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**(2011) 07 PAT CK 0163**  
**In the Patna High Court**  
**Case No : CWJC No. 16774 of 2010**

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|----------------------------------------|------------|
| The Saraswati Industrial Syndicate Ltd | APPELLANT  |
| Vs                                     |            |
| M/S HPCL Biofules Ltd. and Others      | RESPONDENT |

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**Date of Decision :** 07-07-2011

**Acts Referred:**

Arbitration and Conciliation Act, 1996 — Section 5  
Bihar Entry Tax Act, 1993 — Section 2, 3(1), 8  
Bihar Finance Act, 1981 — Section 2, 26(2), 3  
Constitution of India, 1950 — Article 14, 226

**Citation :** (2012) 1 PLJR 792

**Hon'ble Judges :** S.N. Hussain, J

**Bench :** Single Bench

**Advocate :** Devi Pd. Pal, S.D. Sanjay, Amar Nath Sen and Akash Chaturvedi, for the Appellant; Chitranjan Sinha, Rajeev Prakash for the Respondents No. 1 and 2 and Mr. Lalit Kishore for the State, for the Respondent

**Final Decision :** Allowed

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## Judgement

S.N. Hussain, J.—This writ petition has been filed by the petitioner for restraining M/s Hindustan Petroleum Corporation Limited (hereinafter referred to as "the HPCL" for the sake of brevity) and its wholly owned Subsidiary Company M/s HPCL Biofuels Limited (respondents No. 1 and 2) from deducting any amount from the bills of the petitioner, which is a contractor, on supply of goods from outside the State of Bihar in course of Inter State Trade in the name of payment of Entry Tax and also for declaration that respondents No. 1 and 2, who are the owners/principals, have got no jurisdiction to deduct any amount of Entry Tax from the bills of the petitioner as the liability of payment of Entry Tax is of the said respondents alone being the Importer of goods into the State of Bihar from outside and for other ancillary reliefs. The petitioner claims that it is a Company situated at Haryana engaged in Design, Engineering, Supply, Erection, Commissioning & Performance Testing of Boilers, Sugar Plants & Co-Gen Plants and it also undertakes Engineering Procurements & Construction Contracts.

2. Learned counsel for the petitioner submitted that three Tender Enquiries with respect to a Sugar Plant at Lauriya West Champaran, Bihar; an integrated 20 M.W. Cogeneration Power Plant at Lauriya, West Champaran, Bihar and an integrated Sugar Plant at Sugauli, East Champaran, Bihar were floated by HPCL, which were awarded by HPCL Biofuels Limited vide separate orders dated 22.10.2009 and in the Instruction of Bidders, Part-B (Clause 17), it was mentioned that at the time of placement of Purchase Order, the Engineering Procurement Construction (EPC) Contract will be divided into three parts, namely, Supply Contract, Works Contract and Service Contract. The petitioner submitted its offer for all the three Tender Enquiries and became successful and was, accordingly, awarded all the said three contracts consisting of the said three separate portions of works and the petitioner accepted the terms and conditions. He further submitted that here the matter is only with respect to supply portion of the contracts.

3. Learned counsel for the petitioner further submitted that there is no dispute with respect to the facts that the contract was completed by both the parties as the goods were supplied by the petitioner from its factory at Haryana to HPCL at Haryana itself, which paid the price to the petitioner at Haryana, from where respondents No. 1 and 2 sent the goods to their locations at Lauriya and Sugauli which are within the State of Bihar. Learned counsel for the petitioner also submitted that in the said circumstances the Entry Tax on the goods sent by respondents No. 1 and 2 from Haryana to Bihar was clearly leviable upon respondents No. 1 and 2, but the said respondents No. 1 and 2 are trying to deduct the amount of Entry Tax paid by them from the bills of the petitioner, wrongly relying upon the Bihar Tax on Entry of Goods in the Local Areas for Consumption, Use or Sale therein Act, 1993 (hereinafter referred to as "the Entry Tax Act" for the sake of brevity).

4. On the other hand, learned counsel for respondents No. 1 and 2 argued that there is no dispute that Entry Tax is leviable on the goods sent from Haryana to Bihar and the dispute is only related to the question as to who is liable to pay the said Entry Tax; either the petitioner or respondents No. 1 and 2. He also stated that the petitioner has no locus to challenge the action of the respondents as respondents No. 1 and 2 had issued Letter of Intent and Purchase Order in favour of M/s ISGEC John Thompson (hereinafter referred to as "IJT" for the sake of brevity) and the contract in favour of IJT was a composite contract, according to which everything had to be done by IJT and it cannot be legally bifurcated. On this point, learned counsel for the said respondents relied upon two decisions of the Patna High Court in case of Birendra Kumar Poddar @ Birendra Poddar Vs. Ghanshyam Mandal and Others, and in case of Kaushal Kumar Singh Vs. The State of Bihar and Others, .

5. Learned counsel for respondents No. 1 and 2 also claimed that this writ petition is not maintainable as a specific provision of arbitration mentioned in Clause 14 of the agreement between the parties (Annexure-1). In this regard, he

relied upon four decisions of the Apex Court and one decision of the Patna High Court in case of M/s Titagarh Paper Mills Ltd. vs. Orissa State Electricity Board and Another, reported in (1975) S.C.C. 436; in case of Bisra Stone Lime Co. Ltd. and Another Vs. Orissa State Electricity Board and Another, ; in case of State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd., ; in case of Pimpri Chinchwad Municipal Corporation and Others Vs. Gayatri Construction Company and Another, ; as well as in case of Ashok Kumar Choudhary vs. Hindustan Petroleum Corporation Ltd. and Others, reported in 1989 P.L.J.R. 1108.

6. Learned counsel for respondents No. 1 and 2 also relied upon various clauses of the agreement and stated that, admittedly, the petitioner is paying sales tax and other taxes and hence it is liable to pay Entry Tax also. In this connection, he relied upon three decisions of the Apex Court in case of Nimaligarh Refinery Ltd. vs. Daelim Industrial Co. Ltd., reported in (2007)8 S.C.C. 466; in case of The Indure Ltd. and Another Vs. Commercial Tax Officer and Others, ; as well as in case of Usha Beltron Ltd. vs. State of Punjab and Others, reported in 2005 (7) S.C.C. 58.

7. In the said circumstances, learned counsel for respondents No. 1 and 2 submitted that neither the petitioner has got any case on merit nor it has any locus to seek the reliefs prayed for nor this writ petition is maintainable and as such it is fit to be dismissed.

8. Learned counsel for the State of Bihar and its authorities concerning Commercial Taxes (respondents No. 3 to 5) stated that if any goods is imported into the State of Bihar from outside the State, the person, who brings the goods into the State of Bihar, is liable to pay Entry Tax, hence he averred that the said respondents will be bound by orders of this Court with respect to the liability of the person to pay Entry Tax, and that person may be either the petitioner or respondents No. 1 & 2.

9. After hearing the arguments of learned counsel for the parties and after perusing the materials on record, including Annexures 6 & 6/A, which are letter dated 5.10.2009 of M/s ISGEC Jon Thomson (I.J.T.) written to the Chief Manager, Procurement, M/s Hindustan Petroleum Corporation Limited, Mumbai and order dated 8.11.2010 passed by Commercial Tax Officer, Special Circle, Patna, it is quite apparent that IJT is a Unit of M/s Saraswati Industrial Syndicate Limited (petitioner), which is a statutory body and hence it is a legal person fully entitled to sue on behalf of its component, namely, IJT. The case-laws relied upon by the respondents in case of Birendra Kumar Poddar (supra) and Kaushal Kumar Mishra (supra) are, thus, not applicable to the facts of this case. In the said circumstances, the objection raised by the respondents that the Letter of Intent and Purchase Order having been issued in favour of IJT, the petitioner had no authority to file this writ petition, fails and it is held that the petitioner being the proprietor of IJT has full authority and is justified in filing this writ petition.

10. So far the question of maintainability of this writ petition in view of

availability of the provision of arbitration in Clause 14 of the agreement between the parties as an alternative remedy is concerned, it may be mentioned that the alternative remedy is not a rule of law or compulsion, rather it is a matter of caution and discretion. Furthermore question of violation of Article 14 of the Constitution of India is also involved in this case and the law is well settled that in case of infraction or violation of fundamental right, the plea of alternative remedy cannot be pressed into service against the exercise of the writ jurisdiction by the Court under Article 226 of the Constitution of India. It has also been held that if the impugned order suffers from non-observance of the principle of natural justice, the Court can interfere even in a case where the alternative remedy is available. Reference in this connection may be made to a Division Bench decision of this Court in case of Indian Oil Corporation Ltd. Vs. The State of Bihar and Others .

11. In case of Kayne Construction Pvt. Ltd. and Another Vs. Syndicate Bank and Others, , it has been held that when the pleadings have changed hands and substantial progress has been made in the case, there is no occasion for the Court to throw out the writ petition on the ground of alternative remedy. In the instant case also both the contesting parties have filed their respective pleadings on affidavit with their evidences and their learned counsel have argued their respective claims at full length, whereafter the writ petition has reached its final stage. Hence now it cannot be rejected merely due to the existence of an alternative remedy.

12. Furthermore in the instant case the State of Bihar and its authority (respondents No. 3 & 5), which are levy Entry Tax, are necessary parties to this writ petition, but they were not parties to the agreement between respondents No. 1 & 2 and the component of the petitioner, namely, IJT and hence the arbitration clause of the agreement is not binding on the State of Bihar and its authorities. Section 5 of the Arbitration and Conciliation Act, 1986 provides the extent of judicial intervention, whereas, Section 8 of the said Act provides an opportunity to a party to an arbitration agreement to ask the judicial authority to refer the parties to arbitration with respect to the matter, which is subject of an arbitration agreement. Hence, only such matter, which comes within the ambit of arbitration agreement, can be legally referred to arbitration, but where the matter, involved in a writ petition, lies outside an arbitration agreement and the writ petition is between some of the parties, who are not parties to the arbitration agreement, there is no question of application of Section 8 of the Act.

13. From the facts stated above, it is quite apparent that the instant dispute is not covered by any provision of the Statute or any clause of the agreement and hence no such alternative remedy exists in presence of the State of Bihar and its authorities, which are necessary parties to this case, but were not the parties to the agreement. Reference in this regard may be made to a decision of the Apex Court in case of Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another, . Furthermore only because there exists a disputed question of fact or an

alternative remedy is available, the same, by itself, would not be sufficient for the High Court to decline to exercise its jurisdiction under Article 226 of the Constitution of India as has been held by the Apex Court in case of Noble Resources Ltd. Vs. State of Orissa and Another, .

14. In the light of the aforesaid well-settled principles of law and also in view of the fact that the question of payment of Entry Tax to the Government having not been included in the arbitration clause of the agreement in question, the case laws relied upon by learned counsel of the respondents in case of M/s Titaarh Papers Mills Ltd. (supra); in case of M/s Bisra Lime Stone Company Ltd. and Another (supra), in case of State of U.P. & Ors. (supra), in case of Pimpri Chinchwad Municipal Corporation & Ors. (supra), as well as in case of Ashok Kumar Choudhary (supra) are not applicable to the facts and circumstances of the case as they are concerned with the arbitration clauses specifically included subject matter of the said disputes. Accordingly, the objections of the respondents in this regard are not sustainable in law. Hence in these circumstances, it is held that this writ petition is maintainable inspite of the presence of an arbitration clause in the agreement between respondents no. 1 & 2 and IJT, which is a component of the petitioner.

15. From the agreement and purchase order dated 22.10.2009 (Annexure-1), it is quite apparent that there were separate contracts with regard to supply portion, works portion and service portion, for which separate provisions, consideration money and damages have been included. In the instant case, works portion and service portions of the agreement are not in dispute and the dispute is only with respect to supply portion and that too is limited to the payment of Entry Tax. The said agreement between respondents no. 1 & 2 and the component of the petitioner, namely, IJT is covered under general terms and conditions of the works contract, in which Clause 7.d.1 is with respect to statutory levies, namely, taxes, duties, octroi, rates, cess, levies and statutory payments payable under the Statutes by the contractor and the format for the price and rates is provided under Clause 17.0 thereof and the break-up details of format is provided under Clause 18.0, but in none of those clauses Entry Tax is provided or included and compliance of the aforesaid clauses had been specifically provided in Clause 18.0.(c) thereof.

16. It is not in dispute that the petitioner had paid and/or is paying all the taxes, duties etc. as provided in the clauses of the agreement and only Entry Tax in the State of Bihar has not been paid by it rather the same has been paid by respondents No. 1 & 2, who are trying to deduct the same from the amount payable to the petitioner.

17. It is not in dispute that the petitioner is a Company situated at Haryana and its component i.e. IJT is also at Haryana and they sold and delivered the goods to respondents No. 1 & 2 at Haryana itself. Thus, having purchased the goods at Haryana itself respondents No. 1 & 2 became the owners of those goods and it was their duty to bring the said goods from Haryana to their Units in Bihar as the

said goods were required for their three Units in Bihar. These facts are quite apparent from the letter of IJT dated 29.5.2010 (Annexure 2) as well as the letter sent by respondent to IJT dated 7.6.2010 (Annexure 3).

18. The specific claim of the petitioner is that after purchase the goods in question were brought from Haryana to Bihar by respondents No. 1 & 2 themselves, which is clearly proved by the fact that the Entry Tax on the goods on arrival in the State of Bihar was levied upon respondent No. 1, which they admittedly paid to the authorities concerned.

19. Section 3(1) & (2) of the Entry Tax Act provides that there shall be levied and collected a tax on entry of scheduled goods into a local area for consumption, use or sale therein, which shall be paid by every dealer liable to pay tax under Bihar Finance Act, 1981 or any other person, who brings or causes to be brought into the local areas such scheduled goods whether on his own account or on account of his principal or takes delivery or is entitled to take delivery of such goods on such entry; provided no tax shall be leviable in respect of entry of such scheduled goods effected by a person other than a dealer if, the value of such goods does not exceed 25 thousands in a year.

20. The term "dealer" is defined u/s 2(e) of the Bihar Finance Act, 1981, meaning any person, who carries on the business of buying, selling, supply or distributing goods, directly or indirectly, for cash, or for deferred payment, or for commission, remuneration or valuable consideration including a local authority, a body corporate, a company, any co-operative society or other society, club, firm, Hindu undivided family or other association of persons, which carries on such business. Furthermore section 26(2) & (3) of the said Act provides restrictions on collection of tax, etc. by dealers and also provides that no registered dealer shall collect from any person any amount, except in a case in which and to the extent of which such dealer is liable to pay tax under this part and if any person or a registered dealer contravenes the said provision, the prescribed authority shall after giving an opportunity of being heard, in the manner prescribed, direct that such person or registered dealer shall pay by way of penalty a sum equal to twice the amount collected in contravention of the aforesaid provisions. All the aforesaid provisions of the Bihar Finance Act, 1981 are applicable to the instant case in view of the specific provision of Section 8 of the Entry Tax Act, 1993.

21. In these circumstances, the deduction made by respondents No. 1 & 2 in the name of Entry Tax from the bills of the petitioner is violative of the provisions of Bihar Entry Tax Act, 1993 including provisions of the Bihar Finance Act, 1981. Furthermore Article 265 of the Constitution of India also prohibits by a clear mandate that no tax shall be levied or collected except by the authority of law, but in the instant case respondent-Corporation has miserably failed to show any authority of law, under which the deductions were being made by them in the name of Entry Tax from the bills of the petitioner. Thus, it is quite apparent that respondent-Corporation has been acting in an arbitrary manner by illegally shifting its liability to pay Entry Tax upon petitioner-Firm although the entire

liability of payment of Entry Tax is of respondent-Corporation alone being the importer of goods from Haryana into the State of Bihar. In the aforesaid facts and circumstances, this writ petition is allowed and respondent-M/s Hindustan Petroleum Corporation Ltd. (respondent No. 2) as well as its wholly owned subsidiary company M/s HPCL Biofuels Ltd. (respondent No. 1) are restrained from deducting any amount from the bills of the petitioner on import of goods from Haryana in the State of Bihar in the name of Entry Tax as they have no jurisdiction to deduct any amount of Entry Tax from the bills of the petitioner.