
(1996) 04 PAT CK 0015
In the Patna High Court
Case No : C.W.J.C. No. 2230 of 1983

Bihar Minerals Industries

APPELLANT

Vs

The State of Bihar and Another

RESPONDENT

Date of Decision : 12-04-1996

Acts Referred:

Citation : (1996) 04 PAT CK 0015

Judgement

Ravi Nandan Sahay, J.—The writ Petitioner is a firm engaged in sale and purchase of Mango Karnels and other commodities at Purani Bazar, Munger. The Petitioner is a registered dealer amongst Ors. in mango karnels and during the period 1977-78 it had sold Mango Karnels to M/s Hanuman Vitamins Food Products Ltd. of Khamgaon, Maharashtra which were in the course of inter-State trade. The purchasing registered dealer has duly furnished Form "C" under the Central Sales Tax Act and also paid Central Sales Tax thereon at the prescribed rate of 4%. According to the Petitioner, the chargeability of the goods in question to C.S.T. was doubtful and the Petitioner credited the said amount of C.S.T. in its books of accounts styled "Security C.S.T. (Zamanat) Khamgaonwala". Subsequently, the Deputy Commissioner of Commercial Taxes, Bihar, Patna, vide his letter No. 11088 dated 21.8.1978 informed the purchaser in reply to his enquiry that the goods in question were exempted from the levy of Central Sales Tax. The purchaser also claimed exemption in respect of the transactions in question though the Petitioner later paid the said amount under protest as required by the Assessing Officer.

2. Finally the assessment order was passed on 25.9.1979 whereby the goods in question were treated as exempted goods and the Petitioner was thus found entitled to the refund of the aforesaid amount of Rs. 27,573/- paid as above under protest.

3. The Petitioner has a running account of the said purchaser and a final accounting whereof is yet to be settled between the Petitioner and the said purchaser. The Petitioner also informed the purchaser in reply to his legal notice

that the amount due to him will be paid after adjustment of the dues, costs etc. However, the amount in question which had admittedly been credited earlier to an account styled "Security C.S.T. (Zamanat)" (Security Account) by debiting the purchaser, reverse entries were passed by giving credit for the amount to the purchaser and debiting the said account styled "Security C.S.T. (Zamanat)". The Petitioner asserts that the amount paid by the purchaser thus stood refunded to him. The Petitioner was called upon to show cause u/s 26(3) of the Bihar Finance Act, 1981, Part-I as to why penalty should not be imposed thereunder for alleged contravention of the provisions of Section 9A of the Central Sales Tax Act. In response to the prior notice the Petitioner submitted his show cause on 4.10.1982 in which it was, inter alia, denied that there was any contravention of Section 9A of the Central Sales Tax Act. Further the circumstances under which the amount had been billed and the manner in which it was adjusted in the Petitioner's books of account and subsequently readjusted by contra-entries to the account of the purchaser were also explained. At the time of hearing the partner Shri Purushottam Das Drolia who was conversant with these transactions could not appear to instruct his lawyer due to illness. The show cause of the Petitioner was rejected by the Commercial Taxes Officer, who by the impugned order (Annexure-2) imposed a penalty of Rs. 55,146/-. The penalty was imposed u/s 26(3) of the Bihar Sales Tax Act and Section 9A of the Central Sales Tax Act.

4. Mr. K.N. Jain, learned senior Counsel for the Petitioner has questioned the legality of imposition of penalty as being wholly illegal and without authority of law. Learned Counsel for the Petitioner also submitted that no penalty could be imposed with reference to Section 23(3) of the Ordinance since the alleged violation was with respect to the Central Sales Tax Act in which there is no provision for imposition of penalty under the Bihar Finance Act. Learned Counsel also submitted that the conclusion of the Sales Tax Officer that the Petitioner did contravene the provision of Section 9A of the Central Sales Tax Act is erroneous for the simple reason that at the relevant time the taxability in question was doubtful and only as a matter of abundant caution the Petitioner has charged under the Central Sales Tax Act in the said bill, which was admittedly charged at the same rate at which it would have been levied, if leviable and the purchaser also had paid accordingly together with form "c" issued therefrom. Both the Petitioner and the purchasers were thus under the bonafide belief that the sale in question was chargeable to tax @ 4% and there was no mens rea on the part of the Petitioner which would be evident from the fact that the later amount in question was also paid by the Petitioner in the Government treasury as required by the assessing officer, though under protest. This amount was not taxable even according to the D.C.C.T. and this has been held to be not taxable even by the Assessing Officer. Learned Counsel further argued that in the circumstances stated above, the charging of the Central Sales Tax in the bill could not be said to be a collection of the Central Sales Tax as held by the Supreme Court in R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another, and in contravention of the provisions of Section 9A with any malafide intention.

5. Section 9(2A) of the Central Sales Tax Act, 1956 reads as follows:

9(2A) All the provisions relating to offences and penalties (including provisions relating to penalties in lieu of prosecution for an offence or in addition to the penalties or punishment for an offence but excluding the provisions relating to matters provided for in Sections 10 and 10(A) of the general sales tax law of each State shall, with necessary modifications, apply in relation to the "assessment, re-assessment, collection and the enforcement of payment of any tax required to be collected under this Act in such State or in relation to any process connected with such assessment, re-assessment, collection or enforcement of payment as if the tax under this Act were a tax under such sales tax law.

Section 10 of the Central Sales Tax Act provides for penalties. Section 10(f) reads as under:

10(f). If any person collects any amount by way of tax in contravention of the provisions contained in Section 9A; he shall be punishable with simple imprisonment which may extend to six months, or with fine, or with both and when the offence is a continuing offence, with daily fine which may extend to fifty rupees for every day during which the offence continues.

Therefore, it is clear that if a person contravenes Section 9A he is also liable for punishment u/s 10(f) of the Act but no penal action was taken against the Petitioner but penalty has been imposed by resort to Sub-section (3) of Section 26 of the Bihar Finance Act, which is in the following term:

26(3). If any person or a registered dealer contravenes the provisions of Sub-section (1) or Sub-section (2) the prescribed authority shall, after giving an opportunity of being heard in the manner prescribed, by an order in writing, direct that such person or registered dealer shall pay by way of penalty a sum equal to twice the amount collected in contravention of the provisions of Sub-sections (1) and (2).

6. Section 9(2) of the Central Sales Tax Act clearly authorise the use of procedural provisions of the State Act and did not authorise imposition of any penalty which was not authorised by the Central Act.

7. What is contended by Mr. Jain, learned Counsel for the Petitioner was the legal position prior to insertion of Sub-section 2A in Section 9 by Act 103 of 1976. In *Khemka and Co. (Agencies) Pvt. Ltd. Vs. State of Maharashtra*, which was a case heard by a Bench of five learned Judges of the Supreme Court, the Assessee under the Act was a resident of State of Maharashtra, it was held that levy of penalty u/s 16(4) of Bombay Sales Tax Act for default in payment of Sales Tax under the Act was not warranted by the provisions of Section 9(2) of the Act. The Supreme Court by majority of 3:2 held that penalty is not merely sanction or adjunct to or consequential to assessment and is also not just a machinery to enforce payment of tax but is a statutory liability in absence of any express

provision of levy of penalty for delay or default in payment of tax under the Act, it was not open to the authorities under the State Law to levy penalty for default in payment of tax under the Act. Prior to the decision in Khemka's case (supra) it was understood that all the sales tax authorities under the States, who were authorised to exercise power u/s 9(2) penalty could also be collected in accordance with the provisions of general Sales Tax Law of the appropriate State in order to impose provisions of the Act including collection of tax thereunder. In view of the decision in Khemka's case (supra) Section 9 was amended by amendment Act which was published in the Gazette of India on September 9, 1976 introducing Sub-section (2A).

8. Constitutional validity of Section 9(2A) was considered in Shiv Dutt Rai Fateh Chand and Others Vs. Union of India (UOI) and Another, The Supreme Court held that the lacuna in the Central Act in the shape of non-application relating penalty under general Sales Tax Act of the States was removed by introduction of Sub-section (2A) of Section 9 by amendment Act. It was contended before the Supreme Court in Shiv Dutt Rai Fateh Chand's case (supra) that even after the amendment of Section 9 lacuna in the Central Act which was pointed out by the Supreme Court in Khemka's case (supra) namely that there was no specific provision levying penalties in the Act as it stood before its amendment in 1976 remains unfilled up even after Amendment Act and hence no penalties can be recovered by utilising the provisions of the General Sales Tax Laws of the respective States. The Supreme Court observed that Sub-section (2A) of Section 9 of the Act expressly makes all the provisions relating to offences and penalties which are committed or incurred, as the case may be, under the General Sales Tax of the respective States, applicable to persons who commit corresponding acts and omissions under the Act.

9. So according to the decision in Shiv Dutt Rai Fateh Chand's case, the provisions of penalty under the General Sales Tax Law of the State will only be applicable if there are corresponding acts of omission under the Central Sales Tax Act. This is apparent from discussion in Para 17 of the Supreme Court judgment extracted hereunder:

...The Assessee incurr the liability to pay penalties on account of certain acts or omissions committed by them at the various stages specified above, namely, assessment, re-assessment, collection and the enforcement of payment of tax. The inclusion of the word "penalties" along with these four stages would have, therefore, been redundant apart from being inappropriate. Sub-section (2-A) of Section 9 of the Act expressly makes all the provisions relating to offences and penalties which are committed or incurred, as the case may be, under the General Sales Tax of the respective States, applicable to persons who commit corresponding acts and omissions at the above mentioned stages under the Act. To illustrate, if a person is liable to pay any penalty for not filing a return required to be filed by him under the General Sales Tax Law of a State, a person who is similarly required to file a return under the Act incurs the penalty for not

filing a return and the measure of penalty is the same as under the State law. If a person is liable to pay penalty at a particular rate in addition to the tax for not paying any part of the tax due under the State law within the specified time, a person liable to pay the penalty at the same rate if he commits default in paying the tax due under the Act.

10. Section 26 of the Bihar Finance Act enjoins that no person who is not a registered dealer shall collect from any person any amount by whatever name or description it may be called, toward or purporting to be tax on sale of goods. Sub-section (2) of Section 26 provides that no registered dealer shall collect from any person any amount, except in a case in which and to the extent to which such dealer is liable to pay tax under this part. Charge against the Petitioner is that he collected Central Tax from the dealer while no Central Sales Tax was payable on Mango Karmel. In contravention of Sub-section (1) or (2) of Section 26 of the Bihar Finance Act, the dealer is liable to penalty under Sub-section (3) of Section 26 of the Bihar Finance Act in view of the decision of the Supreme Court in Shiv Dutt Rai Fateh Chand's case that the court will examine whether there is any corresponding provisions like Sub-section (2) of Section 26 of the Bihar Finance Act under the Central Sales Tax Act. Learned Counsel for the revenue has not been able to point out any such provision under the Central Sales Tax Act. Under the Central Sales Tax Act, penalty can be imposed u/s 10(f). Section 10(f) of the Central Sales Tax Act attracts penalty on the dealer who collects any amount by way of tax. In contravention of the provisions contained in Section 9A which says that "no person who is not a registered dealer shall collect in respect of any sale by him of goods in the course of inter-State trade or commerce any amount by way of tax under this Act, and no registered dealer shall make any such collection except in accordance with this Act and the rules made thereunder". No doubt, the Petitioner is not registered for dealing in Mango Karmel but penalty has not been imposed for the reason that it is not registered in Mango Karmel. This point has been highlighted in the counter affidavit filed by the Respondents.

11. It is next submitted that penalty could be imposed in lieu of prosecution as provided u/s 10-A of the Central Sales Tax Act. But this provision can be resorted to only if there is violation of Clause (b) or (c) or (d) of Section 10 of the Act and not in respect of cases covered u/s 10(f) of the Act. The authorities, therefore, could not resort to Section 26(3) of the Bihar Finance Act. Section 9(2A) may be examined more closely. This section provides that all provisions relating to offence and penalties (including the provisions relating to penalty in lieu of prosecution for an offence of the General Sales Tax of the State) shall apply in relation to assessment, collection, enforcement of payment of any tax required to be collected under the Act. The provisions of Sections 10 and 10A are excluded from the purview of Section 9(2A). In this instant case contravention of Section 10(f) is alleged against the dealer. Since Section 10 is completely excluded by Section 9(2A) itself, penalty under the State Act could not be imposed. Only remedy is prosecution as envisaged u/s 10 of the Central Sales Tax Act. Moreover, penalty in lieu of prosecution can be imposed for the offence

under Clause (b) or Clause (c) or Clause (d) and not in respect of Section 10(f) of the Act.

12. The second question for consideration is whether penalty could be imposed on the Petitioner only because he collected sales tax from buyers although they were not liable to pay any central Sales Tax on Mango Karnel. The Petitioner in his show cause before the Sales Tax Officer submitted that it was bonafide mistake and the tax was not collected intentionally.

13. In *Hemchandbhai & Co. v. State of Gujarat* reported in (1982) 50 S.T.C. 274 the Assessee failed to furnish the return and pay the tax under the Central Sales Tax Act for the period from 1st April, 1970 to 5th May, 1970, on or before 30th June, 1970. The proceeding for imposition of penalty u/s 9(1) of the Central Act read with Section 36(3) of the Bombay Act were initiated against the Assessee by the Sales Tax Officer. In the course of penalty proceedings, the case of the Assessee, inter alia, was that it was under a bonafide impression that the permission granted on 4th January, 1967, under the Bombay Act was still operative because it was not informed about the enactment of Rule 23A and its consequences by the service of notice. The contention of the Assessee was rejected by the Sales Tax Officer and penalty was imposed. The Gujarat High Court held that the imposition of penalty was illegal because the act of the Assessee was not intentional but a bonafide mistake.

14. The position of law in regard to the penalty proceedings is no longer in doubt. In *Hindustan Steel Ltd. Vs. State of Orissa*, the Supreme Court in paragraph-7 held as follows:

7. Under the Act penalty may be imposed for failure to register as a dealer; Section 9(i) read with Section 25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the company in failing to register the company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out.

This answers the contention of the learned Counsel that the Petitioner is liable to

penalty because it was not a registered dealer in mango karnel.

15. In *Associated Cement Company Limited Vs. Commercial Tax Officer, Kota and Others*, , the Supreme Court considered the validity of the imposition of penalty on the Assessee by not including freight charges in its taxable turnover in the bonafide belief that they were not liable to be included. The Supreme Court in para-17 at page 1900 held as under:

The first question canvassed before us relates to the levy of penalties on the Assessee under the two assessment orders for not paying the sales tax payable under the Act and under the Central Sales Tax Act in respect of the freight charges which were declared as components of sale price by this Court in *Hindustan Sugar Mill's* case (supra) on August 22, 1978. The explanation of the Assessee for not including the freight charges in the taxable turnover was, as mentioned earlier, that there was a doubt about its liability to pay sales tax thereon as the very same question was pending adjudication before this Court and that on the facts and in the circumstances of the case, the Assessee could not be held guilty of filing false returns before the assessing authority. It was pleaded that since the non-inclusion of the freight charges in the taxable turnover was a result of bona fide belief of the Assessee that they were not liable to be included in the taxable turnover, the assessing authority should have in its discretion not imposed the penalties particularly having regard to the fact that within two months after the judgment of this Court in *Hindustan Suger Mill's* case (supra), the Assessee had filed the revised returns including the freight charges in the taxable turnover and paid the sales tax payable in respect of them even before the assessing authority has passed the orders of assessment. We are of the view that this part of the case of the Assessee has got to be accepted in view of the decision of this Court in *Cement Marketing Co. of India Ltd. Vs. Assistant Commissioner of Sales Tax, Indore and Others*, where under similar circumstances, this Court held that the Assessee therein which was also a manufacturer and dealer in cement was not liable to pay a penalty u/s 43 of the *Madhya Pradesh General Sales Tax Act, 1958* read with *Section 9(2) of the Central Sales Tax Act*. For the reasons mentioned therein, we hold that the levy of penalties for not including the freight charges in the taxable turnover in the original returns and for not paying the tax in respect of such freight charges is unsustainable and that the impugned penalties are liable to be quashed.

16. In view of the decisions of the Supreme Court referred to above, the imposition of penalty in the facts of this case cannot be held to be justified. There is no finding by the Sales Tax Officer that the Petitioner had deliberately or intentionally collected Central Sales Tax. The plea of the Petitioner was not properly considered. I must hold that the imposition of penalty in the facts and circumstances of this case is illegal.

17. Accordingly, this writ application is allowed. The impugned order dated 24.1.1983, as contained in Annexure-2 is quashed. However, there shall be no order as to cost.