(1995) 01 PAT CK 0032

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No''s. 3258, 3260, 3261 and 3073 of 1989

Mithila Motors (P) Ltd. APPELLANT

Vs

State of Bihar and Others RESPONDENT

Date of Decision : 23-01-1995

Acts Referred:
Bihar Finance Act, 1981 — Section 16(9), 25(3)

Citation : (1995) 1 BLJR 426

Hon'ble Judges : K. Venkataswami, C.J;Sudhansu Jyoti Mukhopadhaya, J

Bench : Division Bench

Final Decision : Allowed

Judgement

S.J. Mukhopadhaya, J.—All the writ petitions filed by the common petitioner involves common point of law and in all the cases the revisional order passed by the Bihar Commercial Taxes Tribunal is common, thereby they have been heard together and disposed of by this common order.

2. The petitioner is a private1 Limited Company having its Registered Office at Jamshedpur and Branch Offices at different places in the State of Bihar. By these writ petitions, the petitioner has challenged the orders passed by the Respondents imposing penalties u/s 25 (3) of the Bihar Finance Act, 1981 (hereinafter referred to as the Act) and/or penalties imposed by the Respondents u/s 16 (9) of the Act, the appellate orders confirming the penalties and the order passed by the Chairman of the Commercial Taxes Tribunal, Bihar, Patna in the Revision applications.

3. The petitioner has not only challenged the order imposing penalties for nonpayment of Sales tax "Surcharge" in time and the revisional order confirming the same, on the basis of the merit of each case, but also has challenged the validity of Rule 33 (8)(a) of the Bihar Sales Tax Rules, 1983 (hereinafter referred to as the Rules), the proviso to which empowers the decision of the Chairman as final, in case there is a difference of opinion that of the Chairman with another

member of the Tribunal and when the post of third Member is vacant.

4. The brief facts of the case lie in a narrow compass which are, as follows.

5. The Respondents State promulgated the Act and provisions of Sales Tax "Surcharge" was levied for the first time vide Section 5 of the Act. This Section 5 levying Sales tax "Surcharge" came into force with effect from 15th January, 1981 by Notification No. SO 16 of the same date. The petitioner and similarly other situated persons filed different writ petitions challenging the validity of Section 5 of the Act levying Sales tax "Surcharge". Writ petition bearing C.W.J.C. No. 2271 of 1981 was filed by the petitioner. On 24th of August, 1981, a Bench of this Court passed stay order in favour of the petitioner in the said writ petition. Ultimately, the writ petition aforesaid was dismissed on 30th April, 1982 upholding the validity of Section 5 of the Act imposing a levy of Sales tax "Surcharge".

Being aggrieved, the petitioner moved before the Supreme Court in SLP (Civil) No. 918 of 1982. The Supreme Court also passed stay in favour of the petitioner on 3rd September, 1982 but ultimately the said SLP was also dismissed on 6th May, 1983.

It was because of such stay order, the petitioner did not choose to pay the Sales Tax "Surcharge". When the Supreme Court dismissed the Special Leave Petition, thereby the stay was vacated, the petitioner approached the Respondents Stated for payment of Sales tax "Surcharge" by way of instalments. On 25th November, 1983, vide Annexure-1, the Respondents stayed immediate recovery and asked the appropriate authority to intimate as to in how many instalments the payable Sales tax "Surcharge" is to be recovered. But the order finally went against the petitioner relating to instalments on 1st March, 1984 when the Respondents disagreed for instalments.

The petitioner thereafter again moved this Court by filing C.W.J.C. No. 2176 of 1986 praying therein for direction to the Respondents for recovery of Sales tax "Surcharge" by way of instalments. Vide order dated 14th May, 1986 (Annexure-2), a Bench of this Court disposed of the writ petition on "agreed term", laying down therein that the balance Sales tax "Surcharge" is to be paid on instalments, as mentioned therein.

In the meantime, different orders imposing penalty under Sections 16 (9) and 25(3) of the Act were issued by the different Respondents, as mentioned below.

Vide order dated 15th November, 1985, penalty u/s 25 (3) of the Act has been imposed for the period 1982-83 by the Assistant Commissioner, Commercial Taxes, Muzaffarpur Circle, (vide Annexure-5), which is the subject matter of C.WJ.C. No. 3258 of 1989. Vide another order dated 15th November, 1985, penalty u/s 25(3) of the Act has been imposed by the Assistant Commissioner, Commercial Taxes, Muzaffarpur Circle for the period 1983-84, vide Annexure-5, which is the subject matter of C.WJ.C. No. 3261 of 1989. Vice one order dated

9th May, 1984, the Deputy Commissioner, Muzaffarpur Circle imposed penalty in terms of Section 16 (9) of the Act. This is with respect to the period from 15th January, 1981 to 29th February, 1984, vide Annexure-5, which is the subject matter of C.W.J.C. No. 3260 of 1989. Earlier vide another order dated 10th October, 1983, the Deputy Commissioner, Muzaffarpur Circle imposed penalty in terms of Section 16(9) of the Act with respect to the period from 15th January, 1981 onwards on the ground that the Sales tax "Surcharge" was not paid, (vide Annexure-5), which is the subject matter of C.WJ.C. No. 3073 of 1989.

Being aggrieved, the petitioner filed four appeal petitions before the Joint Commissioner (Appeals), Tirhut Division, Muzaffarpur. Therein he has challenged the penalties imposed on the petitioner by different orders, as aforesaid, on merit. The petitioner pointed out therein that there was no laches on the part of the petitioner in making payment of Sales tax "Surcharge". Further the petitioner brought to his notice the different orders of stay passed by one or other court with respect to payment of Sales tax "Surcharge" and stay granted by the State Government as well as instalments relating to repayment of Sales tax "Surcharge" as agreed before the High Court on 14th May, 1986. All the appeals have been dismissed by the Respondent Joint Commissioner (Appeals) vide different orders all dated 2nd March, 1988, which are Annexure-6 to the respective writ petitions.

6. At this stage, it is to be taken into note that one of the grounds with respect to penalties u/s 16 (9) of the Act was taken by the petitioner, is imposition of penalties without hearing the petitioner.

7. Being aggrieved, the petitioner filed four different revision applications before the Commercial Taxes Tribunal which were numbered as Revision Case Nos. MZ-54, 55, 56 and 57 of 1988. They were heard together by the Tribunal in which the Chairman and one Member of the Tribunal were present.

At this stage, it is to be taken into note that apart from the Chairman and one Member, there was no third Member-the post of third Member being vacant. Under the Rules, there is a provision for appointment of two Members in addition to the Chairman.

8. All the aforesaid Revision applications were dismissed by the Commercial Taxes Tribunal by order dated 16th of December, 1988 by a common order, vide Annexure-7 to the respective writ petitions. By the aforesaid impugned order passed by the Tribunal dated 16th of December, 1988; while the Chairman of the said Tribunal has dismissed the Revision applications filed by the petitioner; the other Member has allowed all the said Revision applications setting aside the impugned orders of penalties. As stated above, in terms of proviso to Rule 33(8)(a) of the Rules, the Revision applications stood dismissed because of the order of the Chairman of the Tribunal, without referring to any other Member, the other post of Member being vacant at that point of time.

9. The petitioner has challenged the appellate orders (Annexure-6 to the

respective writ petitions) confirming the penalties imposed u/s 25(3) and/or Section 16(9) of the Act. The petitioner has also challenged the proviso to Rule 33(8)(a) of the Rules with prayer to declare the same as ultra vires.

10. Counsel for the petitioner while brought to our notice al the chronological events relating to levying of Sales tax "Surcharge", stay of the same by one or other Court; stay of the same by the State Government, and ultimate agreed order as passed by this Court on 14th May, 1986 (Annexure-2) in C.W.J.C. No. 2176 of 1986, has submitted that there was no laches and/or fault on the part of the petitioner and thereby no penalty in terms of Section 25 (3) and/or Section 16 (9) of the Act can be imposed.

11. Sections 25 (3) of the Act reads, as follows :--

25. Payment and recovery of tax.--

1....

2....

3. If a dealer has failed, without reasonable cause, to make payment of any amount of tax by the date specified in the notice issued under Sub-section (2) or forthwith as required by the second Proviso thereto, or in the like manner has failed to make payment of tax by the date extended under the first Proviso of the said Sub-section or has defaulted in payment of instalments, the prescribed authority may direct that the dealer shall pay, in the prescribed manner by way of penalty for such failure, an amount which may extend to five percentum of the amount of tax, for each of the first three months following the expiry of such date and to 10 per centum for each subsequent month or part thereof.

12. Counsel for the petitioner submits that the Respondents can impose penalty on a dealer only if the dealer fails, "without reasonable course", to make payment of any amount of tax. According to the petitioner, the events show that the petitioner earlier failed to make payment of Sales tax "Surcharge" because of reasonable cause, there being stay granted by one or other court and/or by the State Government. Thereafter full payment of Sales lax "Surcharge" has not been made at a time, the instalments having been fixed by this Court on the basis of the agreements with the Respondents. Further counsel for the petitioner stated that the full payment of Sales tax "Surcharge" for the period, in question, has been made by the petitioner in due time, by various instalments, as ordered by this Court, receipt for such payment has been annexed as Annexure-4 to the respective writ petitions. By fulfilling all the requirements, as aforesaid, counsel for the petitioner submitted that the penalty imposed on the petitioner was completely illegal and confirmation of the same by the appellate authority vide impugned order, as contained in Annexure-6 to the respective writ petitions are bad.

13. Counsel for the petitioner further submitted that penalties u/s 16(9) of the Act were also imposed in violation of rules of natural justice, without hearing the

petitioner. It has been contended that the grounds shown by the petitioner were good ground and without ascertaining reasonable cause, the penalties have been imposed and they were confirmed by the appellate authority on the same fashion. He further submitted that one of the Member has accepted the contentions of the petitioner, on the basis of aforesaid facts, that there was a "reasonable cause" in making delayed payment of Sales tax "Surcharge", on instalments, on the part of the petitioner. Further such delay was taken into account by this Court while fixing instalments, on agreement. It was for the said reason one of the Members allowed all the Revision applications, which were rightly allowed.

14. It was at this stage, the Counsel for the petitioner argued the validity of Rule 33(8) of the Rules. Rule 33(8)(a) and Proviso thereto reads, as follows :--

Where an application is heard by all the three members of the tribunal and the members are divided in opinion on any point or points, such point or points shall, subject to the provisions of Section 48, be decided in accordance with the opinion of the majority :

Provided that if the post of any one of the members is vacant such points shall be decided in accordance with the opinion of the Chairman.

15. Counsel for the petitioner made various submissions relating to legality of the aforesaid Proviso to Rule 33 (8)(a) of the Rules and contended that the said Proviso of the Rules should be declared ultra vires and the Revisional orders should be referred to a third Member.

16. As we are doing to dispose of these writ petitions on the basis of the merits of the petitioner''s case, we feel there is no necessity in going into the second contention of the petitioner as to whether the Proviso to Rule 33(8)(a) of the Rules is ultra vires or not.

17. Mr. Advocate General appearing on behalf of the Respondents has not disputed the facts, as narrated above. He has also accepted that after the vacation of the stay, it was on agreement with the Respondents, this Court on 14th May, 1986, vide Annexure-2, disposed of the writ petition fixing instalments, to be paid by the petitioner for discharging or his liability of payment of Sales tax "Surcharge". He has practically conceded that mere is a reasonable cause in favour of the petitioner in making delayed payment of Sales tax "Surcharge" in instalments, as has been held by one of the Members;

18. Having heard both the parties, we also hold that there is a reasonable cause in favour of the petitioner for making delayed payment of Sales tax "Surcharge" by way of instalments. The decision given by the Member of the Tribunal is upheld. Thereby the impugned order as contained in Annexures-5 and 6 to the respective writ petitions and the Revision application as dismissed by the Chairman of the Tribunal, as contained in Arinexure-7 to the respective writ petitions, are quashed.

19. In the result, the writ petitions are allowed, but there will be no order, as to costs

K. Venkataswami, C.J.

20. I agree.

