

(2012) 03 JH CK 0139

In the Jharkhand High Court

Case No : Writ Petition (T) No. 1023 of 2012 with W.P. (T) No"s. 1024-1027 of 2012

M/s Tata Steel Limited

APPELLANT

Vs

State of Jharkhand and Others

RESPONDENT

Date of Decision : 02-03-2012

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2012) 2 JCR 576 : (2012) 49 VST 225

Hon'ble Judges : Prakash Tatia, C.J;Aparesh Kumar Singh, J

Bench : Division Bench

Advocate : M.S. Mittal and A.R. Choudhary, for the Appellant; Ajit Kumar, AAG, Rajesh Shankar and Abhay Kumar, for the Respondent

Final Decision : Dismissed

Judgement

1. Background facts leading to present controversy is issuance of a demand by the Deputy Commissioner of Commercial Taxes first in the form of notice against M/s. BOC India Limited; which was challenged by BOC India Ltd. by preferring W.P.(T) No. 4963 of 2005 before this Court but that petition was dismissed on 2.11.2007, holding that M/s. BOC has no locus standi to file writ petition as admittedly tax was payable by TISCO (presently petitioner before us), who is purchaser of oxygen produced by the BOC and using it in its industrial unit for its product. This Court was of the view that since liability will be on TISCO, therefore, the TISCO alone could have challenged the action of the revenue. The order of the Court was challenged by both M/s. BOC as well as present petitioner-TISCO by preferring Civil Appeal No. 1538 of 2009 and Civil Appeal No. 1540 of 2009 respectively. Both these appeals were decided by Hon"ble Supreme Court vide judgment dated 5th March, 2009 and in the said judgment, it has been held that M/s. BOC could have challenged the action of the revenue, however, while considering the issues raised by the parties including by the TISCO Hon"ble Supreme Court was of the view that such evidence may be in possession of

TISCO and obviously, because of that reason, the assessing authority in the light of the observations made by the Hon''ble Supreme Court allowed the petitioner, TISCO to participate in the assessment proceedings after remand to it by the Supreme Court, though the original notice and the proceedings were only against M/s. BOC India Limited. The Hon''ble Supreme Court in the said judgment clearly rejected the plea of the writ petitioner to accept the process which has been prescribed in the statute to be taken to be binding for deciding whether the oxygen in question used by the writ petitioner is raw material or not and held that this issue is required to be decided on the basis of the evidence which may be produced and obtained by the department. Because of this obvious reason the assessing officer not only inspected the site of the TISCO but also drawn a report with reference to the report of the procedure wherein the oxygen is consumed. The assessing officer, in assessment proceedings even gave opportunity of hearing to the representative of the TISCO as well as for producing evidence which was duly produced by the writ petitioner. After considering all the evidences on record the assessing officer held that the oxygen is a "refining" or "reducing agent" only and cannot be held raw material. The assessing officer's order dated 1st October, 2011 is sought to be challenged in this writ petition. Learned counsel for the State has raised objection about the maintainability of the writ petition on the ground of the availability of alternative remedy of appeal u/s 45 of the Bihar Finance Act, 1981 as adopted by the State of Jharkhand.

2. Learned counsel for the petitioner submitted that the petitioner cannot prefer appeal in view of the fact that appeal u/s 45 of the Act can be preferred only by the dealer and the principle which allows the aggrieved party to prefer appeal cannot be applied in taxing statutes and to the Bihar Finance Act and learned counsel assisting the senior counsel also submitted that if it is held that anybody who is affected by the order passed by the assessing officer can prefer appeal u/s 45 of the Act of 1981 then, every consumer or any person, who ultimately pays the sales tax may prefer appeal u/s 45 of the Act and therefore, the appeal can be preferred only by the dealer obviously, the dealer registered under the Bihar Finance Act of 1981 against order which has been passed and cannot be preferred by any person who is ultimately affected by the order.

3. Learned counsel for the petitioner relied upon two judgments of the Hon''ble Supreme Court reported in 1996(5) SCC 370 EIL Chemical v. Union of India, and also in a case of India Explosive Ltd. v. Sales Tax Commissioner U.P., reported in 1978(41) 315 and submitted that Hon''ble Supreme Court in both the decisions has considered this aspect of the matter and clearly held that the writ petition is maintainable by a stranger to the proceeding and therefore, the present writ petitioner is maintainable.

4. We have considered the submission of the learned counsel for the parties and perused the facts of the case as well as Section 45(1) of the Act of 1981. It is true that in sub-section (1) of Section 45 it is provided that the dealer may prefer appeal against any order of assessment or penalty, passed by the

prescribed authority against him and it is also provided that person objecting to order of penalty passed against him or an order u/s 27 of the Act may appeal to the Joint Commissioner, Deputy Commissioner especially authorized for it.

5. Therefore, it is true that the dealer can prefer appeal against the order of assessment and appeal also can be preferred by person other than dealer in the cases where order of penalty has been passed or order has been passed u/s 27 of the act against such person who may not be dealer. So far as assessment order is concerned, it can be challenged by the dealer. But the factual situation here is entirely different because of the reasons that the writ petitioner approached the Hon''ble Supreme Court by preferring Civil Appeal No. 1540 of 2009, which was decided along with appeal preferred by M/s. BOC in civil appeal No. 1538 of 2009 by a common judgment dated 5th March, 2009 and in the said judgment it has been held by Hon''ble Supreme Court that M/s. BOC being dealer could have challenged the action taken by the authority and at the same time in the presence of the present petitioner itself held that the evidence may be In the possession of the TISCO and further held that the question raised by both the parties M/s. BOC and TISCO is a question of fact which is required to be decided on the basis of the evidence obviously to be produced by the parties. The Hon''ble Apex Court remanded the matter to the assessing officer and, therefore, following the decision of Hon''ble Supreme Court the petitioner itself appeared before the assessing authority and assessing officer entertained the evidence produced by the petitioner and thereafter, passed the impugned order. Therefore, the petitioner's right to challenge the order is concerned i.e., available to the petitioner and that view is supported by the judgment relied upon by the counsel for the petitioner himself wherein it has been held that writ petition to challenge such order by stranger is maintainable if the person was not party in assessment proceedings and not the dealer registered under the act then he can prefer writ petition. However, in peculiar facts and circumstances available in this case where, by the order of the Hon''ble Supreme Court the petitioner was permitted to appear before the assessing authority, who otherwise could not have been a party in the original assessment proceeding and become party by virtue of the Hon''ble Supreme Court's order as a party and therefore, in these peculiar facts and circumstances when he was a party in original proceeding then in that situation the petitioner can prefer appeal u/s 45(1) of the Act, 1981.

6. At first, we may observe that the petitioner admittedly otherwise could not have participated in the proceedings but once he was permitted to produce evidence and argue the matter before assessment officer and is entitled to challenge the order of assessing authority then we have to examine whether writ petition is proper form in these peculiarly fact situation or such person can prefer appeal u/s 45 of the Act of 1981.

7. We are of the opinion, that in these peculiar facts and circumstances if the view is taken otherwise then that may result into multiplicity of the proceedings before the different Courts; one by the dealer before the appellate authority to

avail the remedy available in the Act, which normally dis-entitles such party to approach the Court under Article 226 of the Constitution of India because of the availability of effective alternate statutory remedy and other proceeding by such person like petitioner under Article 226 of the Constitution of India. In these facts it is difficult to hold that the same party, which was party before the same assessing authority will not be entitled to prefer appeal. Meaning thereby, in the same proceeding against one order one is mandatorily required to prefer appeal if he wants to challenge the order passed by the original authority and another person cannot prefer appeal and can challenge the order only in the writ jurisdiction. Such interpretation cannot be given to Section 45 (1) of the Act of 1981.

8. In these peculiar facts and circumstances of the case, we do not find any substance in the submission of the learned counsel for the petitioner that because of the view expressed by us every consumer affected by the taxation who may not be dealer will be challenging the order of the assessing authority in Appeal. The ratio applies to the facts of the case. In view of the above reasons we are to examine whether it is a fit case for entertaining the writ petition even when the petitioner can challenge the impugned order.

9. We are of the considered opinion that for determination of question of fact requires technical expertise of the department in view of the observation of the Hon'ble Apex Court as this issue is not of law only and therefore, in the facts of the case where it is required to be decided after considering the evidences of the parties then it would be appropriate, in this case, that the petitioner may approach the appellate authority by preferring appeal and therefore, we are not inclined to entertain the writ petition as we are of the view that the petitioner can avail the remedy available in the Act, 1981. Hence, the writ petition is dismissed on the ground of availability of alternative remedy only.

10. Learned counsel for the petitioner submitted that period for filing the appeal expired three days ago only and the is not aware whether M/s. BOC has preferred an appeal before the appellate authority or not. It is submitted that if BOC has preferred appeal then petitioner may be permitted to intervene in that appeal.

11. If M/s. BOC has preferred appeal then certainly the writ petitioner may intervene in that matter to avoid the multiplicity of proceeding and if BOC has not preferred appeal then the writ petitioner may prefer appeal against the impugned order and may file application for the condonation of delay for preferring appeal, which may be considered sympathetically by the appellate authority.

12. Learned counsel for the petitioner submitted that the appellate authority or the officer holding the post of appellate authority has retired only on 29th February, 2012 and therefore there may not be possibility of posting any officer in short time who may dispose the appeal. We may expect that the officer may

be appointed soon and if officer is not appointed then petitioner will free to avail remedy available to him according to law wherein the matter can be examined on the merit of the writ petition for interim relief.