
(2000) 07 GAU CK 0012
In the Gauhati High Court
Case No : Civil Rule No. 31 to 34 of 1992

Hill Development Co.

APPELLANT

Vs

State of Tripura and Others

RESPONDENT

Date of Decision : 31-07-2000

Acts Referred:

Tripura Sales Tax Act, 1976 — Section 13, 20, 35, 35(3), 8

Citation : (2000) 3 GLT 121

Hon'ble Judges : J.N. Sharma, J

Bench : Single Bench

Advocate : Mr. S. Saha, for the Appellant; Mr. U.B. Saha and Mr. A. Ghosh, for the Respondent

Final Decision : Dismissed

Judgement

1. All the Civil Rules raise the common question of fact and law and as such the same are taken up for hearing together.
2. I have heard Mr. S. Saha, learned counsel for the petitioner and Mr. U.B. Saha, learned senior Govt. Advocate assisted by Mr. A. Ghosh, learned counsel for the respondents.
3. Civil Rule Nos. 31/93 and 33/92 have been filed challenging the order of assessment dated 30.1.1991 passed by the Superintendent of Taxes, Charge-IV, Government of Tripura, Agartala for the year 1988-89 in exercise of the powers u/s 9(4) of the Tripura Sales Tax Act, 1976 in respect of the firm of the petitioner. In these Civil Rules the orders passed by the Additional Commissioner of Taxes, Government of Tripura, Agartala in appeal dated 1.1.1992 and 3.1.1992 are also challenged.
4. Civil Rule Nos. 32/92 and 34/92 arise out of an order dated 18.1.1992 passed by the Certificate Officer, Government of Tripura, Agartala imposing penalty u/s 13 of the Tripura Sales Tax Act, 1976 (herein after referred to as "the Act")

5. The brief fact of the case is that the petitioner submitted return based on his own estimation of sale of bricks, bats etc. manufactured by him in his brick kiln. The said returns were for the years 1988-89 and 1989-90. The petitioner paid some amount is sale tax on the basis of his own estimation but the authority did not accept it as the correct payment. The Sales Tax Inspector in course of his duty visited the brick kiln of the petitioner and inspected the registers maintained by the petitioner firm. The Sales Tax Inspector submitted his inspection report to the respondent No. 3 that is Superintendent of Taxes, Charge-IV, Government of Tripura, Agartala. The respondent No. 3 visited the brick kiln of the petitioner at Jaharnagar, Mohanpur, West Tripura and in course of his visit he found two register in the office of the brick kiln of the petitioner relating to manufacture of green bricks, burning of green bricks, loading and unloading, labour payment etc. and those two registers were seized from the possession of one Shri Niranjana Majumdar, and employee of the petitioner firm in the brick kiln by granting a receipt by the respondent No. 3. The said two registers were seized by the respondent No. 3 on 23.2.1990. While making the assessment of tax u/s 9(4) of the Act, the authority also took into consideration the said two registers. The authority before making the assessment and utilising these two registers for the purpose of assessment gave opportunity to the petitioner to inspect and scrutinise those registers seized by them and that opportunity was given on four days that is on 1.3.1990, 11.6.1990, 20.8.1990 and 12.12.1990. It is also evident from para - 11 of the affidavit-in-opposition. Mr. Saha, the learned Govt. Advocate has also produced the record in support of this contention. The last letter dated 12.12.1990 which is available in the record is quoted below :-

"No. SDR/ST/2377/88/4459 GOVERNMENT OF TRIPURA OFFICE OF THE SUPERINTENDENT OF TAXES CHARGE - IV : : AGARTALA

Dated, Agartala, the 12th Dec" 90

To,

M/s Hill Development Comp.

Hariganga Basak Road.

AGARTALA

Whereas it appears from the scrutiny of the seized book on 23rd Feb"90 that you have not brought into account the sale proceeds of 10.84.157 nos. of bricks into account during the year 1989-90 and tried to evade the payment of due tax on the sale proceeds of the said bricks and bats. Again, it is found that you have filed all the returns late and these returns are incorrect and incomplete and not exhibit the actual turnover of the dealer for the year. Therefore, you have tried to conceal a portion of the turnover for the year and also tried to evade the payment of tax on the sale proceeds of the bricks and bats stated above.

Now, therefore, you are given last opportunity to appear in person or by agent before the undersigned at his office at Kalibari Road. (Palace Compound)

Agartala on 28th December 90 at 10-30 A. M. with the relevant B/acs and documents and to explain why the sale proceeds of the said bricks, bats shall not be added with the turnover for 4 Q.E. 31/3/90 and also to explain why penalty u/s 13 will not imposed for filing of returns violating section 8 of the Act and committing offence u/s 13 of the TST Act.

Failure to comply with the terms of the notice actions will be taken up exparte without reference.

Sd/- (S.R. DEB) SUPERINTENDENT OF TAXES CHARGE IV : : AGARTALA"

6. As the petitioner did not appear in response to the aforesaid letter, the best judgment on assessment was made and thereafter, in exercise of the power u/s 13 of the Act penalty was also levied. Thereafter, against the best judgment assessment two appeals were preferred by the petitioner before the appellate authority but he did not comply with the requirement of section 20 of Act. Section 20 and Proviso (ii) are quoted below :-

"20. Appeal. - (i) Any dealer objecting to an order of assessment or penalty passed under this Act, may, within thirty days from the date of the service of such order, appeal to the prescribed authority against such assessment or penalty :

(ii) the authority before whom an appeal has been filed may, for reasons to be recorded in writing, direct the appellant to pay any lesser amount which shall not be less than fifty per cent of the tax assessed or fifty per cent of the penalty levied and, on payment of the amount so directed entertain the appeal ;

7. Against the orders of penalty also appeals were filed and as there was no compliance with the proviso as quoted above, the appeals were rejected.

8. Mr. Sana, learned Govt. Advocate relying on Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others,) submitted that where the petitioner failed to avail the equally efficacious alternative remedy by way of appeal this writ could should not entertain these writ applications. The Supreme Court in Para 11 of the aforesaid judgment has laid down the law as follows :-

"It is not well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J, in Wolverhampton New Water Works Co. v. Hawkesford (1859) 6 CBNS 336 in the following passage :

"There are three classes of cases in which a liability may be established founded upon statute. * * * * * But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it * * * * * the remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute

must be adopted and adhered to." The rule laid down in this passage was approved by the House of Lords in *Neville v. London Express Newspaper Ltd.* 1919 AC 363 and has been reaffirmed by the AIR 1940 105 (Privy Council) It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court through out. The High Court was therefore justified in dismissing the writ petitions in limine."

Though there is force in this contention of Mr. Saha, I am not inclined to throughout these writ petitions on this ground after elapse of eight years and I want to go the merit of the matter.

9. The learned counsel for the petitioner strenuously submits that the search and seizure itself was illegal and in connection with this he relies on a Judgment of this court reported in (1994) 95 STC 189 S C. and another v. Deputy Commissioner of Taxes and others) wherein this court pointed out that while the officers have a duty to exercise powers conferred by law and safeguard the public interest that must also respect the restrictions imposed by the very law which gives them the power. The learned counsel for the petitioner relies on section 35, sub-section (3) of the Act. That section 35, sub-section (3) is quoted below :-

"35(3) If the Commissioner has reasons to suspect that any dealer is attempting to evade payment of any tax under this Act, he may, for reasons to be recorded in writing seize such accounts, registers or documents of the dealer as may be necessary, and shall grant a receipt for the same and shall retain the same only for so long as may be necessary for the purposes of this Act."

10. In the affidavit-in-opposition itself it has been stated that the returns submitted by the dealer were not accepted by the authority and the authority had doubts regarding the genuineness of the return and it was only then that the registers as mentioned above were seized and the record also shows the reasons. It is the requirement of law that some reasons should be there. So this contention of the learned counsel for the petitioner shall fall. The case relied on by the learned counsel does not help him.

11. The next case relied on by the learned counsel for the petitioner is (1989) 2 GLR 461 (*Shri Dwijendra Kumar Bhattacharjee, petitioner v. The Superintendent of Taxes, Government of Tripura, Agartala and other, respondents*) wherein in paragraph 11 a Division Bench of this court on this particular Act itself laid down the law as follows :-

"11. The assessing officer cannot rely on any evidence or any fact in arriving at his conclusion without first pointing out the same to the assessee and giving him a reasonable opportunity of meeting the case which is sought to be made out in the assessment order. In other words, though the assessing officer can make such inquiries he considers necessary he must give an opportunity of being heard to the assessee in respect of any materials proposed to be used for the purpose of assessment. Even in cases where the assessing officer gets informations from

private sources and does not want to disclose the source of information to the assessee, he shall have to communicate to the assessee the substance of such information if he proposes to use the result of such inquiry against the assessee. It is necessary in order to put the assessee in possession of full particulars of the case he is expected to meet. The assessee must be given full opportunity to meet objections raised by the assessing officer. If an assessment is based on materials which were not disclosed to the assessee, the order of assessment would be vitiated."

That case also is of no help to the petitioner inasmuch as in this particular as indicated above, reasonable opportunity was given to the petitioner to inspect the seized books of account and as many as four dates were given to him to appear but he did not appear. A horse can be taken to the water but it cannot be made to drink.

12. The next case relied on by the learned counsel for the petitioner is (1991) 82 STC 22 (Sankar Trading v. State of Tripura & others) wherein a Division Bench of this court observed that in making a best judgment where the authority wants to dispute the sale price as quoted by the dealer, the authority is duty bound to tell the dealer that the sale price which they are accepting is based on some materials, or information and that should be disclosed to the dealer. That is not the position of the case in hand. The position of the case in hand is that the dealer did not disclose the sale of a particular quantity of bricks as found by the authority. On the other hand, regarding the best judgment assessment, Mr Saha, the learned Govt. Advocate relies on a decision of the Supreme Court reported in (1973) 32 STC 77 (Commissioner of Sales Tax, Madhya Pradesh v. H. M. Esufali H. M. Abdulali) wherein the Supreme Court has pointed out as follows :-

"In estimating any escaped turnover, it is inevitable that there is some guess-work. The assessing authority while making the "best judgment" assessment, no doubt, should arrive at its conclusion without any bias and on rational basis. That authority should not be vindictive or capricious. If the estimate made by the assessing authority is a bona fide estimate and is based on a rational basis, the fact that there is no good proof in support of that estimate is immaterial. Prima facie, the assessing authority is the best judge of the situation. It is his "best judgment" and not of anyone else. The High Court could not substitute its "best judgment" for that of the assessing authority. In the case of "best judgment" assessments, the courts will have to first see whether the accounts maintained by the assessee were rightly rejected as unreliable."

13. The next case as relied by the learned Govt. Advocate is 1996 (3) GLT 661 (M/s. Fatik Cherra Tea Estate v. The State of Tripura and others) and this judgment is on two points, one the best judgment and the other is the proviso of section 20 of the Act which has been quoted above. The learned Single Judge of this Court on both the counts found in favour of the authority and rejected the writ applications.

14. This being the position of law and fact as indicated above. I do not find any merit in these writ petitions and accordingly the same are dismissed. The stay orders passed earlier stands vacated.