
(2012) 04 JH CK 0041

In the Jharkhand High Court

Case No : Writ Petition (T) No. 6556 of 2011

Sudhir Deoras and Another

APPELLANT

Vs

The Commissioner, Central Excise and Service Tax,
Jamshedpur and Another

RESPONDENT

Date of Decision : 27-04-2012

Acts Referred:

Central Excises and Salt Act, 1944 — Section 14, 14(1)
Penal Code, 1860 (IPC) — Section 193, 228, 91, 92

Citation : (2012) 284 ELT 326 : (2013) 22 GSTR 137 : (2012) 4 JCR 32 : (2013) 64 VST 92

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

Bench : Division Bench

Advocate : M.S. Mittal and N. Pasari, for the Appellant; R. Kumar, SSCCE and A. Kumar, for the Respondent

Judgement

1. Heard learned counsel for the parties. The petitioner has challenged the summons issued to him u/s 14 of the Central Excise Act, 1944. According to the learned counsel for the petitioner's company, which is a registered company under the provisions of the Companies Act, received a notice dated 12.1.2010 in the name of the company asking it to furnish information given in the said notice. The petitioner-company fully co-operated and furnished all relevant documents and also produced the authorized person of the company to give his statements in inquiry/ investigation u/s 14 of the Central Excise Act, 1944. The company's authorized person holding the post of General Manager (F&A) appeared before the authority and gave his statements. Thereafter the Commissioner, Central Excise & Service Tax, Jamshedpur, issued summon u/s 14 of the Central Excise Act, 1944 on 11.11.2011 through the Superintendent (Prev.), Central Excise, Jamshedpur, directing the petitioner, Sri Sudhir Deoras, Managing Director of the petitioner-company, to appear personally before the said authority. In the said summon, though it is stated that he should bring with him information, documents and records specified in the schedule, which may in

his knowledge or in his control or in his possession, however, in the schedule, it is specifically mentioned "NIL". Therefore, the present petitioner has been summoned to appear before the said authority in the proceedings of inquiry, which may be, to give evidence and, as per the notice, not for production of documents. The petitioner has challenged the summon on the ground that summon has been issued without there being any reason and inspite of the fact that the authorized officer of the company and who is General Manager (F&A), who has full knowledge of the facts of the case and who is dealing with the subject of taxation matters, appeared before the authority and gave his statements. Today one affidavit has been filed on behalf of the company through its officer, Sri Prabhakar Kumar Singh, stating therein that Mr. Ashim Roy, who appeared on behalf of the petitioner-company before the authority, is one of the senior most officials and is entirely acquainted with all the taxation matters of the company and is a person having best knowledge and the petitioner does not intend to state further or amend any of his statement. In paragraph 25, the petitioner stated that the replies given by Mr. Ashim Roy to the queries raised by the respondent No. 2 is as per best of his knowledge and the petitioner No. 1 does not have to state anything further or amend any of the statements given by Mr. Roy. It is also stated in the rejoinder that whether the plant and equipments supplied under an independent supply contract is liable to service tax or not is a matter of legal interpretation based on contracts entered by the company with the customers and the contracts are all ready produced by the company and available on record with the respondents. It is further stated that issuance of summon only for legal interpretation whether plant and equipments supplied under an independent supply contract is liable to service tax or not is not permissible and such calling of the petitioner would be an exercise in futility and would only cause undue harassment to the petitioner. However, petitioner and the company are fully co-operating in the inquiry u/s 14.

2. Learned counsel for the respondents vehemently submitted that Orissa High Court held that High Court should not interfere at the stage when the Department issues summons and the order of the Orissa High Court rendered in the case of Tata Iron and Steel Co. Ltd. Vs. Union of India (UOI), has been approved by the order of the Hon'ble Supreme Court as SLP preferred by Tata Iron & Steel Co. Ltd. has been dismissed. Orissa High Court held that power given to the Excise Officer to call upon the person either to give evidence or produce documents in his custody which the Excise Officer believes would have a vital bearing in the inquiry and the status of the persons summoned is of no relevance.

3. Be that as it may, legal issue has been raised by the writ petitioner that in a matter of inquiry u/s 14 of the Act of 1944, what is the scope and jurisdiction of the Enquiry Officer in the matter of summoning a person when the assessee is a company and in the opinion of the company, the authorized person has already appeared in inquiry and gave statements which the company is accepting to be the statements given correctly and fully to the Enquiry Officer, whether, in that

situation, merely for the purpose of obtaining information with respect to interpretation of a document, company's Managing Director can be summoned even if the power u/s 14(1) and (2) of the Act of 1944 are wide enough to summon any person whose attendance is considered necessary by the Enquiry Officer?

4. It is submitted by the learned counsel for the Revenue that the representative of the writ petitioner, Mr. Ashim Roy, was summoned twice and he gave his statements but he gave evasive reply or shown his inability to explain the facts and; therefore, the Officer found it just and proper to summon the Managing Director of the petitioner-company to give statement in the inquiry.

5. We considered the submissions of the learned counsel for the parties and perused the detailed pleadings of the parties. We have noticed that it is a matter of proceeding against a company which run by its Board of Directors and with the help of its officers. The company's affairs are assigned to various persons, who discharge their duties as assigned. In conducting the affairs and business of any company, there may be departmentalization and several persons may be holding different positions as well as high positions in the company but may be dealing with some of the matters of the company only and the person holding very high positions may not have sufficient knowledge of all the activities of that company to the requisite extent so as to make every person by virtue of his holding post to be a competent person for giving statements on behalf of the company. Primarily it is for the company to decide who should be responsible for the affairs of the company for a particular subject-matter and disclose in proceedings undertaken under various Acts. Such person is the person authorized and may be accepted as representative of the company for that purpose and he may have full knowledge of the facts relating to the issue under inquiry/investigation. There may be possibility of delaying tactics, hide and seek as well as deliberate avoidance of responsible person of that company who if faces inquiry may have to face the consequence which may be penal and to avoid natural legal consequences, which may even be of prosecution. But a competent Officer can certainly take care of all issues by taking adequate measures. The power u/s 14 of the Act of 1944, as has been given, are, no doubt, wide enough and thus, the officer exercising such power has power to summon any person whose attendance such Officer considers necessary either to take evidence or produce documents. It has been made further wide by sub-section (2), which makes it obligatory and mandatory upon the summoned person to attend and appear before such officer and sub-section (2) made him bound to state the truth upon the subject of the inquiry. The inquiry has been declared to be a "judicial proceeding" under Sections 193 and 228 of the Indian Penal Code. Therefore, it is clear that giving false evidence in proceedings u/s 14 of the Act of 1944 is punishable under the provisions of the Indian Penal Code. It can not be disputed that the officer authorized u/s 14 of the Act of 1944 has a very wide and very pervasive power and can summon any person to give evidence or to produce documents. Such power is very necessary power and was required to be given to

such officer so that complete inquiry may be conducted by him.

6. Now the question arises as to how this power is to be exercised whether exercise of such vast and important power, if is regulated by reasonableness, will amount to any unreasonableness restriction upon the power of such officer?

We are of the considered opinion that this power is given to such officer so that he may discharge his legal obligation effectively but does not authorize him to act as per his whims or act but in reasonable manner. Reasonableness is inherent in any exercise of power. In Section 14 itself it is provided that one can be summoned in the inquiry if in the opinion of such officer, presence of any person is "consider necessary", which is the only requirement for exercise of power to summon any person and if that is kept in mind and thereafter such officer summons any person whose appearance in inquiry is necessary, it will be reasonable exercise of the power by such officer. Reasonableness depends upon the facts of each case and no fixed guidelines can be framed, nor there should be hypertechnical view and reasonableness may be inferred from the facts of each case. Normally it is to be presumed that the authority has acted absolutely reasonably and it cannot be presumed that there may be any element of unreasonableness or mala fide in action in exercise of the power for which he has been authorized by the statutory provision.

7. Keeping in mind all these principles, we have to examine whether it is a fit case for interference by this Court in the matter of summoning of the petitioner, who is the Managing Director of a limited company who has been summoned u/s 14 of the Act of 1944 only for the purpose of giving his statements and has not been summoned for producing documents. Therefore, the Officer has all the documents with him as may be needed by him at this stage. The contention of the company is that its all affairs relating to tax in question is handled by Ashim Roy, who is the General Manager (F&A) and whatever he has stated company is accepting to be the statements on behalf of the company. The company also stated that the company does not want to state more than what Ashim Roy, General Manager (F&A), has stated before the authority u/s 14 of the Act of 1944. The company's stand also is to the effect that the said authorized officer has issued summon to the Managing Director of the company on the ground that Ashim Roy did not give proper reply to the queries raised by the investigating team, Ashim Roy is one of the senior most officials of the petitioner-company and is entirely acquainted with all taxation matters of the petitioner-company.

8. In view of the above stand of the petitioner and petitioner-company, the Managing Director to whom all facts may not be in full knowledge and in better knowledge than the knowledge of the General Manager (F&A) of the company is also a relevant Issue. Not only this issue alone can be a factor for us but other factors, which are relevant, are coming from the reply filed by the respondents, wherein the respondents have quoted relevant statements of Ashim Roy to indicate that General Manager (F&A), Ashim Roy, gives some evasive reply and even did not disclose what the gross value of the project by stating that there is

no gross value of the project. Ashim Roy also stated that "I can not express my opinion whether this means a Turnkey/Composite contract to the best of his knowledge". It is also stated that "ownership of the plant and equipments (including spare parts) procured in the country where the site is located shall be transferred to the employer when the plant and equipments are loaded on to the mode of transport to be used to convey the plant and equipments". In the reply, it has been stated that "It is clear from the above (i) that the employer has not yet taken the care, custody and the risk of the equipment delivered by TRF to them till now. The employer will take over the goods together with the care, custody and the risks only after issuance of the completion certificate. Thus, ownership of the goods has not yet been passed, (ii) It falsifies, the statement of Sri Roy who told that the ownership of the goods gets transferred as per Sale of Goods Act, as the risk is still with TRF. (iii) It also makes suspicious and requires to be ascertained whether the statement dated 16.6.2010 of Sri Roy who in answer to Q. No. 11 stated that the goods were not in a ready state for operation when the transfer of title took place".

9. In totality, it has been stated in the reply that the Assessing Officer was of the view that Ashim Roy, General Manager (F&A), either did not give complete reply or gave evasive reply and therefore, an opinion was formed by the Assessing Officer to summon the Managing Director of the company.

10. At this place, it will be relevant to mention here that it is an inquiry with respect to levy of service tax and the subject-matter is of two contracts, whereunder issue for determination is that, whether the petitioner's company is liable to pay service tax under one contract and not liable to pay service tax under another contract. The Revenue is proceeding to find out whether service tax is leviable upon both the contracts and if so, then what is the value of the services to find out the correct tax liability of the writ petitioners. Therefore, according to the respondents also, who are examining service contract and examining the nature of the contract and finding out the meaning of "Turnkey Project" and its value and finding out whether, though there are two separate deeds of contract, it is a composite contract with "single responsibility" basis in terms of Clause 10 of the contract, copy of which has been placed on record as Annexure-C. In view of the above reasons, basically it is a matter of interpretation of a document first so as to find out the real nature of the contract. It is a settled law that when the deed under consideration is having unambiguous and clear terms incorporated in it, the parties either by pleadings or by evidence cannot add or subtract from the said deed. In view of the above, the oral evidence for the purpose of finding the true meaning of the contract between the parties, i.e. the petitioner and its contracting party, is concerned, it depends upon first examining the contract itself and if there is ambiguity and some vagueness which can be cleared by evidence then only evidence can be considered. In Section 91 of the Indian Evidence Act, it is clearly provided that when the terms of a contract have been reduced to the form of a document, no evidence shall be given in proof of the terms of such contract except the

document itself and Section 92 excludes the oral evidence for such written contract and it is specifically provided that no evidence of oral agreement shall be admitted as between the parties to any such Instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms. The principles of Section 91 of the Indian Evidence Act and 92 of the Indian Evidence Act spell out what can be proof of written contract and Section 91 of the Indian Evidence Act requires production of the contract itself and Section 92 of the Indian Evidence Act excludes oral evidence and excludes oral agreement. This principle can be applied in the light of the legal position that when the deed and document are unambiguous and " clear, neither by pleadings, nor by evidence its contents can be varied or altered by the parties.

11. In the light of this legal position as well as in the light of the nature of the affairs of any public limited company, the Officer u/s 14 of the Act of 1944 should examine the relevant issue before summoning any person to give evidence because of the reason that every person of the company may not be a relevant person at all for the purpose of Inquiry may he be holding highest position in the company because of the reason mentioned above. In that situation and to avoid unnecessary delay, it is always appropriate to first ask the company to send a duly authorized person well acquainted with the facts and issues involved in the inquiry so that thereafter the company may not take evasive stand and may not take false stand that the person who deposed was either not authorized or had no knowledge or had given statements without the knowledge of the company etc. This will advance the cause of justice and certainly rules out the delay that may be in the conduct of any inquiry. At the same time, it is not binding upon the Assessing Officer to accept that the person nominated by the company to be and as only witness who can be examined in the inquiry. The Enquiry Officer in the facts and circumstances of a particular case if is not satisfied with the statements on the ground of its being unreliable (*prima facie*) or any further explanation is required from the person who may be found to be relevant by the Assessing Officer from the statements of such witness, in that situation the Enquiry Officer may summon any of the persons irrespective of his status in the company. It appears that sometimes when the highest executive or higher person in the affairs of the company refuses or do not want to appear in response to the summon for giving evidence or for producing documentary evidence, then it may be misunderstood because of the sole reason of his status. That impression may not be true in all cases. The efforts of not making appearance before the Assessing Officer by the highest officer or person who is at the helm of the affairs of the company may be due to the reason that he himself may not have knowledge and there is more probability of drawing Impression that person in high position must have knowledge of each and every activity and he can be in better position to explain contracts, and such impression may not be correct because of the reason that for better task, planning services of expert are taken whose opinions are accepted by the persons in high position in company and

therefore, persons who prepared the contract may better explain the contract, if needed. Therefore, the Assessing Officer or Enquiry Officer should keep in mind that he being an Officer authorized by law to summon any body does not make him an Officer having no control of reasonableness and though he has right to summon any person either the Managing Director or the General Manager of the company or even a clerk of the company but he should not summon unless it is required for the purpose of an inquiry. Sometimes such summon to the company's officer may also be misunderstood that the same has been issued by the Officer to show his authority. It is also not correct. In dealing with the public by all Officers having power to summon, such caution is required to be taken that no other impression be gathered by anybody; either by the high officers in the company or any of the persons who has been summoned by the authority, nor by the authority himself that either is only trying to show his authority or superiority. If this impression is removed by both the parties, then only enquiry may proceed smoothly without there being delay and thus, this will avoid unnecessary challenge to the orders of summoning the persons in inquiry.

12. At this stage, it will be very relevant to mention here that we have already noticed the provision of sub-section (3) of Section 14 of the Act of 1944, wherein and whereby proceedings u/s 14 of the Act of 1944 have been declared to be Judicial proceedings and having consequence under Sections 193 and 228 of the Indian Penal Code. There may be possibility of avoidance of the witnesses to appear in the inquiry to avoid such consequence of punishment and imprisonment. Therefore, the task of the Enquiry Officer is onerous as well as he is required to act cautiously so as to see that no guilty person may escape from the liability and consequence of his giving false evidence and statements.

13. Coming to the judgment of the Orissa High Court, we may observe that the Division Bench of Orissa High Court also observed in that case on facts, which was under the Excise Act. 1962. that only limitation contemplated u/s 108 of the Act of 1962 is that the person to be summoned must be such as the authority issuing summon considers necessary. We are in full agreement with the view expressed by the Orissa High Court. We reiterate that the authority issuing the summon must issue summons to a witness only when the authority considers it necessary for summoning. This necessarily implies application of mind and is guided by the principles of reasonableness in the matter of summoning of witness and, therefore, as we have already observed that in the matter of summoning witnesses, there must be reasonableness and the guiding condition is that the witness is necessary for the purpose of inquiry.

14. Therefore, we are of the considered opinion that in the present facts and circumstances, at this stage, when one of the witness has already appeared before the concerned authority, produced all the relevant documents, which were called and summoned by the Enquiry Officer and he has deposed and the company is of the view that it has nothing more to submit, state, explain and admits the statements of the witness, then the Assessing Officer may proceed

further with the inquiry at this stage without summoning petitioner himself in person and after forming any opinion about necessity of summoning the petitioner, [prima facie satisfaction], he may be free to summon any of the petitioners and other persons irrespective of the person's status to give evidence. We are passing this order in this case because of the facts of this case only and these facts are that the statements of the witness has already been recorded by the Enquiry Officer and he is also the person who is the General Manager (F&A) of the company and the reason has been disclosed in the counter-affidavit by the respondents for summoning the petitioner and therefore, for the purpose of deciding of a larger issue to examine the scope and power of the Assessing Officer u/s 14 of the Act of 1944, we are passing this order and we also are of the view that it is not necessary for the Assessing Officer to record reasons for summoning of witnesses in each and every case. However, whenever action of the Assessing Officer is questioned in the matter of summoning witness, as is the case made out prima facie by the petitioner, then respondents may show reasons for summoning of the witnesses from record.

15. Here in this case, we are of the considered opinion that at this stage of inquiry, the evidence of the Managing Director may be dispensed with, with permission to the Assessing Officer to take a decision subsequently and if necessary, then to summon the Managing Director himself. It is also made clear that in case the Assessing Officer proceeds to summon any of the witnesses of the company, he need not to record any reason and may summon any witness. In view of the above observation, the summon dated 11.11.2011 contained in Annexure 1 is quashed with liberty to the Assessing Officer to proceed in the light of the observations made above.