(2012) 09 JH CK 0123

In the Jharkhand High Court

Case No : Civil Review No. 38 of 2012

Damodar Valley Corporation APPELLANT

Vs

M/s Anjaney Ferro Alloys Ltd. and Others RESPONDENT

Date of Decision : 21-09-2012

Acts Referred:
Electricity Duty Act, 1948 — Section 3, 4(4)

Citation : AIR 2013 Jhar 78 : (2013) 2 AJR 560 : (2012) ELR 1309

Hon'ble Judges : Prakash Tatia, J;Jaya Roy, J

Bench : Division Bench

Advocate : S.B. Gadodia and Tapas Kabiraj, for the Appellant; M.S. Mittal, A.R. Choudhary and Manish Mishra and Mr. Rajesh Shanker, Government Advocate for the State, for the Respondent

Final Decision : Allowed

Judgement

Prakash Tatia, C.J.—These three review petitions have been preferred by the non-petitioner-Damodar Valley Corporation in writ petitions to seek review of the judgment rendered by us in W.P.(T) No. 2890 of 2011, W.P.(T) No 6163 of 2006, W.P. (T) No 667 of 2007 as well as in W.P.(T) No. 2847 of 2008 dated 3rd April, 2012, by which writ petitions of the petitioners were allowed. However, what emerges from the review petitions and argument advanced by the learned counsel for the review petitioner is that these review petitions are, in fact, not for reviewing and setting aside the impugned judgment dated 3rd April, 2012 but, in fact, appears to be for seeking some clarification only. The facts in brief are that previously M/s Atibir Hi-Tech Pvt. Ltd preferred W.P.(T) No. 6163 of 2006 and that writ petition along with several other writ petitions were decided by the Division Bench of this Court vide judgment dated 11th January, 2007. Against that judgment dated 11th January, 2007 several Special Leave Petitions were filed before the Hon''ble Supreme Court and by judgment dated 30th April, 2008 the Hon''ble Supreme Court remanded the matter to the High Court for deciding the issues mentioned in the judgment of the Hon''ble Supreme Court dated 30th

April, 2008. After remand, the said W.P.(T) No. 6163 of 2006 was decided along with other three writ petitions referred above vide judgment dated 3rd April, 2012, wherein it has been held that:

(I) "Damodar Valley Corporation was not the licensee under the Bihar Electricity Duty Act, 1948 and Rules of 1949;

(II) The Damodar Valley Corporation was the assessee and covered under the definition of the assessee given in Rule 2(b) of the Rules of 1949;.

(III) The petitioner Companies are neither licensees nor assesses but obtained the registration under the Chapter-II of the Bihar Electricity Duty Rules, 1949. Their registration are of no use. They may have obtained the registration under misconception of law or wrong advice but that will not make them the assessee registered under the Rules of 1949;

(IV) The State Government has no right to recover the electricity duty from the writ petitioners who are consumers of the Damodar Valley Corporation and who are obtaining the electricity from DVC for their own use;

(V) The petitioners cannot be subjected to assessment and reassessment for the electricity duty. Therefore, any proceeding of assessment order, reassessment or opening of assessment, which is pending, is quashed. The bills or demand raised by the State Government against these petitioners for electricity duty is also quashed.

(VI) After coming into force of Electricity Act, 2003, the DVC is deemed licensee and because of the Act of 2003, the petitioners'' status has not changed to assessee from non-assessee.

(VII) Section- 5 of the Jharkhand Electricity Duty(Amendment) Act, 2011 amending Section 4 of the Act of 1948 is declared to be arbitrary as it gives power to the State Government to choose and pick up either seller or consumer of the electricity for payment of electricity duty and Section 5 of the Act of 2011 amending Section 4 of the Act of 1948 is wholly unworkable and may create chaotic situation, made against the public interest, therefore, declared to be ultravires and illegal.

The petitioners are not liable to pay surcharge to the Damodar Valley Corporation.

Challenge to the rest of the provisions of the Act of 2011 is left open. The writ petitions are allowed accordingly, in terms of the points mentioned above. However, none of the petitioners, if has paid electricity duty to the State, shall be entitled to recover it from the State.

2. The review petitions have been preferred on the ground that Hon''ble supreme Court specifically directed this Court to consider whether it''s judgment should or should not operate prospectively, particularly, when after the enactment of Electricity Act of 2003, the Regulatory regime has come into force. According to the review petitioners, in judgment dated 3rd April, 2012 this issue has not been

decided and it has not decided whether the judgment shall be operative prospectively or retrospectively. Another ground raised by the review petitioner is that it was argued that according to the provisions of the Damodar Valley Act, 1948, the Damodar Valley corporation can have only bulk supply consumers of electricity and it can sell electricity energy at a very high pressure of 30000 volt or more to any of the consumers of the Damodar Valley Corporation. Section 3 of the Electricity Duty Act, 1948 is the charging Section, which provides that electricity duty shall be paid to the State Government and Schedule of the Act prescribing the rate of electricity duty under Electricity Duty Act, 1948, which is integral part of Section 3 thereof. The Schedule prescribes not only the rate of electricity but it provides that electricity duty shall be leviable according to the use of the electricity. Since Damodar Valley Corporation is supplying electricity energy at very high pressure of 30000 volt and Schedule does not prescribe the rate of electricity to be leviable and/or to be calculated on such supply of electricity energy by Damodar Valley corporation, in that situation Damodoar Valley Corporation cannot be liable to pay electricity duty, especially when there is no provision in Schedule of the Electricity Act, 1948 for calculating the electricity duty in respect of and/or in relation to bulk supply by the Damodar Valley Corporation. It was also argued by the learned counsel for the Damodar Valley Corporation that electricity duty has to be levied on the units consumed in respect of mine and/or industrial undertaking and Schedule also provides that a to what would be the rate applicable in respect of premises used for residential and/or for office purposes and Schedule also provides as to what shall be duty payable for use of electrical energy in the premises which are metered and/or un-metered, depending upon the watts of the lamps which is being used. In substance, it has been argued that since electricity duty depending upon the nature of use of the electricity and since DVC is supplying bulk electricity to the consumers, who, in turn, step down the energy level from 30000 volts to 240 volts or 440 volts, therefore, only consumers can calculate the quantum of electricity duty payable according to their own consumption and this task cannot be taken by the Damodar Valley Corporation.

3. The Review petitioner- Damodar Valley Corporation also urged that in para-32 of the impugned judgment, this Court held that DVC is a licensee and this finding is contrary to the judgment of the Hon''ble Supreme Court delivered in the case of Damodar Valley Corporation Vs. State of Bihar and Others, and contrary to the finding given in impugned judgment itself wherein it has been held that DVC was not a licensee under the Electricity Duty Act, 1948 after considering the judgment of the Damodar Valley Corporation(supra). The review petitioner also submitted that in para-32 of the impugned judgment, this Court observed " the writ petitioners were regularly paying the electricity duty to the D.V.C. and did not question the right of the D.V.C. under statutory agreement between he parties". The fact situation is that the writ petitioners were regularly paying the electricity duty to the State Government and now paid electricity duty to the Damodar Valley Corporation.

4. In addition to above, it has been strenuously argued that M/s Tata Steel Ltd., in view of the statements made in W.P. (T) No. 2847 of 2008, wherein said Tata Steel Ltd. admitted that it has obtained registration under Bihar Electricity Duty Act having registration No. HZ/ED-41 and in other writ petitions admitted that said Company is supplying energy to its employees and in view of such admission made in W.P. (T) No. 645 of 2007, W.P. (T) No. 656 of 2007 and W.P. (T) No. 658 of 2007, Tata Steel is liable to pay electricity duty u/s 4(4) of the Electricity Duty Act, 1948.

5. Learned counsel for the respondents- Mr. M.S. Mittal and Mrs. A.R. Choudhary vehemently submitted that the plea raised by the review petitioner does not fall within the scope of review and, therefore, the review petitions are liable to be dismissed. It is also submitted that, in fact, all the facts and the law have been considered in detail in the impugned judgment and the review petitioner was to take new pleas to find out the solution for itself and to know how the review petitioner is required to calculate the electricity duty inspite of the fact that in State of Jharkhand, the Jharkhand State Electricity Board is collecting the electricity duty from its bulk electricity consumer and DVC itself, in the State of West Bengal is collecting duty from bulk supply consumer and is paying to the State Government of West Bengal.

6. We have considered the submissions of the learned counsel for the parties and perused the judgment dated 3rd April, 2012 passed in W.P.(T) No. 2890 of 2011 and connected writ petitions as well as the judgment of the Hon''ble Supreme Court, delivered in the case of M/s Atibir Hi-tech Pvt. Ltd. Dated 30th April, 2008.

7. The Hon''ble Supreme Court specifically directed this Court that " We, however, make it clear that the Hon''ble High Court shall also consider whether its judgment should or should not operate prospectively, particularly, when after the enactment of the 2003 Act, the Regulatory Regime has come into force."

In the judgments sought to be reviewed dated 3rd April, 2012, this aspect has not been considered by us and, therefore, it is a mistake apparent on the face of the record. Therefore, the judgment dated 3rd April, 2012 deserves to be reviewed on this point.

8. Learned counsel for both the parties addressed on the above question and we have considered the rival arguments. We are of the considered opinion that in the judgment dated 3rd April, 2012, we have already held that DVC was not the licensee under the Bihar Electricity Duty Act, 1948 and Rules of 1949. Damodar Valley Corporation was the assessee and covered under the definition of the assessee given in Rule 2(b) of the Rules of 1949. The petitioner Companies are neither licensees nor assesses but obtained the registration under Chapter-II of the Bihar Electricity Duty Rules, 1949. Their registration are of no use. They may have obtained the registration under misconception of law or wrong advice but that will not make them the assessee registered under the Rules of 1949. The State Government has no right to recover the electricity duty from the writ

petitioners who are consumers of the Damodar Valley Corporation and who are obtaining the electricity from Damodar Valley Corporation for their own use. The petitioners cannot be subjected to assessment and reassessment for the electricity duty. Therefore, any proceeding of assessment order, reassessment or opening of assessment, which is pending, is quashed. The bills or demand raised by the State Government against these petitioners for electricity duty is also quashed. Thereafter, it has been held in the judgment dated 3rd April, 2012 that after coming into force of Electricity Act, 2003, the DVC is deemed licensee and because of the Act of 2003, the petitioners'' status has not changed to assessee from non-assessee.

9. It is not in dispute that the consumer of the DVC, the writ petitioner, obtained the registration under Chapter-II of the Bihar Electricity Duty Rules, 1949 and they used to pay electricity duty directly to the State Government and this practice was going on since long, therefore, the DVC has no material and particulars with respect to the facts and figures for levy of electricity duty According the Returns of consumers of the DVC, the authorities of the State Government used to decide the issue of levy of electricity duty on the electricity consumed by the consumer of DVC and if, the decision as given in Clause V of paragraph-64 of the judgment dated 3rd April, 2012 will remain, it will create undue hardship for the DVC as well as for the State Government whereas there will be no hardship or inconvenience to the assessees because they themselves used to pay the electricity duty to the State Government directly after obtaining registration under Chapter-II of the Bihar Electricity Duty Rules, 1949. Therefore, in our opinion, the judgment dated 3rd April, 2012, so far it relates to the assessment and reassessment for the electricity duty, is concerned, this should be prospective. The DVC merely because of this judgment dated 3rd April, 2012 cannot be made responsible for submitting the Return for electricity duty for the prior period, i.e., period prior to this judgment which if DVC can, then can do only after obtaining the requisite information from the consumers of the DVC which is neither just nor will be practical and the task will be absolutely unworkable for the DVC for the past years i.e., from before 3rd April, 2012.

10. In view of the above reasons, the judgment dated 3rd April, 2012 is reviewed to the above extent and the decision given in Clause V of Paragraph-64 of the judgment dated 3rd April, 2012 is declared to be operative prospectively, meaning thereby any proceeding of assessment, re-assessment or opening of assessment, which has been initiated after 3rd April, 2012 (if any) for the petitioners shall stand quashed and the bills or demand raised by the State Government against the petitioner towards the electricity duty after 3rd April, 2012 also stands quashed. The effect of the judgment dated 3rd April, 2012 will be prospective from 3rd April, 2012. The petitioners will be free to agitate correctness of bill or quantum of electricity duty, if there is any dispute, before appropriate forum as we, in the judgment dated 3rd April, 2012, have not decided the disputed question of facts.

11. It has been submitted by the review petitioner that in the impugned judgment dated 3rd April, 2012, it has been wrongly observed by this Court that " the writ petitioners were regularly paying the electricity duty to the D.V.C. and did not question the right of the D.V.C. under statutory agreement between the parties". According to the review petitioners, this issue is factually wrong as the writ petitioners never paid any electricity duty to the DVC and were paying electricity duty to the State Government and that observation is absolutely irrelevant, in view of the detailed reason given in the same para-32, wherein it has been held that though the writ petitioners entered into an agreement with DVC which is a statutory agreement and agreed to pay the electricity duty to the DVC and it has been specifically held that "liability of petitioners who are party to legal and statutory agreement are bound by the terms and conditions of the agreement and therefore, the D.V.C. has right to recover the electricity duty from its consumers under the terms of the agreement".

Then this Court held in the same paragraph that "therefore, the D.V.C. statutorily has fixed this liability upon its consumers". In the impugned judgment, it has not been held that because of the reason that petitioners were regularly paying electricity duty to the DVC, therefore, petitioners are liable to pay the electricity duty to the Damodar Valley Corporation. Therefore, there is no affect of above observation of this Court, wherein it has been observed that petitioners were regularly paying the electricity duty to the Damodar Valley Corporation.

For other grounds, we are of the opinion that these issues do not fall in the scope of review.

In view of the above reasons, the review petitions are partly allowed, as indicated above.