(2007) 07 PAT CK 0146

In the Patna High Court

Case No : Cr. Misc. No. 13001 of 2007

Vijay Kumar Agrawal APPELLANT

Vs

The State of Bihar RESPONDENT

Date of Decision : 13-07-2007

Acts Referred:

Citation : (2007) 07 PAT CK 0146

Final Decision : Allowed

Judgement

Ghanshyam Prasad, J.—Heard.This application u/s 482 Cr.P.C. has been filed to quash the order dated 8.9.1995 passed by C.J.M. Patna as well as the entire criminal proceeding arising out of Kadamkuan P.S. Case No. 721 of 1992 now pending in the court of Shri Bharat Tiwari, Judicial Magistrate. 1st Class Patna thereby cognizance u/s 49(g) & (h) of Bihar Finance Act has been taken against the petitioner and others.

2. The petitioner along with others have been prosecuted by department of Commercial Tax for evasion of sales tax on lottery tickets. The petitioner is proprietor of M/s Vijay Agency. The case has been registered on the basis of fardbeyan lodged by Deputy Commercial Taxes, Investigation Bureau.

The Learned Counsel for the petitioner raised several points against the prosecution of the petitioner under sales tax provisions including limitation, jurisdiction of police to investigate and non-assess ability of sales tax on Lottery tickets. It is submitted that now constitution Bench of Hon''ble Supreme Court in decision reported in Sunrise Associates Vs. Govt. of NCT of Delhi and Others, , has finally settled that the Lottery tickets are not "goods" for the purpose of sales tax law. It is only actionable claim having no value in itself and it is mere piece of paper and hence not taxable under Sales Tax Act. The prosecution of the petitioner for non-payment of sales taxi assessed in default by the department is out and out misuse of process of the court.

Earlier to the above decision of the Constitution Bench, the Supreme Court in a case H. Anraj Vs. Government of Tamil Nadu, had held lottery tickets as "goods" for the purpose of sales tax. In above decision of 2006, the correctness of Anraj case was called in question. In paragraph -44 of the judgment, it has been held as follows:

44. The question is, what is this right which the ticket represents? There can be no doubt that on purchasing a lottery ticket, the purchaser would have a claim to a conditional interest in the prize money which is not in the purchaser''s possession. The right would fall squarely within the definition of an actionable claim and would therefore be excluded from the definition of '''goods" under the Sale of Goods Act and the sales tax statutes. This was also accepted in H. Anraj when the Court, said that to the extent that the sale of a lottery ticket involved a transfer of the right to claim a prize depending on chance, it was an assignment of an actionable claim. Significantly in B.R. Enterprises v. State of U.P. construing H. Anraj the court said.

In paragraph-51 of the judgment, it has further been held as follows:

51. We are therefore of the view that the decision in H. Anraj incorrectly held that a sale of a lottery ticket involved a sale of goods. There was no sale of goods within the meaning of Sales Tax Acts of the different States but at the highest a transfer of an actionable claim. The decision to the extent that it held otherwise is accordingly overruled though prospectively with effect from the date of this judgment.

Thus from the above decision, it is quite clear that Lottery tickets are not goods for Sales Tax Act and, therefore, there is no question of payment of Sales Tax on sale and purchase of the lottery tickets arise. On this score, it is apparent that the prosecution of the petitioner for non-payment of Sales Tax or fine under the above provision is apparently bad and illegal.

The other points canvassed by the learned Counsel for the petitioner also appear to have merit. Bihar Finance Act is a Special Act. Therefore, the police has no power to investigate and similarly no court has power to take cognizance on the basis of chargesheet submitted by the police. The other point is that the prosecution has been launched in contravention of Section 49(5) of finance Act. Prosecution has been launched by Deputy Commissioner without prior sanction of the Commissioner. For that the learned Counsel for the petitioner has relied upon some decisions of the Hon''ble High Court including the orders passed in Cr. Misc. Nos. 11663, 1063, 1108, 2394, 12097 and 2408 of 1992 (Annexure-2) and in Cr. Misc. No. 31855 of 2003 (Annexure-3). In both the decisions, the above points have been considered. In judgment (Annexure-2) vide paragraph-9, it has been held as following:

9. Learned Counsel for the petitioners cited some decisions in support of his contention. The first case cited is the case Regent Cinema, patna v. State of Bihar and Ors. 1993 (2) BLJ 318. It has been held in this case that if there is special provision of investigation and prosecution provided in any special Act, it

excludes the application of the provisions of the Indian Penal Code, as per Sub-section (2) of Section 4 of the Code of Criminal Procedure. The second case is the Hindustan Lever Ltd. v. State of Bihar and Ors. (supra). In this case also it has been held that in the Drugs and Cosmatic Act offences, if the prosecution can be instituted by filling complaint by the Drug inspector registering of a case in the F.I.R. and investigation by police is without jurisdiction and therefore, such proceeding is fit to be quashed. The Learned Counsel further contended that in earlier case. Bindeshwari Prasad Chaudhary v. Collector Sifawarhi and Ors. 1979 BLJ 391 it has been held by their Lordships of this Court that when any special authority is empowered to launch prosecution under some special enactment, it has overriding effect over the existing provisions of enactment in force.

Thus, from the above discussions of decisions of the Hon''ble Apex Court as well as the Hon''ble High Court, it is quite clear that the prosecution of the petitioner is out and out misuse of process of the court. No case for prosecution under provision of the Bihar Finance Act has been made out.

Accordingly, this application is allowed and the impugned order as well as the entire criminal proceeding in question is hereby quashed.