(2008) 09 OHC CK 0068

In the Orissa High Court

Case No : Writ Petition (C) No. 10555 of 2008

Jagdamba Polymers Pvt. Ltd. APPELLANT

Vs

State of Orissa and Others RESPONDENT

Date of Decision : 17-09-2008

Acts Referred:

Orissa Value Added Tax Act, 2004 — Section 41, 42(6)
Orissa Value Added Tax Rules, 2005 — Rule 49(3)

Citation : (2008) 09 OHC CK 0068

Hon'ble Judges : B.S. Chauhan, C.J;B.N. Mahapatra, J

Bench : Division Bench

Advocate : J. Sahoo, N.K. Rout and P. Mohapatra, for the Appellant; R.P. Kar, A.S.C. (C.T), for the Respondent

Final Decision : Dismissed

Judgement

B.S. Chauhan, C.J.—This writ petition has been filed mainly on three grounds taken in paragraph 1 of the writ petition which are as under:

(i) Firstly, assessment order has been passed by the authority having no competence. As the Petitioner is a TIN dealer it could not have been assessed by the assessing authority of the Circle, but it could have been assessed only by the assessing authority - Range;

(ii) Secondly, the assessment order is antedated which is an abortive attempt to prevent limitation provided u/s 42(6) of the Orissa Value Added Tax Act, 2.0.04 (hereinafter referred to as the "OVA T Act"; and (iii) Thirdly, it is in violation of the principles of natural justice.

2. The facts and circumstances giving rise to this case are that Petitioner, which is a company registered under the Companies Act and is also registered under the OVAT Act, carries on business of plastic goods like buckets, mugs, jugs, and in course of its business it maintains books of accounts as prescribed under the law. Its business was subjected to audit u/s 41 of the OVAT Act and the audit

visit report in Form No. 3.03 was issued by the audit team. In pursuance thereof the assessing authority issued notice dated 18.9.2.0.07 (Annex.-1) asking the Petitioner''s representative to appear on 27.10.2007. The Petitioner appeared on the said date before the assessing authority and submitted an application for adjournment. The application was accepted and the case was adjourned till 11.11.2.0.07. Subsequent thereto the matter was not heard for quite some time. In the meanwhile the officer was changed and notice dated 3.0.1.2.0.08 was issued to the Petitioner - Assessee to appear before the notice issuing authority for audit assessment. The Petitioner was asked to produce the books of accounts for the tax period, i.e., from 1.4.2.0.05 to 31.3.2.0.07 on 15.2.20.08. The order sheet dated 15.2.2.0.08 reveals that despite service of statutory notice the dealer deliberately avoided to produce the books of account for the tax period from 1.4.2005 to 31.3.2007 and the assessing authority passed order dated 15.2.2008 (Annex. - 4), which reveals that the audit team detected suppression of purchase and sales of Rs. 30, 85,928/- and Rs. 46,15,650/- respectively. The said assessment order has been challenged by the Petitioner on the aforesaid three grounds.

3. So far as ground No. 1 is concerned, this Court has already dealt with the same in an identical case in M/s. B.P. Enterprises v. State of Orissa & 3 Ors. W.P. (C) No. 11638 of 2008 decided on 11.9.2008. It has been held in the said case that in such an eventuality the Assessee ought to raise the issue of jurisdiction under Rule 49(3) of the Orissa Value Added Tax Rules, 2005 and under Clause (4) of the said Rule the assessing authority is bound to deal with the objection before proceeding for assessment.

4. In the instant-case-Mr Sahoo, learned Counsel for the Petitioner, for the reasons best known to him, has given up that issue and does not raise it at all. Thus, there is no occasion for us to decide the said jurisdictional issue.

5. So far as ground No. 2 with regard to the allegation that the order of assessment has been ante-dated is serious and scurrilous one against the statutory authority without laying down any factual foundation whatsoever. No material has been produed to substantiate the allegation.

6. The issue of "malus animus" was considered in Tara Chand Khatri Vs. Municipal Corporation of Delhi and Others, , wherein the Supreme Court has held that the High Court would be justified in refusing to carry on investigation into the allegation of mala fides, if necessary particulars of the charge making out a prima facie case are not given in the writ petition and burden of establishing mala fide lies very heavily on the person who alleges it and there must be sufficient material to establish malus animus.

7. Similarly, in E.P. Royappa Vs. State of Tamil Nadu and Another, , the Supreme Court observed as under:

Secondly, we must not also over-look that the burden of establishing mala fides is very heavy on the person who alleges it. The Court would, therefore, be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration. Such is the judicial perspective in evaluating charges of unworthy conduct against ministers and other, not because of any special status but because otherwise, functioning effectively would become difficult in a democracy.

8. The Supreme Court, in Sukhwinder Pal Bipan Kumar and Others Vs. State of Punjab and Others, ; and Shivajirao Nilangekar Patil Vs. Dr Mahesh Madhav Gosavi and Others, ; has made similar observations.

9. In M. Sankaranarayanan, IAS Vs. State of Karnataka and others, , the Supreme Court observed that the Court may "draw a reasonable inference of mala fide from the facts pleaded and established. But such inference must be based on factual matrix and such factual matrix cannot remain in the realm of institution, surmise or conjecture."

10. In N.K. Singh Vs. Union of India and others, , the Supreme Court has held that "the inference of mala fides should be drawn by reading in between the lines and taking into account the attendant circumstances."

11. There has to be very strong and convincing evidence to establish the allegations of mala fides specifically alleged in the petition as the same cannot merely be presumed. The presumption is in favour of the bona fides of the order unless contradicted by acceptable material. (Vide State of U.P. v. Dr. V.N. Prasad 1995 Suppl. (2) SCC 151; Arvind Dattatraya Dhande Vs. State of Maharashtra and others, ; Utkal University Vs. Dr. Nrusingha Charan Sarangi and Others, ; Kiran Gupta and Others Vs. State of U.P. and Others Etc., and Netai Bag and Others Vs. The State of West Bengal and Others,).

12. In State of Punjab v. V.K. Khanna and Ors. (2001) 2 SCC 330, the Apex Court examined the issue of bias and mala fide, observing as under:

Whereas fairness is synonymous with reasonableness- bias stands included within the attributes and broader purview of the word ''malice'' which in common acceptation means and implies ''spite'' or ''ill will''. One redeeming feature in the matter of attributing bias or malice and is now well settled that mere general.statements will not be sufficient for the purposes of indication of ill will.

There must be cogent evidence available on record to come to the conclusion as to whether in fact, there was existing a bias or a mala fide move which results in the miscarriage of justice.In almost all legal inquiries, ''intention as distinguished from motive is the all-important factor'' and in common parlance a malicious act stands equated with an intentional act without just cause or excuse.Similar view has been reiterated in M/s. Samant and Another Vs. Bombay Stock Exchange and Others, .

13. In First Land Acquisition Collector and Others Vs. Nirodhi Prakash Gangoli and Another, ; and Jasvinder Singh and Others Vs. State of Jammu & Kashmir

and Others, , the Apex Court held that burden of proving mala fides is very heavy on the person who alleges it. Mere allegation is not enough. Party making such allegations is under the legal obligation to place specific materials before the Court to substantiate the said allegations.

14. More so, it is settled legal proposition that in case allegations of mala fide are made against any person he is to be impleaded by name, otherwise the allegations cannot be considered. (Vide State of Bihar and Anr. v. P.P. Sharma, I.A.S. of Delhi and another AIR 1996 SC 326; All India State Bank Officers'' Federation and Others Vs. Union of India (UOI) and Others, ; and I.K. Mishra Vs. Union of India and Others, .)

15. In Federation of Railway Officers Association and Others Vs. Union of India (UOI), , the Apex Court has held that the allegation of mala fide has to be specifically made arid the person against whom such allegations are made has to be impleaded and in his absence such allegations cannot be taken into consideration.

16. In the instant case no factual foundation has been laid to substantiate the scandalous allegation of mala fide against the assessing authority that he passed the assessment order ante dated. More so, the Petitioner has not impleaded the officer by name. In view thereof, as the pleadings fall short of taking note of such an issue, we are not inclined to entertain such baseless pleas.

17. So far as ground No. 3 that the assessment order has been passed in violation of the principles of natural justice. We are of the view that after receiving the audit report sufficient time had been given to ''the, petitioner by issuing notice dated 18.9.2007 to appear on 27.10.2007. Even on that date when the matter was listed before the assessing authority, the Petitioner''s application for adjournment was accepted and he was given time up to 11.11.2007 to produce the books of accounts etc. When the matter came up, the assessing authority had been changed and the notice dated 30.1.2008 was sent to the Petitioner to produce the books of accounts on 15.2.2008. The order sheet dated 15.2.2008 makes it, clear that notice had been served upon the Petitioner, but it failed to produce the books of account etc. and therefore, the assessment order was passed.

18. Mr. Sahoo has persistently and consistently submitted that the notice dated 30.01.2008 had not been served upon the Petitioner and the finding recorded to the effect that it had been served is factually incorrect. We are afraid that such a plea is not tenable nor this issue can be entertained by this Court for the simple reason that no pleadings had been taken to the effect that the notice dated 30.01.2008, fixing the case on 15.2.2008, had not been received by the Petitioner.

19. There can be no dispute to the settled legal proposition that the Court or Tribunal is not permitted to decide a case going out of pleadings of the parties nor the evidence led on a non-existing plea is permitted to be taken into

consideration. (Vide Shri Mahant Govind Rao v. Sita Ram Kesho and Ors. (1898) 25 IA 195 (PC); Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar, ; Kishori Lal Vs. Mst. Chaltibai, ; Samant N. Balkrishna and Another Vs. V. George Fernandez and Others, ; Dalim Kumar Sain and Others Vs. Smt. Nandarani Dassi and Another, ; Dattatraya Vs. Rangnath Gopalrao Kawathekar (Dead) by his legal representatives and Others, ; Bhoona Bi and Another Vs. Gujar Bi, ; Dr. R.K.S. Chauhan and Anr. v. State of U.P. and Ors.; Commissioner of Income Tax, Calcutta Vs. Park Hotel (P) Ltd., 15 Park Street, Calcutta-16, ; Syed Dastagir Vs. T.R. Gopalakrishnasetty, ; Sankaran Pillai(dead) by Lrs. Vs. V.P. Venuguduswami and Others, ; J. Jermons Vs. Aliammal and Others, ; Life Insurance Corporation of India and Others Vs. Jyotish Chandra Biswas, ; Om Prakash Gupta Vs. Ranbir B. Goyal, ; and Ashutosh Gupta Vs. State of Rajasthan and Others,).

20. Mr. Sahoo learned Counsel for the Petitioner further submitted that the books of accounts had been submitted on 8.11.2007, the date on which the matter had not been fixed. We fail to understand why this matter could not be brought to the notice of the authority who passed the assessment order dated 15.2.2008. Petitioner could appear and pointed out to the assessing authority that the books of accounts had already been submitted on 8.11.2007. The Petitioner has also filed the receipt dated 8.11.2007 (Annex.- 2). Reference thereto does not find place either in the order sheet or in the assessment order. Therefore, we are very m1223 uch doubtful about the genuineness of filing such an application.

In view of the above, we find no force in the petition.

The writ petition lacks merit and is dismissed.

B.N. Mahapatra, J.

21. I agree.

