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(2004) 08 PAT CK 0070

In the Patna High Court

Case No : Criminal Miscellaneous No. 15041 of 2003

Rajendra Kumar Goenka APPELLANT

Vs

The State of Bihar and Another RESPONDENT

Date of Decision : 03-08-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Penal Code, 1860 (IPC) — Section 406, 409, 420, 467

Citation : (2004) 4 PLJR 80

Hon'ble Judges : Mridula Mishra, J

Bench : Single Bench

Advocate : Navniti Pd. Singh, Rajesh Mohan, for the Appellant; Sudhir Singh, Rabindra Kumar Priadarsi and , Assistant Public Prosecutor for the State, for the Respondent

Final Decision : Allowed

Judgement

Mridula Mishra, J.—This application u/s 482 of the Code of Criminal Procedure has been filed by the petitioner, one of the Directors of M/s Ganpati Traders, for quashing the order dated 8.1.2003, passed by the Chief Judicial Magistrate, Begusarai, whereby cognizance has been taken against the petitioner and other named accused persons under Sections 406, 409, 420 and 467 of the Indian Penal Code. This application is also for quashing the entire criminal proceeding of Begusarai (Town) P.S. Case No. 206 of 2002 instituted for alleged violation of Bihar Tax on Entry of Goods into Local Area for Consumption, Use or Sale Act, 1993 {hereinafter referred to as the "Act"). The informant is one of the partners of M/s Jairam Das & Company, Begusarai and is a local dealer in Tobacco products (Cigarettes) at Begusarai.

2. In the F.I.R, it is alleged that during the period 1993-96 the firm of the informant had purchased cigarettes worth Rs. 1,79,06,407/- from M/s Ganpati Traders, Patna. Bills issued by M/s Ganpati Traders though indicated charging of local tax including entry tax but did not issue declaration Form ET-IX to the

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informant''s firm. Due to this for the period 1993-96 the informant''s firm was assessed to pay entry tax again at Begusarai. M/s Ganpati Traders committed criminal breach of trust as it charged entry tax but did not deposit it in the Government Treasury. It is alleged that M/s Ganpati Traders, its directors and others are liable to be prosecuted for offences punishable under Sections 406, 409, 420 and 467 of the Indian Penal Code (hereinafter to be referred to as the Code.)

3. The background behind filing this case is that the Bihar Tax on Entry of Goods into Local Areas for Consumption Use or Sale Therein Ordinance, 1993 was promulgated on 22.2.1993. It was later on 2.8.1993 was replaced by the Bihar Tax on Entry of Goods Into Local Area for Consumption, Use or Sale Therein Act, 1993 (Bihar Act 16 of 1993). Section 3 of the Act created a charge and it provided that there shall be levied and collected a tax on entry of certain goods into a local area for consumption, use or sale therein at rates not exceeding 5% to be notified. For the first time by Notification No. S.O. 37 dated 25.2.1993 the rate of entry tax for tobacco products was specified as 3%. The liability to pay entry tax under the Act has been fixed on every dealer who brought into any local area the specified goods for sale, use or consumption therein. This Act was challenged by the Bihar Chamber of Commerce a body representing traders as well as the Bihar Tobacco Vikreta Sangh by filing a writ application vide C.W.J.C. No. 3224 of 1993 challenging the validity of the provisions of the Act. By order dated 4.5.1993 interim stay was granted by which the requirement of obtaining registration and payment of entry tax was stayed. As a consequence of interim order dated 4.5.1993 the traders neither charged any tax nor applied for registration under the State Ordinance or the Act or Rules framed therein. The informant''s firm as well as the firm of the petitioner also did hot get themselves registered or charged entry tax from its purchaser during the period in question. Since the petitioner''s firm had not registered itself under the Act it could not and did not charge entry tax. It also did not issue statutory form of evidence having charged tax in form ET-IX: Ultimately the writ application challenging the validity of the Act was allowed holding that the provisions of the Act and the Rules framed thereunder were ultra vires and as such unenforceable. The State of Bihar took the matter in appeal to the Supreme Court and by judgment and order dated 6.2.1996 the Apex Court over-ruled and reversed the judgment of the Patna High Court. Once the validity of the aforesaid Act was upheld, the informant was asked to apply for registration at Begusarai under the Act. Consequent to the application of the informant''s firm for registration under the Act, it was found that the informant''s firm had not paid entry tax on importation of tobacco products for the town of Begusarai. A proceeding was initiated against the informant''s firm under the Act and the Rules. The informant''s stand in these proceeding initiated under the Act and the Rules was that he was the second importer in the State of Bihar. He purchased the goods from the petitioner''s firm at Patna and as such under the provisions of the Act and the Rules he was not liable to pay tax. The liability if any was that of the petitioner''s firm. This stand

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of the informant was not accepted by the authorities under the Act and entire purchase made by the informant''s firm was brought to assessment. The informant''s firm challenged the action of the taxing authorities by filing C.W.J.C. No. 10276 of 2000 which was ultimately dismissed upholding the liability of the petitioner''s firm to pay tax under the Act. Having fastened with the liability to pay tax the informant lodged the present F.I.R, on 7.7.2002. In the F.I.R, the allegations are

(i) though petitioner''s firm had charged entry tax as bills were endorsed showing price inclusive of local taxes, it did not issue form ET-IX for the period 1993-94 to 1995-96 because of which informant''s firm had to pay entry tax again.

(ii) Though the petitioner''s firm had charged entry tax in the manner aforesaid it did not deposit it in the Government Treasury and as such it has committed offence under Sections 406, 409, 420 and 467 of the Indian Penal Code.

4. Counsel for the petitioner has submitted that it is an admitted fact that the informant''s firm had stopped dealing with the petitioner''s firm within the financial year 1995-96 itself. It has falsely been alleged that the petitioner''s firm had charged entry tax from the informant''s firm. The informant has relied on an invoice dated 17.2.1993 which is in printed form and bears a printed endorsement "Price inclusive of local taxes". This endorsement surely not refer to entry tax. The Ordinance with regard to entry tax for the first time was enacted on 22.2.1993. The rate was notified for the first time on 25.2.1993 as such endorsement on the invoices dated 17.2.1993 do not and cannot include entry tax. The assertion of the informant that the petitioner''s firm had charged entry tax is based on the solitary printed endorsement on the invoices completely demolishes the very basis of the F.I.R, as such order taking cognizance is liable to be quashed.

5. Secondly it has been submitted that in view of Entry 52 of list II of the seventh schedule to the Constitution no entry tax could have been charged by the petitioner as the petitioner had sold goods for consumption at Begusarai to the informant''s firm. The liability u/s 3(2) of the Act to pay tax is on the person concern importing goods in a local area for consumption. Informant had distinct and independent liability as a consequence of importation of the said goods at Begusarai. In that view of the matter, it cannot be said that any amount was charged as entry tax by the petitioner. In support of his submission counsel for the petitioner has relied on a decision of this Court in the case of Tata Engineering & Locomotive Company Limited and another vs. Municipal Corporation of the City of Thane and others (1993 (1) S.C.C. 361) wherein it has been held that in case of octroi the taxable event is the entry of goods which are meant to reach an ultimate user or consumer in the octroi area. Mere physical entry in the octroi area would not attract levy of tax the goods are brought in not for consumption within the area but for temporary detention and eventual export, octroi is not leviable. Counsel for the petitioner has also placed reliance in the case of State of Bihar etc. Vs. Bihar Chamber of Commerce etc., wherein it

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has been held that entry tax is a tax levied at the point of entry of goods into a local area for the purpose of consumption or use or sale therein. Taxes on sale and purchase of goods are provided by Entry 52 in List II. Moreover Entry 52 has been the subject matter of several decision of this court which say that tax is upon the entry of goods into a local area i.e. upon entry of goods for the purpose of consumption, use or sale therein. Neither mere entry of goods is enough to attract the levy under Entry 52 is the entry of goods into a local area for consumption or use within that local area.

6. In the present case the petitioner''s firm imported goods at Patna but it was not consumed here at Patna, it was sold to informant''s firm and it was sold for consumption at Begusarai as such the petitioner''s firm was not liable to pay entry tax. Since it was not the liability of the petitioner''s from it never charged this entry tax from the informant''s firm. There was no need to issue any Form ET-IX to the informant for payment of tax. Liability of payment of entry tax, if any is that of the informant''s firm. It was also submitted that since there no entrustment of any money by the informant''s firm to the petitioner''s firm no offence under the provisions of Section 406, 409, 420 and 467 of the Indian Penal Code is made out. The order taking cognizance is fit to be quashed.

7. Counsel for the opposite party no. 2 has filed counter affidavit wherein it has been stated that from perusal of the F.I.R. it is apparent that the opposite party no. 2 (informant) being a sub-dealer/second importer used to purchase cigarettes from the petitioner''s firm/First importer. Petitioner is the Director of the firm and he used to issue cash memo to the second importer which clearly indicated that the tax inclusive entry tax was charged by Ganpati Traders. The accused firm is legally responsible to issue Form-ET-IX to the second importer so that the second importer may take the exemption as per Rule VI. By not doing that the petitioner and other accused persons have committed a fraud and cheated not only the opposite party but the State of Bihar. The Chief Judicial Magistrate, Begusarai has taken cognizance on consideration of entire material and there is no reason for quashing of the order taking cognizance. It has also been submitted that C.W.J.C. No. 10276 of 2000 was filed by the informant''s firm only for a limited question as to whether Form ET-IX is mandatory or directory for the purpose of taking exemption under Rule VI as such on the ground of dismissal of writ application the present matter cannot be interfered with. Further it has been stated that it is the duty of the first importer to issue Form ET-IX alongwith the cash memo and other documents to the second importer so that the double taxation can be avoided. Since the accused persons refused to issue Form ET-IX to the opposite party, they have committed fraud upon the opposite party. They are also liable for punishment for evading the tax to State of Bihar.

8. On consideration of the application filed by the petitioner, the counter affidavit filed by the opposite party and on considering the entire material including the submissions made by the parties, I find that the argument advanced by the

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petitioner has much force. The decision which has been cited by the counsel for the petitioner fully covers the submissions made by him. In both the decisions it has been held that tax on entry of goods into local areas for consumption, use or sale therein Act was made with respect to taxing power under Entry 52 List II of the seventh schedule of the Constitution of India. Entry 52 under this Act the tax is upon the entry of goods into the local are a i.e. upon entry of goods for the purpose of consumption use or sale therein. Neither mere entry of goods is enough to attract the levy nor mere sale thereof within the local area would attract the levy. Under Entry 52 is the entry of goods into a local area for consumption or for use or for sale within that local area for the purpose of consumption use within that local area.

9. In the present case the informant''s firm imported cigarettes, being the whole seller and having its office at Patna only received cigarettes at Patna, it was never sold for consumption at Patna to the opposite party no. 2. It was the firm of opposite party no. 2 which purchased cigarettes from the firm of the petitioner for sale and consumption within the local area of Begusarai. This being the fact the firm of the informant will be termed as first importer under the provisions of Bihar Tax of Entry of goods into Local Area for Consumption, Use or Sale Therein Act, 1993. The invoices which has been annexed by the informant alongwith the F.I.R, in order to show that entry tax was being charged by the petitioner''s firm also do not support the case of the informant. The invoice which is annexed is prior to the date of promulgation of the Ordinance and even the invoices which are subsequent to the date of the promulgation of the Ordinance indicates that the similar amount was charged by the petitioner''s firm from the firm of the informant. It clearly indicates that the tax realised by the firm of the petitioner did not include entry tax.

10. From the allegations made in the F.I.R, also it is clear that there was no entrustment of any amount by the informant to the petitioner. Under the circumstances no prima-facie case under sections 406, 409, 420 and 467 of the Indian Penal Code is made out against the petitioner. This application is accordingly allowed and the order impugned is hereby quashed.

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