader in form "C". That date being in January, 1984, the period of limitation of four years would go back to the year, 1980-81 and any assessment order for the earlier years (i.e., 1978-79. and 1979-80) would, therefore, be barred by limitation.

23. We thus come to the same conclusion as the Certificate Officer but for

different reasons as indicated above.

24. This being the position in law, the authorities under the Act would be required to suitably modify the assessment orders and confine them to the period commencing from 1980-81.

25. We are next called to consider the validity of the assessment orders in so far as the imposition of penalty is concerned. From the assessment order, dated 8.4.1988 passed in the case of M/s. Bharat Sugar Mills Limited, it appears that the assessing authority determined the market fee payable by the Assessee on the sugar canes purchased by it for the period 1978-79 to 1982-83 and simply added to it, by way of penalty, an amount equal to the amount of market fee determined by it. Penalties were imposed against the other two sugar mills in similar manner.

26. The provision of penalty is contained in Sub-section (8) of Section 27AA of the Act which reads as follows:

In addition to the market fee levied under Sub-section (7), a defaulter trader may be liable to pay a penalty equal to the fee so levied, if so ordered by the Sub-Committee.

27. From the scheme of Section 27AA, it is evident that the imposition of penalty is not automatic and the penalty is not to follow as a matter of course in each case of defaulted payment of market fee. There may be cases of default for reasons bonafide and/or beyond the control of the trader and such cases would not attract any imposition of penalty.

28. Section 27AA undoubtedly clothes the assessing authority with the power to impose penalty on defaulted, payments of market fees. This power, however, has to be exercised reasonably and not arbitrarily or mechanically. It is axiomatic that there cannot be any reasonable exercise of power without application of mind and it is therefore imperative that the order imposing penalty should indicate some application of mind by the assessing authority on the question whether the facts and circumstances concerning the default in payment were such as to attract the penalty. The assessment orders passed against the Petitioners do not in the least show any application of mind on the question of imposition of penalty and the amount of penalty has been added purely mechanically.

29. Mr. Giri submitted that the non-payment of market fees by the Petitioners was not an act of defiance and the Petitioners had no intention to flout the provisions of the Market Act. The Petitioners were, however, under the bonafide belief that being engaged, in the industrial production, of sugar they were not covered by the provisions of the Agriculture Produce Market Act. He further stated that at the material time a number of cases between the Sugar Mills (including the three Petitioners) on the one side and the Market Committee on the other were pending in different courts on the question of liability of the Sugar

Mills to pay any market fees. He submitted that it was in those circumstances that the Petitioners had omitted to file returns and to pay market fees held to be payable by them.

30. Mr. Giri further submitted that the Petitioners did not want to indulge in litigation and had no intention to withhold payment of any amount lawfully payable by them to the Market Committee on any frivolous or vexatious plea, in this regard he further submitted that in case the Petitioners were afforded an opportunity of hearing on the limited question of imposition of penalty on the unpaid amount of market fees they would make payment, without any delay, of the entire liability finally determined by the authorities under the Act. Mr. Giri, after consulting his three clients, gave a definite undertaking to the court ;that in case the three Petitioners were afforded an opportunity of hearing and were further given the opportunity to take the matter before the appellate and the revisional authorities, in case the assessing authority decided against them, the Petitioners would make payment of their total liability including the amount of penalty, if any determined by the authorities, within two months from the date of the final determination. Mr. Giri further stated that in that event the Petitioners will not sit over the matter compelling the authorities under the Market Act to take recourse to the provisions of the Public Demand Recovery Act for the realisation of the dues.

31. Having regard to our own finding and in view of the undertaking given by Mr. Giri on behalf of the three Petitioners we find it just and proper that the Petitioners be allowed an opportunity to plead their case before the assessing authority on the limited question of imposition of penalty,

32. It has been held above that the demands of market fees (including penalty) against the Petitioners concerning the years 1978-79 and 1979-80 were beyond, the period of limitation and therefore unrecoverable. At the same, time the demands of market fees concerning the years 1980-81 to 1982- 83 have not been interfered with and thus the amounts of market fees payable by the Petitioners for those years remain undisturbed.

33. On the basis of the aforesaid findings, we dispose of this batch of writ petitions with the following directions:

(i) The Market Committee will modify the assessment orders and issue fresh demands for the years 1980-81 to 1982-83. The demands would be limited to the amount of market fees, keeping the question of imposition of penalty in abeyance for the present.

(ii) The Petitioners, in accordance with the undertaking given on their behalf will make payment of the market fees within one month from the date of receipt of the demand notice.

(iii) As soon as the Petitioners. Make payment of the market fees in pursuance of the demands the assessing authority will afford them an opportunity of hearing

on the question of imposition of penalty and pass a fresh order in accordance with law. The final order on the question of penalty must be passed by the Assessing authority within two months from the date the Petitioners make payment of the market fees in pursuance of the demand.

(iv) In case any of the Petitioners is aggrieved by the order of the assessing authority on the question of penalty it would be open to it/them to file appeal and/or revision, as the case may be, in accordance with law and within the period of limitation provided under the Act.

(v) In case appeal(s) and revision(s) are filed by any of the Petitioners the appellate and the revisional authorities will finally dispose them of in accordance with law, within two months from the date of filing.

(vi) As and when the question of penalty is finally determined by the authorities under the Act, the Petitioners in accordance with the undertaking given to this Court on their behalf will make payment of the penalty amount, if any, within two months from the date of the final determination of that question.

(vii) In view of the orders passed in these writ petitions the proceedings under the three certificate cases i.e. Certificate Case Nos. 1, 2 and 3 of 1989-90 pending in the court of the District Certificate Officer, Gopalganj stand quashed.