

(2012) 03 JH CK 0034

Jharkhand High Court

Case No: W.P.T. No. 5324 of 2011

Sunil Kumar Sawa

APPELLANT

Vs

The State of Jharkhand and
others

RESPONDENT

Date of Decision: March 28, 2012

Acts Referred:

- Bihar Finance Act, 1981 - Section 17(2), 17(3), 19, 33, 33(3)

Citation: (2012) 2 JCR 662 : (2013) 2 JLJR 150

Hon'ble Judges: Prakash Tolia, C.J; Aparna Kumar Singh, J

Bench: Division Bench

Advocate: Shankar Lal Agarwal, for the Appellant; Ajit Kumar, A.A.G., for the Respondent

Final Decision: Dismissed

Judgement

1. Heard learned counsel for the parties. The petitioner initially preferred this writ petition to challenge the demand notice which is memo no. 1760 dated 05.07.2011 whereby a demand of Rs.34,73,029/- has been raised against the petitioner.

2. The petitioner's contention is that the demand has been raised only on the ground of audit objection and obviously there being no order passed by any competent authority. It is submitted that only on this audit objection, no demand can be raised. Appreciating this argument, this Court has passed an interim order dated 27th September, 2011 and stayed the realization of demand under the heading "audit" for the years 1985-86 and 1986-87, amounting to Rs.34,73,029/-.

3. Reply was filed by the respondents wherein it is submitted that after being given due opportunity of hearing to the writ petitioner, the penalty order was passed by the authority and that too, in the year 2000 specifically on 11.2.2000.

4. The petitioner then submitted an interlocutory application no.32 of 2012 and placed on record the copies of the order dated 11.2.2000 along with copies of all the

order sheets and took a new ground and sought permission to amend the writ petition to challenge the order dated 11.2.2000 after delay of about 12 years with the plea that petitioner had no notice of hearing of the matter.

5. Learned counsel for the respondents submitted that writ petition of the petitioner is liable to be dismissed only on the ground of suppression of materia facts as well as because of the reason that the order sought to be challenged i(sic) of the year 2000 itself which is being challenged after delay of 12 years and the order was appellable.

6. However, learned counsel for the petitioner has assailed the order on the ground that the petitioner was earlier, subjected to penalty proceeding u/s 33(5)(b) of Bihar Finance Act, 1981 and the penalty was imposed vide order dated 28.8.1986 which was set aside by Ranchi Bench of Patna High Court vide order dated 09.12.1986 passed in C.W.J.C No. 1215 of 1986(R). In view of the above, the petitioner could not be subjected to the said proceeding again under same Section 33(5) (b) of the Act. It is also submitted that the Assessing Officer has passed the order only on the ground of audit objection.

7. We have considered the submissions of the learned counsel for the parties and perused the facts of the case. It appears that for the Assessment Year 1985-86 and 1986-87, during the course of search and seizure by the Vigilance Department of the respondents, some books of account have been seized and thereafter two regular assessment orders were passed which are dated 21.3.1994 and placed on record vide annexures-7 and 8. These assessment orders were challenged by preferring a Revision Petition No. (S) 614-615/94-95 which were dismissed by the Commissioner, Commercial Taxes, Bihar. Patna vide order dated 20.5.1999. Against that revision order, it appears that two further revision petitions were preferred before the Commercial Tax Tribunal being Revision Petition Nos. JR 1523/2001 and JR 1524/2001 which were also dismissed by a reasoned order dated 2.4.2009. Therefore, so far as regular assessments are concerned, those orders attained finality.

8. It appears from the copies of the order sheets which have been placed on record by the writ petitioner himself dealing the audit objection which is dated 01.10.1994 wherein there is reference of assessment order dated 21.3.1994 which were the assessment orders of the writ petitioner of the relevant period. In the audit objection, it was pointed out that the dealer has returned nominal account of G.T.O. during both the relevant years and notice u/s 17(2) of Bihar Finance Act was served but the dealer failed to produce books of account and seizure were made u/s 33 of Bihar Finance Act. Books of account and the records were seized u/s 33 (3) of the Act by Investigation Bureau of Jamshedpur Division. On 13.8.1986 u/s 33(5) of the Act, goods were also seized by Investigation Bureau which were 389 bags of posta, 44 bags of Tea and 6 half bags of tea. The Commercial Tax Officer, Investigation Bureau, Division- Jamshedpur after detailed examination of seized books of

accounts has suggested the amount of G.T.Os. for both the years and same amount were determined by the Assessing Officer and assessments were done u/s 17(3) of the Act Further, it was noticed that as per provisions of Section 33(5)(b), the dealer was also liable to penalty to the tune of thrice of the amount of the tax levied which was not levied by the Assessing Officer without assigning any reason for the same. Hence, the dealer was liable to pay penalty u/s 33(5)(b) of the Act, in addition to tax already levied, and the auditor determined this penalty to the tune of Rs.34,73,028.99.

9. For this audit objection, petitioner was given full opportunity of hearing to contest the penalty proceeding for which the petitioner was served several notices. It appears from the copies of the order sheets, which have been placed on record by the petitioner himself along with LA. No.32 of 2012 and which had not been submitted in the writ petition, it appears that on 6.10.1994 specifically it was recorded in the order sheet that as per audit objection dated 01.10.1994 for imposing penalty for the year 85-86 and 86-87, notice was issued to assessee u/s 19 of the Act. Thereafter, in the order sheet dated 30.09.99, it has been recorded that notices were given to the assessee on 06.10.94, 01.11.94, 16.07.95, 26.07.95, 30.10.96 etc. and it has been observed that notices were served upon the assessee. Not only this but on 27.12.99, the assessee appeared and his appearance was marked. On 08.2.2000 also assessee appeared and he informed the authority that he is not in a position to produce books of account. However, on the request of the assessee, time was granted and the next date was fixed for order on 11.2.2000. Thereafter, (sic) 11.2.2000, the assessee again did not appear thereafter order dated 11.2.2000 was passed and assessing officer found that assessee has no defence. From the order sheet as well as proceeding even before the revisional authority itself, it is clear that assessee did not produce the books of account and in view of the fact available on records, which find support of non-contesting by the assessee, the assessing officer imposed the penalty u/s 33(5) (b) which is equal to three times of the assessment after reconsideration that there was earlier proceedings under purported provisions of Section 33(5) (b) of the Act and in that proceeding vide order dated 28.8.1986, an order was passed. In this order dated 28.8.1986 (annexure-2), the issue which was considered was with respect to the facts as to how much goods were found in the premises of the writ petitioner and how many transactions were made and thereafter, the assessment of tax was made. Thereafter, for non -payment of the above tax in time, a penalty was imposed. It is stated that this order was set aside in the writ petition being C.W.J.C. No. 1215 of 1986(R) vide order dated 09.12.1986. However, a copy of the order of the said writ petition is available but it is not clear therefrom as to which order was set aside. Be that as it may, if we accept that the order dated 28.8.1986, annexure-2, has been set aside, even then it will not change the situation in that case, the order passed may be under purported power u/s 33(5) of Bihar Finance Act but that was the order passed due to escapement of assessment and penalty was imposed. After this order dated 28.8.1986, when

petitioner came to know about the audit objection dated 01.10.94, he preferred a writ petition before Ranchi Bench of Patna High Court being C.W.J.C. No. 3296 of 1994 (R) wherein petitioner's challenge was to the audit objection which was rejected vide order dated 15.12.1994 on the ground that mere audit objection cannot be a cause of action to the writ petitioner as no formal order imposing penalty has been passed. Therefore, petitioner was well aware of the audit objection dated 01.10.94 as early as in the month of December. 1994 and he tried to challenge that audit objection. This is only for the purpose of finding out the fact that what was the conduct of the petitioner and petitioner has challenged all the proceedings initiated for imposing of penalty on the basis of audit objection dated 01.10.1994. The petitioner further have full knowledge of the proceeding which have been impugned now from the beginning in the year 1994 and thereafter also he was served with several notices and the order of the assessment was passed on the date for which the date was fixed by the assessing officer in presence of the assessee but he did not appear and did not produce his books of account From the all orders referred above, it is clear that the assessee did not produce books of account to justify the transaction and therefore, Section 35(3) (b) was obviously applicable whereunder the fixed penalty is there for three times of the amount of tax calculated on the value of tax. In view of the above reasons, we are of the considered opinion that the petitioner is not entitled to invoke the writ jurisdiction which is an extraordinary and equitable writ jurisdiction wherein relief can be for the person only who comes up with clean hands. Here, in this case, petitioner has not come up with clean hands because he suppressed the material facts and gave false statement. Yet the petitioner approached this Court by filing this writ petition for the purpose of quashing demand notice projecting that demand notice has been issued only on the basis of the audit objection, obviously, without there being no order of the Assessing Officer or competent authority and petitioner succeeded in obtaining interim relief on 27.9.2011. It appears that the petitioner misled this Court and now to take benefit from the reply filed by the respondent disclosing that assessment order was passed as back as in the year 2000 and more than about 12 years have passed, then the petitioner, thereafter, filed the interlocutory application to challenge the penalty order, which was appealable one. Therefore, we are of the considered opinion that the petitioner is not entitled to any relief because of his conduct as well as in view of lack of merit in his contention. Therefore, this writ petition is dismissed.