

(2008) 08 JH CK 0092

In the Jharkhand High Court

Case No : Writ Petition (T) No. 1022 of 2008

Tata Motors Ltd.

APPELLANT

Vs

The State of Jharkhand and Others

RESPONDENT

Date of Decision : 12-08-2008

Acts Referred:

Constitution of India, 1950 — Article 136, 145
Supreme Court Rules, 1966 — Rule 10, 11, 13, 4

Citation : (2008) 56 BLJR 2903 : (2008) 4 JCR 370

Hon'ble Judges : M.Y. Egbal, J; Jaya Roy, J

Bench : Division Bench

Advocate : Sumeet Gadodia and Ashok Kr. Sinha, for the Appellant; P. Modi, G.P.-I, for the Respondent

Judgement

1. By this application, the petitioner has prayed for quashing the notice No. 383 dated 6.2.2007 with regard to the entry tax assessment for the year 2005-06 issued under the provisions of the Bihar Tax on Entry of Goods into the local Areas for Consumption, Use or Sale there in Act, 1993, as adopted and amended by the State of Jharkhand and further sought a direction to the respondents to refund the entry tax paid by the petitioner-company in respect of the assessment year 2005-06 alongwith interest.

2. Learned Counsel appearing for the petitioner further submits that although the provisions of entry tax have been declared ultra-vires by a division bench of this Court, the respondents are issuing notices for assessment of entry tax. He further stated that having regard to the division bench judgment declaring the provisions of entry tax as ultra vires, the petitioner is entitled to refund the amount.

3. Learned Counsel appearing for the petitioner has drawn our attention to Annexure-9 to the writ petition and submitted that in similar circumstances, this division bench of this Court in the case of K.I.C. Metaliks Ltd. Vs. State of Jharkhand and Others, directed to refund the amount together with interest.

4. Mr. P. Modi appearing on behalf of the State on the other hand submits that the judgment of the division bench has been challenged which is pending for consideration before the Hon"ble Supreme Court in Special Leave Petition. Learned Counsel appearing on behalf of the State further submits that in view of the pendency of Special Leave Petition, no direction could be issued for refund of the entry tax collected by the respondents.

5. The mailer was listed on 26.06.2008 and on the request of Mr. Modi, learned Counsel appearing for the State, the case was adjourned to enable him to bring the stay order from the Hon"ble Supreme Court with regard to the refund of tax collected by the respondents. But no stay order has been obtained in those Special Leave Petitions, pending before the Hon"ble Supreme Court.

6. Mr. Sumeet Gadodia, learned Counsel appearing on behalf of the petitioner submits that all Special Leave Petitions tagged with SLP No. 1101 of 2007 and although, notices were issued on interim relief also, but respondents are taking adjournment by letter of circulation and they are not pressing the stay matter before the Hon"ble Supreme Court.

7. The question therefore that falls for consideration is as to whether the pendency of Special Leave Petitions will amount to stay the operation of the impugned judgment passed by the Division Bench of the High Court. In this connection, we would like to refer the decision of the Supreme Court in Kunhayammed and Others Vs. State of Kerala and Another, where Their Lordships discussed the effect of pendency of Special Leave Petitions.

In para-14 of the judgment, Their Lordships observed as follows:

The exercise of jurisdiction conferred on this Court by Article 136 of the Constitution consists of two steps: (i) granting special leave to appeal; and (ii) hearing the appeal. This distinction is clearly demonstrated by the provisions of Order 16 of the Supreme Court Rules framed in exercise of the power conferred by Article 145 of the Constitution. Under Rule 4, the petition seeking special leave to appeal filed before the Supreme Court under Article 136 of the Constitution shall be in Form No. 28. No separate application for interim relief need be filed, which can be incorporated in the petition itself. If notice is ordered on the special leave petition, the petitioner should take steps to serve the notice on the respondent. The petition shall be accompanied by a certified copy of the judgment or order appealed from and an affidavit in support of the statement of facts contained in the petition. Under Rule 10 the petition for grant of special leave shall be put up for hearing ex parte unless there be a caveat. The court if it thinks fit, may direct issue of notice to the respondent and adjourn the hearing of the petition. Under Rule 13, the respondent to whom a notice in SLP is issued or who had filed a caveat, shall be entitled to oppose the grant of leave or interim orders without filing any written objections. He shall also be at liberty to file his objections only by setting out the grounds in opposition to the questions of law or grounds set out in the SLP. On hearing, the Court may refuse the leave

and dismiss the petition for seeking special leave to appeal either ex parte or after issuing notice to the opposite party. Under Rule 11, on the grant of special leave, the petition for special leave shall, subject to the payment of additional court fee, if any, be treated as the petition of appeal and it shall be registered and numbered as such. The appeal shall then be set down for hearing in accordance with the procedure laid down thereafter. Thus, a petition seeking grant of special leave to appeal and the appeal itself, though both dealt with by Article 136 of the Constitution are two clearly distinct stages. In our opinion, the legal position which emerges is as under:

(1) While hearing the petition for special leave to appeal, the Court is called upon to see whether the petitioner should be granted such leave or not. While hearing such petition, the Court is not exercising its appellate jurisdiction; it is merely exercising its discretionary jurisdiction to grant or not to grant leave to appeal. The petitioner is still outside the gate of entry though aspiring to enter the appellate arena of the Supreme Court. Whether he enters or not would depend on the fate of his petition for special leave;

(2) If the petition seeking grant of leave to appeal is dismissed, it is an expression of opinion by the Court that a case for invoking appellate jurisdiction of the Court was not made out;

(3) If leave to appeal is granted the appellate jurisdiction of the Court stands invoked; the gate for entry in the appellate arena is opened. The petitioner is in and the respondent may also be called upon to face him, though in an appropriate case, inspite of having granted leave to appeal, the Court may dismiss the appeal without noticing the respondent.

(4) In spite of a petition for special leave to appeal having been filed, the Judgment, decree or order against which leave to appeal has been sought for, continues to be final, effective and binding as between the parties. Once leave to appeal has been granted, the finality of the judgment, decree or order appealed against is put in jeopardy though it continues to be binding and effective between the parties unless it is a nullity or unless the Court may pass a specific order staying or suspending the operation or execution of the judgment, decree or order under challenge.

It is worth to quote para-28 of the said judgment also;

Incidentally we may notice two other decisions of this Court which though not directly in point, the law laid down wherein would be of some assistance to us. In *Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat* this Court vide para 7 has emphasized three preconditions attracting applicability of doctrine of merger. They are: (i) the jurisdiction exercised should be appellate or revisional jurisdiction; (ii) the jurisdiction should have been exercised after issue of notice; and (iii) after a full hearing in presence of both the parties. Then the appellate or revisional order would replace the judgment of the lower court and constitute the only final judgment. In *Sushil Kumar Sen v. State of Bihar* the doctrine of merger

usually applicable to orders passed in exercise of appellate or revisional jurisdiction was held to be applicable also to orders passed in exercise of review jurisdiction. This Court held that the effect of allowing an application for review of a decree is to vacate a decree passed. The decree that is subsequently passed on review whether it modifies, reverses or confirms the decree originally passed, is a new decree superseding the original one. The distinction is clear. Entertaining an application for review does not vacate the decree sought to be reviewed. It is only when the application for review has been allowed that the decree under review is vacated. Thereafter the matter is heard afresh and the decree passed therein, whatever be the nature of the new decree, would be a decree superseding the earlier one. The principle or logic flowing from the abovesaid decisions can usefully be utilized for resolving the issue at hand. Mere pendency of an application seeking leave to appeal does not put in jeopardy the finality of the decree or order sought to be subjected to exercise of appellate jurisdiction by the Supreme Court. It is only if the application is allowed and leave to appeal granted then the finality of the decree or order under challenge is jeopardized as the pendency of appeal reopens the issues decided and this Court is then scrutinizing the correctness of the decision in exercise of its appellate jurisdiction.

8. Considering the aforesaid proposition of law laid down by the Hon''ble Supreme Court, we are of the view that mere pendency of Special Leave Petitions will not amount to stay the operation of the impugned judgment. However, we give one more opportunity to the respondent-State to pursue their application for interim relief before Hon''ble the Supreme Court and to obtain appropriate order of stay. In the event, respondents fails to obtain appropriate order from the Hon''ble Supreme Court in Special Leave Petitions, we shall have no option but to pass appropriate order in accordance with law.

9. Granting sufficient time to the respondents to bring appropriate order from the Hon''ble Supreme Court, let this case be listed after four weeks.

Put up this case along with W.P (T) Nos. 1030 of 2008 & 1031 of 2008.