(2015) 01 JH CK 0049

In the Jharkhand High Court

Case No : Writ Petition (T) No. 5623 of 2014 and I.A. Nos. 5699 and 6355 of 2014

Hindustan Construction Company Limited — APPELLANT

Vs

State of Jharkhand — RESPONDENT

Date of Decision : 07-01-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Jharkhand Value Added Tax Act, 2005 — Section 35, 42, 79, 80

Citation : (2015) 1 JLJR 485 : (2015) 2 AJR 13 : (2015) 86 VST 29

Hon'ble Judges : Pramath Patnaik, J.;Dhirubhai Naranbhai Patel, J.

Bench : Division Bench

Advocate : Biren Poddar, Darshana Poddar and Piyush Poddar, for the Appellant; Ajit Kumar, A.A.G. and Kumar Sundaram, Advocates for the Respondent

Judgement

Dhirubhai Naranbhai Patel, J.—The present writ petition has been preferred against the ex-parte order of assessment passed by the Commercial Taxes Officer, Koderma Circle, Koderma dated NIL, under the Jharkhand Value Added Tax Act, 2005 (hereinafter referred as "the Act, 2005", for the sake of brevity).

2. Learned counsel appearing for the petitioner submitted that the impugned order at Annexure-14 is an ex-parte order without giving any opportunity of being heard to the petitioner. Even otherwise on merit also, the ex-parte assessment order is not tenable at law. Learned counsel appearing for the petitioner has taken this Court to various annexures of this writ petition including the order sheet of the assessment proceedings for the assessment year 2010-11 from which also it is very clear that notice was never served upon the petitioner upon whom liability of tax of approximately Rs. 90 Lakhs is imposed. It is further submitted by learned counsel for the petitioner that had an opportunity been given to the petitioner, the true and correct facts would have been pointed out by the petitioner that there is no sale of the goods as mentioned in the ex-parte assessment order, but, it is stock transfer of machineries from different branches of the petitioner situated in different States, as stated in paragraph 12 of the writ

petition. The contentions of the writ petitioner have been supported by necessary documentary evidences annexed with the memo of this writ petition and it is submitted on the basis of these documentary evidences that upon stock transfer, no Value Added Tax is leviable. It is also submitted by learned counsel for the petitioner that whenever there is violation of principles of natural justice, the impugned order will be arbitrary and whenever there is arbitrariness, there is breach of right of equality and, hence, impugned order is also violative of Article 14 of the Constitution of India and, hence, there is violation of fundamental right of the petitioner and, therefore, instead of sending the petitioner to any other authority, let the matter be remanded to the Commercial Taxes Officer, Koderma Circle, Koderma and the petitioner will remain present through its representative on the date and time given by this Court so that without any delay, a true, correct and legal assessment order can be passed, within stipulated time given by this Court. The petitioner will not ask for any unnecessary adjournment. Learned counsel for the petitioner has relied upon decisions rendered by the Hon''ble Supreme Court reported in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, and decision reported in Filterco and Another Vs. Commissioner of Sales Tax, Madhya Pradesh and Another, and several other decisions and has submitted that in the peculiar facts and circumstances of this case that a tax payer upon whom approximately Rs. 90 Lakhs tax liability is imposed, ought to have been given an opportunity of being heard. Even otherwise also, this Court will take at least four weeks'' time after filing the affidavit by the respondents and, therefore, meanwhile fresh assessment order can be passed by the assessing officer and this order can be passed, if the State Government is ready as on today.

3. We have heard learned Additional Advocate General appearing on behalf of the State, who has submitted that from the documents on record, nothing is coming out that the notice was served upon the petitioner. Nonetheless, there is efficacious alternative remedy available to the petitioner and he can prefer an Appeal under Section 79 of the Act, 2005 or a Revision under Section 80 of the Act, 2005. It is also submitted by learned Additional Advocate General that it is true that if the counter affidavit is to be filed and thereafter the matter is to be decided in this Court, it will take minimum four weeks time.

4. Having heard learned counsel for both the sides and with consent of the learned counsel for both the sides, the matter is taken up for its final disposal.

5. Looking to the facts and circumstances of the case, it appears that the assessing officer viz. Commercial Taxes Officer, Koderma Circle, Koderma has passed an order of assessment for the year 2010-11, which is at Annexure-14 to the memo of this writ petition. Looking to the order sheet of the assessment proceedings for the assessment year 2010-11, which is at Annexure-15 to the memo of this writ petition, nothing is coming out to the effect that notice was served upon the petitioner before assessment order is passed. The ex-parte assessment order has been passed by the assessing officer.

6. It ought to be kept in mind by the State that when the State is imposing such a huge liability of tax of approximately Rs. 90 Lakhs, more care should have been taken by the State to serve the notice upon the petitioner or upon the assessee. Not only orthodox methods of service of notice should have been followed, but, over and above the orthodox methods, the State should have served the notice upon assessee by sending any employee of the State. The State has several vehicles and persons with them. When such a huge liability of tax is imposed or is going to be imposed, the State should have served the notice upon the assessee by sending any responsible employee instead of passing ex-parte order. When there is more liability of amount of tax, more care should have been taken by the State, at least in following the procedure. Always ex-parte orders have inbuilt difficulties because correct facts along with correct documents are not available with the assessing officer. This Court is not pointing out anything on the merits of the case, but, several arguments have been canvassed by the learned counsel for the petitioner even on the merits of the case that the transaction in question which is assessed improperly is not a sale at all, but, they are stock transfer transaction. There is no change of ownership at all, hence, transaction in question is not falling within the charging section of the Act, 2005. These contentions are not decided by this Court, but, they are left open to be decided by the assessing officer.

7. It is rightly submitted by learned counsel for both the sides that if this Court will wait for affidavit to be filed by the State and, thereafter to be decided, it will take at least four weeks'' time and, therefore, without wasting the time, we hereby quash and set aside the ex-parte order of assessment passed by the Commercial Taxes Officer, Koderma Circle, Koderma dated NIL, which is at Annexure-14 to the memo of this writ petition as well as also quash and set aside the demand notice dated 15th March, 2014/5th July, 2014 which is at Annexure-13 to the memo of the writ petition and remand the matter to the said assessing officer for his fresh decision. The petitioner shall remain present before the Commercial Taxes Officer, Koderma Circle, Koderma on 15th January, 2015 at 11:00 a.m. to 01:00 p.m. and, thereafter, the Commercial Taxes Officer, Koderma Circle, Koderma will give his own date or he may decide the matter, after giving adequate opportunity of being heard. All the necessary documents shall be presented by the petitioner, at the earliest before the Commercial Taxes Officer, Koderma Circle, Koderma.

8. It is submitted by the learned Additional Advocate General that let suitable stipulated time be given to the assessing officer so that assessment proceedings for the assessment year 2010-11 may be concluded. For this suggestion, learned counsel for the petitioner has no objection.

9. We therefore direct the Commercial Taxes Officer, Koderma Circle, Koderma to pass the assessment order within a period of eight weeks from the service of the copy of the order of this Court.

10. Learned Additional Advocate General submitted that under Sub-section 8 of

Section 35, there is period of limitation for passing the order of assessment, which is to be read with Sub-section 2 of Section 42 of the Act, 2005. The provisions of Sub-section 2 of Section 42 of the Act, 2005 is a relaxation of the period of limitation for the assessment order, but, it is applicable whenever any order of assessment is passed in appeal or revision. Looking to the facts and circumstances of the present case that an ex-parte order has been passed by the Commercial Taxes Officer, Koderma Circle, Koderma and as we are remanding the matter to the said assessing officer and also looking to Sub-section 2 of Section 42, if any order of appellate forum or revisional forum is passed under the Act, 2005, the period of limitation is enhanced up to 2 years from the date of such order. The provision of Sub-section 2 of Section 42 is also applicable whenever any order is passed in writ petition under Article 226 of the Constitution of India, mainly for the reason that there is an ex-parte assessment order without giving any opportunity of being heard to the assessee and once there is a violation of principles of natural justice, the impugned order will be arbitrary and once there is arbitrariness in passing of the order, the said order is always violative of right of equality vested in the petitioner under Article 14 of the Constitution of India. Thus, the impugned order is violative of fundamental right guaranteed to the petitioner. In these circumstances, whenever order of remand and order of reassessment is passed by this Court, in a writ petition, provisions of Sub-section 2 of Section 42 of the Act, 2005 is applicable and whenever there is violation of fundamental right, we see no reason to relegate the petitioner to file an appeal or revision. Moreover, under Sub-section 3 of Section 79 of the Act, 2005, the assessee has to deposit 20% of the tax assessed. Even otherwise also, the appeal or revision will take at least four weeks'' time to be decided. Hence, looking to the totality of the circumstances, as stated hereinabove that:

(a) there is violation of fundamental right of the petitioner;

(b) much time will be consumed by this Court if this matter is not taken for its final disposal as on today; and

(c) if the petitioner is relegated to approach appellate forum or revisional forum, it will also take at least four weeks'' time.

We have heard this writ petition for its final disposal, instead of relegating the petitioner to appellate or revisional authority.

11. As a cumulative effect of the aforesaid facts and reasons, we hereby remand the matter to the Commercial Taxes Officer, Koderma Circle, Koderma to decide afresh the tax liability, if any, of the petitioner. The relaxation of the time limit as mentioned in Sub-section 2 of Section 42 which is applicable in the case of appellate order or revisional order, is also applicable whenever any order is passed in the writ petition under Article 226 of the Constitution of India. Hence, there is no question of limitation whatsoever arises in this case, if the assessing officer is deciding within the time limit, as stated in Sub-section 2 of Section 42

of the Act, 2005.

12. The attachment already available with the respondent authority, shall remain intact and as it is, till the assessment order is finally passed, by the assessing officer. If there is any amount attached, the same will be set off against final liability of assessee for the year 2010-11.

13. This writ petition is, hereby, disposed of in view of the aforesaid directions.

14. Accordingly, I.A. No. 5699 of 2014 and I.A. No. 6355 of 2014 are also disposed of, in view of final disposal of the writ petition.