

(2013) 05 JH CK 0030

In the Jharkhand High Court

Case No : WP (sic) No's. 1846, 1876 and 1892 of 2013

M/s Devkabai Velji (in all)

APPELLANT

Vs

The State of Jharkhand and Another (in all)

RESPONDENT

Date of Decision : 01-05-2013

Acts Referred:

Jharkhand Value Added Tax Act, 2005 — Section 35(7), 40(2)

Citation : (2013) 3 AJR 320 : (2013) 2 JLJR 456

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

Bench : Division Bench

Advocate : Sumeet Gadodia, for the Appellant; Ajit Kumar, for the Respondent

Judgement

1. These writ petitions are decided by this common order because of the reason that issue involved in all these matter is very short which goes to the root of the matter and i.e. non-observance of the principle of natural justice in the matter of passing the impugned orders dated 9.2.2013 in all these matter where the orders of assessment have been made without affording opportunity of hearing to the writ petitioner. This fact, in fact, is not disputed by the respondents themselves because of the reason that from the record it transpires that in the cases, the Assessing Officer, after recording absence of the petitioner in the order-sheet in the detailed assessment order, himself mentioned that the assessee appeared and he was given opportunity of hearing and thereafter the order was passed but the fact which is not in dispute is that petitioner was not given opportunity of hearing. We are not going in detailed argument of the learned counsel for the petitioner because of the plain and simple reason that, we are of the considered opinion that in these matters liability of crores of rupees has been created by these assessment orders and the manner in which it has been done is highly objectionable. In the assessment under challenge in writ petition W.P.(T) No. 1846 of 2013 admittedly no material was available with the Assessing Officer, reference of which has been given in the impugned order and learned counsel for the petitioner drew our attention to some of the facts which

clearly indicate that the Assessing Officer, to determine the highest market value of the commodity of the petitioner, took the average rate of two companies and that was the highest rate of sale of the commodity of the companies and not only this, even the highest rate of the iron ore prescribed by the Indian Bureau of Mines (I.B.M.) was also taken into account whereas according to the petitioner, the petitioner's iron ore's grade is very low and so has been already certified by the Union of India. Learned counsel for the petitioner also drew our attention to the fact that in reply affidavit the deponent, who is Officer-in-Charge and also who is Assessing Officer, clearly admitted that "the petitioner sold the same grade of iron ore for the same period at far lesser price than the price fixed by the I.B.M.", therefore, the Officer-in-Charge-cum-Assessing Officer in reply affidavit admitted that "X" may be the price fixed by the I.B.M., but the petitioner sold the goods @ X minus Y which is less than the price fixed by the I.B.M. In that situation, the Assessing Officer had no jurisdiction to exercise powers u/s 40(2) read with Section 35(7) of the Jharkhand Value Added Tax Act, 2005 because admittedly the petitioner has shown the actual sale price in the invoice and, therefore, it is not a case of showing less price in the invoice than the sale price received by the petitioner.

2. Be that as it may, the Officer-in-charge also has filed affidavit on legal issues which can be done by an Officer-in-charge, but at the same time such submissions cannot be binding upon the adjudicatory authority, its appellate authority and further appellate authority who are under obligation to decide the legal issues after giving opportunity of hearing to the parties and in accordance with law and are not bound by the stand taken in reply affidavit in writ jurisdiction when that subject matter itself is not under consideration as a legal issue and matter is heard only on preliminary issue like challenge to the show cause notice or violation of principle of natural justice and on those issues only, the matter required to be decided. The reply on legal issues can be only in a case when those contentious issues are to be decided by the Court. In this case, when this Court is of the view that the petitions deserve to be allowed only on the ground of gross violation of principle of natural justice and on the ground of taking into consideration the materials which were not available on record and on the basis of materials which were though available but were not supplied to the petitioner and in assessment proceedings, no reasonable opportunity to meet with the plea of the department was given, then in that situation, any stand taken by the respondents in reply affidavit shall not be binding upon the Assessing Officer, its appellate authority and further appellate authority and, therefore, they are supposed to decide all the issues raised by the petitioner in the proceeding uninfluenced by the stand taken in the reply affidavit and in accordance with law, after giving opportunity of hearing to the writ petitioner.

3. Since admittedly in these matters opportunity of hearing was not given, the orders dated 9.2.2013 are liable to be set aside and matters are liable to be remanded.

4. Before parting with, we would like to observe that the Assessing Officer should be very careful in passing any order of assessment because if they are acting under pressure whatsoever, then they may commit mistake and that may cause huge loss to the State Revenue. They may commit further grave mistake by creating huge liability upon the assessee which ultimately is liable to be set aside by the Courts and during the period of setting aside of that liability, the statistics will show that huge revenue has been stayed in the litigation and that will be factually wrong. Not only this, in serious cases, the Assessing Officer or appellate authority or further appellate authority may have to face consequences of grave mistakes committed by them under pressure or other consideration including frivolous effort to reach to some target when in fact there is no tax liability and, therefore, also it is appropriate that the Revenue Officer should act with care and caution. We are giving example of the facts of the case of W.P.(T) No. 1846 of 2013 in which notice was issued on 1.2.2013 for appearance on 9.2.2013. On 9.2.2013 it was recorded in order-sheet that nobody appeared on behalf of the assessee. Then the Assessing Officer, because of one absence (which is factually wrong) observed that because of nonappearance of assessee, it is clear that attitude of the assessee is non-cooperative and this also shows his intention of evading the tax. This order-sheet is factually wrong as admittedly the petitioner appeared on 9.2.2013 and he gave his attendance in writing. That is not enough, after writing this, by a separate order-sheet in the same page, there is another order-sheet before which the word "after" has been mentioned. So, subsequent to the writing of the order dated 9.2.2013, the Assessing Officer recorded in order-sheet that separate assessment order has been passed which is running in four pages and the evaded sale amount is Rs. 1,02,88,79,541.27 over which the total tax and interest liability is of Rs. 8,61,54,927.90. In such huge transaction creating a tax and interest liability of more than 81/2 crores, in the order of assessment alleged to have been drawn on the same day, the Assessing Officer mentioned that assessee appeared and he was heard also. Not only this, that the order-sheets drawn are wrong but in the first alleged non-appearance of the petitioner, inference has been drawn that non-appearance of the assessee on the first date appears to be because of the non-cooperative attitude and this indicates the intention of the assessee of evasion of tax. It will be worthwhile that in other tax matter which were decided on same day, record of that case may have been looked into by Assessing Officer, the assessee was regularly appearing on almost all occasions.

5. We are not commenting on the merit but the facts which cannot be disputed are that for the purpose of finding out the average market value of the iron ore, the Assessing Officer took highest average sale price of two companies and average sale price fixed by the I.B.M. and that too, shown of best quality of the goods. Learned counsel drew our attention to the various documents which seriously require consideration before taking a decision about the price, if law permits, for assessment of the sale of the goods of the petitioner, on the basis of assumption, presumption or on the basis of the sale effected by other parties or

average price fixed by the I.B.M., irrespective of the fact that actual sale price received by the petitioner and proved by him is mentioned in the invoice and he has not sold the commodity on the price lower than the price shown in the invoice.

6. We are only pointing out towards issues which the petitioner has raised in these petitions and since matter is required to be decided by the Assessing Officer first, therefore, our these observations may not be considered to be observation on merit of the case. Only we want to indicate that there appears to be some fault somewhere which could have been corrected by the petitioner who could have assisted the Assessing Officer in arriving at a right conclusion.

7. At the cost of repetition we are making it clear that in a case of serious fault which may indicate towards the mala fide of the officer, the officer will be responsible and not the pressure under which he may have worked and such officer may be liable to be proceeded against in the court or/and departmentally.

8. Learned counsel for the petitioner relied upon the judgment of Hon''ble Supreme Court delivered in the case of Moriroku UT India (P) Ltd. Vs. State of U.P. and Others, but since we are not addressing on any of the issues of merit and leaving it to the Assessing Officer to consider and decide the matter, therefore, we are not commenting on this judgment.

9. Therefore, these writ petitions are allowed. The impugned orders dated 9.2.2013 are set aside and the matter is remanded back to the Assessing Officer.

10. At the request of both, the parties, date is fixed and the parties shall appear before the Assessing Officer on 8th June, 2013. When the assessee appears before the Assessing Officer, the Assessing Officer will supply copies of all the documents which the Assessing Officer wants to rely upon and will give opportunity to the petitioner to produce the evidence and will also give opportunity of hearing to the petitioner and then will pass order. The Commissioner-cum-Secretary, Commercial Tax Department, Government of Jharkhand is directed to circulate a copy of this order to all Assessing Officers and appellate authorities so that they may be well aware about their responsibilities in deciding the matter and consequence of consequential action in case of working under pressure or other consideration or acting negligently deliberately.