

(2019) 12 JH CK 0066

In the Jharkhand High Court

Case No : Writ Petition No. 2133, 2555, 2556, 2557, 2601, 2602 Of 2019, I.As.
No. 5053, 5054, 5055, 5056, 5057, 5058, 5065, 5066, 5067, 5058 Of
2019

Tata Steel Limited

APPELLANT

Vs

State Of Jharkhand And Ors

RESPONDENT

Date of Decision : 04-12-2019

Acts Referred:

Bihar Electricity Duty Act, 1948 — Section 5A, 5A(2), 9A, 9A(1), 9A(3), 9A(4)
Bihar Electricity Duty Rules, 1949 — Rule 11, 12, 12(1), 14, 14(10)

Citation : (2019) 12 JH CK 0066

Hon'ble Judges : H. C. Mishra, J;Deepak Roshan, J

Bench : Divison Bench

Advocate : Sumeet Gadodia, Manoj Tandon, Atanu Banerjee, Prashant Pallav,
Sumit Prakash

Final Decision : Disposed Of

Judgement

1. Heard learned counsel for the petitioner Company and the learned counsels for the State in all these matters.

2. Since the common issues are involved in all these writ applications, they have been heard together and are being disposed of by this common Judgment.

3. These writ applications relate to the electricity duty payable by the petitioner Company for the Years 2005-06 to 2010-11. The petitioner Company is

having its captive mines and it consumes electricity in the mining process, as well as the washing of the coal extracted after the mining, in their washeries.

These writ applications relate to the electricity duty payable by the petitioner Company on the electricity consumed in washing the extracted coal. The

petitioner Company claimed that since washing was not a mining process, and it was an industrial process, the petitioner was liable to make the payment of

electricity duty @ 0.02 paise / unit only, and also paid the electricity duty at the same rate. Whereas the stand of the State is that the washing of the extracted coal is also the mining process, and accordingly, the petitioner Company was liable to pay the electricity duty @ 0.15 paise / unit of the consumption of electricity.

4. By the different orders dated 30.06.2010, 05.08.2010, 18.12.2010 and 01.03.2012, passed by the Assessing Authority, i.e., in W.P. (T) No. 2557 of 2019, the Deputy Commissioner of Commercial Taxes, and in all other matters, the Commercial Taxes Officer, the assessment orders were passed, fixing the duty payable by the petitioner Company @ 0.15 paise / unit of electricity, and by the aforesaid orders, the liability for the payment of electricity duty at the differential rate, i.e., @ 0.13 paise / unit was fixed upon the petitioner Company, which also admittedly, the petitioner Company has since paid.

5. The petitioner Company is now aggrieved by the review of the orders passed by the Deputy Commissioner, Commercial Taxes, whereby the penalty has been imposed upon the petitioner Company, for not making the payment of the electricity duty at the prescribed rate, within the due dates. All the review orders in these writ applications have been passed on 30.01.2014, i.e., much beyond the period of 12 months of the date of assessment order. The petitioner Company challenged these orders, by filing revisions before the Commissioner of Commercial Taxes, Ranchi, which were dismissed by the orders dated 21.05.2014, as contained in Annexure-14 to all these writ applications. All the aforesaid orders were also challenged by the petitioner before the Commercial Taxes Tribunal, Ranchi, (herein after referred to as 'Tribunal'), by filing revision petitions being HZ-ED-66, 67, 68, 69, 70 & 71 of 2014, all of which were dismissed by the common Judgement dated 13.08.2018 by the Tribunal. Aggrieved thereby, the present writ applications have been filed challenging all these orders.

6. Learned counsel for the petitioner has submitted that the impugned orders of penalty dated 30.01.2014, are absolutely illegal and cannot be sustained in the eyes of law. It is pointed out by the learned counsel that after the assessment orders were passed, audit objections were made for non-levy of penalty due to short / less payment of electricity duty, in course of which, the Deputy Commissioner of Commercial Taxes, Ramgarh Circle, agreed to review the

assessment orders, and pursuant thereto, the notices were issued to the petitioner Company on 22.01.2013, by him. The order-sheets for reviewing the assessment orders have been brought on record as Annexure-10 to the writ applications, wherein the order dated 22.01.2013 shows that in view of the audit objection made by the audit team of the Accountant General, the review proceedings have been initiated, and the letters had been issued to the Commissioner

of Commercial Taxes, for granting sanction for review. It is apparent from the order-sheet of the review proceedings, that the sanction was never granted by the Commissioner of Commercial Taxes. After hearing the parties the review orders were ultimately passed on 30.01.2014 in all these matters, which have been brought on record as Annexure-12 to the writ application, whereby the penalty have been imposed upon the petitioner Company for non-payment of electricity duty at the prescribed rate, within the prescribed period. These orders also clearly show that they have been passed in exercise of power of review.

7. Learned counsel for the petitioner has drawn our attention towards Section 9-A of the Bihar Electricity Duty Act, (herein after referred to as the 'Act'), as adopted by the State of Jharkhand as well, wherein sub-Section (3) prescribes that subject to the Rules and for the reasons to be recorded in writing, the prescribed authority may, upon application or of its own motion, revise any order passed under the Act, or the Rules made and analogous matters thereunder, and sub-Section (4) provides that an order of review may be passed by an authority passing it, or by its successor-in-office. It may be stated at this stage itself that for the purpose of passing an assessment order, under the amended Rule 12 of the Bihar Electricity Duty Rules, (herein after referred to as the 'Rules'), the Commercial Taxes Officer and the Deputy Commissioner, Commercial Taxes, stand on the same footing.

8. Learned counsel for the petitioner has also drawn our attention towards Rule 14(10) and (11) of the Rules, which prescribe that save, without the previous sanction of the Commissioner, recorded in writing, an order other than the order passed by the Commissioner, shall not be reviewed more than 12 months after the date of the passing of the order which is sought to be reviewed, and that no authority below the rank of the Commissioner, shall review an order which has been passed by its predecessor-in-office, except with the previous sanction of the Commissioner. It is the case of the petitioner that in all these

matters, though the Assessing Authority wrote to the Commissioner of Commercial Taxes for granting sanction to review the assessment orders, but the sanction was never granted by the Commissioner of Commercial Taxes, and the orders have also been passed beyond the un-extendable period of limitation of one year. Learned counsel submitted that accordingly, the impugned orders of imposing penalty upon the petitioner Company cannot be sustained in the eyes of law, and the subsequent orders / Judgement passed by the Commissioner of Commercial Taxes, Ranchi, and the Tribunal, also cannot be sustained in the eyes of law.

9. Learned counsels for the State, led by learned Additional Advocate General, on the other hand, have opposed the prayer and they have drawn the attention of this Court towards the fact that upon re-assessment, the penalty orders have been passed under Section 5-A(2) of the Act. It is submitted by learned counsels that Section 5-A(2) of the Act is neither subject to any Rules, nor it is subject to any law of limitation. It is further submitted that the penalty order could be passed under Section 5-A(2) of the Act, due to the fact that the prescribed duty was not paid to the Government exchequer within due dates by the petitioner Company, which the petitioner was legally bound to, failing which, the petitioner was liable to make the and analogous matters payment of penalty thereon. It is submitted by the learned counsels for the State that the penalty orders could be passed by any authority prescribed under the Act, as in fact, this is only a clerical exercise of calculation of the penalty to be paid according to the Act and under the Rules, for the delayed payment of the electricity duty, or the part there of.

10. Learned counsels for the State have also drawn our attention to an earlier Judgement of this Court in the case of the petitioner themselves, in W.P.(T) No. 2593 of 2010 (Tata Steel Limited Vs. State of Jharkhand & Ors., decided on 24.06.2010), in which the issue to be adjudicated was whether the petitioner Company was liable to make the payment of the electricity duty @ 0.02 paise / unit of the electricity consumed, claiming the electricity to be consumed in industrial purpose, or the Company was liable to make the payment of electricity duty @ 0.15 paise / unit, as the electricity was consumed in mining purpose. This Court, relying upon the decision of the Hon'ble Apex Court in Chowgula & Co. Pvt. Ltd. & Anr. Vs. Union of India and Ors., reported

in (1981) 1 SCC 653, came to the conclusion that the basic contention of the petitioner that the electricity consumed for washing of the coal, after its

extraction from the coal mines, is not a mining purpose, but is an industrial purpose, is not sustainable, in view of the law laid down by the Hon'ble Apex

Court in the aforesaid case as follows:-

â??Now there can be no doubt, and indeed this could not be seriously disputed that the process of mining comes to an end when ore is extracted

from the mines, washed, screened and dressed in the dressing plant and stacked at the mining site.....â??

11. It is submitted by the learned Additional Advocate General that though this issue is now pending adjudication before the Hon'ble Apex Court, but the fact

remains that there is no stay of the operation of the aforesaid Judgement, and accordingly, since the year 2010 itself, it is absolutely clear to the petitioner

Company that they were liable to make the payment of electricity duty @ 0.15 paise / unit and not @ 0.02 paise / unit, as claimed by them, and accordingly,

if there is any default by them in payment of the electricity duty at the prescribed rate, they are liable to pay the penalty thereon at the prescribed rate.

12. Having heard the learned counsels for both the sides, we find that certain provisions of the Act and the Rules need to be looked into. Section 5-A of the

Bihar Electricity Duty Act reads as follows :-

5-A. (1) If any licensee or other person who is liable to pay duty and surcharge under the Act fails to furnish returns within the prescribed time,

the prescribed authority shall after giving such licensee or other person an opportunity of being heard impose a penalty not exceeding Rs.50

(Rupees Fifty) for every day of default after the due date.

(2) If any licensee or other person liable to pay duty and or surcharge fails to make payment of the duty and or surcharge under sections 3, 3-A

and 4 within the due date, the prescribed authority shall after allowing such licensee or other person an opportunity of being heard impose a

penalty which may extend to five percentum, but not less than two and half percentum of the amount of duty and surcharge for each of the first

three months or part thereof following the due date and to ten percentum, but not less than five percentum for each subsequent month or part

thereof.

Section 9-A of the aforesaid Act reads as follows:-

9A. Appeal.- (1) Any licensee or other person objecting to an order or assessment with or without penalty passed under this Act, or the rules

made thereunder may, within the prescribed period and in the prescribed manner, appeal to the prescribed authority against such order of

assessment or penalty or both:

Provided that no appeal shall be entertained by such authority unless it is satisfied that twenty percentum of the duty assessed or such amount of

duty as the appellant may admit to be due from him, whichever is greater, has been paid.

Provided further that where the prescribed authority revises any order of its motion, no proceeding for such revision shall be initiated at any time

except before the expiry of two years from the date of the said order.

(2) Subject to such rules as may be prescribed, the appellate authority may, in disposing of an appeal under sub-section (1)-

(a) confirm, reduce, enhance or annul the assessment or penalty, or both; or

(b) set aside the assessment or penalty, or both, and direct the assessing authority to make a fresh assessment after making such further inquiry as

may be directed by the appellate authority.

(3) Subject to such rules as may be prescribed and for reasons to be recorded in writing the prescribed authority may, upon application or of its

own motion, revise any order passed under this Act or the rules made thereunder:

Provided that no order of assessment shall be revised upon application on the assessee, unless an order under sub-section (2) has been previously

passed in respect of such order:

Provided further that where the prescribed authority revises any order of its own motion, no proceeding for such revision shall be initiated at any

time before the expiry of two years from the date of the said order.

(4) Subject to such rules as may be prescribed, any order passed under this Act or the rules made thereunder may be reviewed by the authority

passing it or by its successor-in-office.

Rule 12 (1) of the Bihar Electricity Duty Rules, as amended vide S.O. No. 1314, dated 10.9.1982, reads as follows:-

12. Assessment-(1) If the Deputy Commissioner, or Assistant Commissioner, or

has been passed by its predecessors in office, except with the previous sanction of the Commissioner.

13. From the perusal of Rule 12 (1) of the Rules, it is thus, clear that the Commercial Taxes Officer and the Deputy Commissioner of Commercial Taxes are the officers of the same rank, so far as the assessment order is concerned. Rule 14(10) & (11) clearly prescribe that for reviewing any order, other than the order passed by the Commissioner, the sanction of the Commissioner in writing is required, and such review cannot be made beyond the period of 12 months from the date of the passing of the order sought to be reviewed, and further, an order can be reviewed by an officer, who is the successor-in-office of the officer who had passed the order sought to be reviewed, only with the previous sanction of the Commissioner, even if the order is sought to be reviewed within the period of 12 months.

14. The case of the petitioner Company is that in view of Rule 14 (10) & (11), the penalty orders, which were clearly passed beyond the period of one year, in exercise of the power of review, in view of the audit objection raised by the team of the Accountant General, could not have been passed without the previous sanction of the Commissioner, in writing, and in absence of such sanction order, these orders cannot be sustained in the eyes of law. Whereas, the case of the respondent State is that the penalty orders are not the orders of review, and since these orders have been passed in exercise of the power under Section 5-A(2) of the Act, these orders are neither subject to any Rules, nor to any law of limitation, and the same can be passed by any authority prescribed under the Act, as in fact, this is only a clerical exercise of calculation of the penalty to be paid.

15. However, a bare perusal of Section 5-A (2) of the Act shows that even the orders under this provision have to be passed by the 'prescribed' authority.

Such authority may be prescribed either in the Act or in the Rules. If the contention of the learned counsels for the State is accepted that this provision is not

subject to any Rules, then it is incumbent upon the learned counsel for the State to show as to where in the Act such authority has been prescribed, which

could pass the order under Section 5-A(2) of the Act. From the Act, learned counsels for the State could not point out any provision to show that any

authority is prescribed to pass the order under Section 5-A(2) of the Act. The

contention of the learned counsels for the State that since the penalty orders are not the orders of review, the prescribed authority under Section 5-A(2) of the Act means any officer under the Act, cannot be accepted, in view of the wordings of the Act, which clearly say that such order has to be passed by the 'prescribed authority'. In absence of any provision under the Act, as to who is the prescribed authority under the Act to pass such order, one has to look into the nature of the order and the other provisions in the Act and the Rules.

16. The impugned penalty orders as contained in Annexure-12 to the writ applications, clearly show that they have been passed as review orders, and

Annexure-10 to the writ applications, clearly show that in view of the audit objection made by the audit team of the Accountant General, the review

proceedings had been initiated, and the letters had been issued to the Commissioner of Commercial Taxes, for granting sanction for review. According to

Section 9-A (4), the prescribed authority to review an order, would be the officer who had passed the order, or his successor-in-office. In W.P.(T) No. 2557

of 2019, the review order has been passed by the same authority who had passed the assessment order, whereas in all other matters, the review orders have

been passed by the Deputy Commissioner of Commercial Taxes, whereas the assessment orders were passed by the Commercial Taxes Officer, and as

such, the review orders have been passed by the authority successor-in-office, in accordance with Section 9A (4) of the Act, read with Rule 12 (1) of the

Rules. Annexure-8 to the writ applications show that when the audit objection was raised by the audit team and it was pointed out to the Deputy

Commissioner of Commercial Taxes, Ramgarh Circle, the Deputy Commissioner responded that the assessment order would be reviewed.

17. In that view of the matter, the submission of the learned counsels for the State that the order is not an order passed in review, rather it is an order passed

suo-motu, by an authority under the Act, imposing penalty, cannot be accepted. It is the settled principle of law that an order is to be read as it is, and its

contents / nature cannot be improved by subsequent affidavits / submissions.

18. Learned Additional Advocate General had also canvassed before us by placing reliance on second Proviso of Section 9A (3) of the Act, submitting that

since the word 'revises' has been used in the Act, the penalty orders may be treated as an order of revision passed by the competent authority, and it is

submitted that this proviso prescribes that no proceeding for such revision shall be initiated at any time before the expiry of two years from the date of the order, and this was the reason that the penalty orders were passed beyond the period of two years. Even this submission of the learned Additional Advocate General cannot be accepted for the same reason as indicated above, and also in view of the fact that it is apparent that the Act is not properly worded. The word 'except' before the sentence 'before the expiry of two years' appears to be missing in second Proviso of Section 9A (3) of the Act. This word 'except' is mentioned in the second Proviso to Section 9A (1) of the Act, but in this proviso, the word 'own' is apparently missing from the sentence 'revises any order of its motion'. Thus, it appears that these provisions are not very happily worded, and some necessary words are missing here and there in the Section. Even otherwise, if in the second Proviso of Section 9A (3) of the Act, the word 'except' is not read preceding the sentence 'before the expiry of two years', the entire proviso will be rendered meaningless, inasmuch as, there can be no provision, prohibiting the prescribed authority to revise an order, prior to the expiry of two years, without giving any cogent reason therefor.

19. In view of the aforesaid discussions, it is clear and apparent that the impugned orders of penalty dated 30.1.2014, as contained in Annexure-12 to the writ

applications, are actually the orders passed in review, in exercise of the powers under Section 9A (4) of the Act, read with Rules 14 (10) and (11) of the

Rules, and these orders have been passed without any previous sanction in writing, of the Commissioner of Commercial Taxes, and have also been passed

beyond the period of un-extendable limitation of one year. As such, these penalty orders cannot be sustained in the eyes of law. Consequently, the

subsequent orders / Judgement passed by the Commissioner of Commercial Taxes, Ranchi, and the Tribunal, also cannot be sustained in the eyes of law.

20. For the foregoing reasons, all the penalty orders dated 30.1.2014, as contained in Annexure-12 to the writ applications and the revisional orders dated

21.5.2014 passed by the Commissioner, Commercial Taxes, as contained in Annexure-14 to the writ applications, as also the impugned Judgment dated 13th

August, 2018, passed by the Tribunal in Revision Petition Nos. HZ-ED-66, 67, 68, 69, 70 & 71 of 2014, are hereby, set aside. Consequently, the penalty

amount deposited / recovered from the petitioner Company are directed to be

refunded / adjusted in the future bills towards the electricity duty.

21. At this stage, learned Additional Advocate General prays for liberty to the authorities to proceed in accordance with law. It is made clear that we have not stopped any authority to exercise his powers permitted under the law.

22. All these writ applications are accordingly, allowed with the direction and observation as above. All the pending Interlocutory Applications also stand disposed of.