PATNA HIGH COURT

Civil Writ Jurisdiction Case No.777 of 2023

National Insurance Co. Ltd.-Appellant

Versus

The State of Bihar, The Additional Commissioner of State Taxes (Appeal) Patna., The Assistant Commissioner of State Taxes, Patliputra Circle, Patna, Sanjay Kumar Mishra, Assistant Commissioner of State Taxes, Patliputra-Respondent

Coram:HONOURABLE THE CHIEF JUSTICE K. VINOD CHANDRAN AND HONOURABLE MR. JUSTICE RAJIV ROY

Date of order:15/01/2024

Held That: In a legal case reminiscent of past issues, a public sector undertaking faced unwarranted recovery proceedings for tax dues, despite adhering to appeal payment norms. The court criticized the coercive actions, emphasizing the need for proper tribunal constitution and due process, ultimately directing a refund of wrongfully recovered amounts and imposing costs on the responsible officer.

Appearance:

Mr. Gautam Kumar Kejriwal, Advocate Mr. Alok Kumar Jha, Advocate Mr. Mukund Kumar, Advocate Mr. Akash Kumar, Advocate Mr. Aditya Raman, Advocate for the Petitioner.

Mr. Vivek Prasad, GP-7 For the Respondent

JUDGMENT

We are again faced with the problem of ‘valiant tax executives clothed with judicial powers remembering their former capacity at the expense of the latter’ (sic)- as stated in ***R.S Joshi, Sales Tax Officer, Gujarat and Others v. Ajit Mills Limited and Another; (1997) 4 SCC 98.***

2. Bereft of the facts leading to the writ petition, we have to only notice that on 21.09.2022, an appeal filed by the assessee/petitioner against the order of

assessment dated 17.02.2022 was rejected. There was no Appellate Tribunal constituted as provided under Section 109 of the Bihar Goods and Services Tax Act.

3. Even in that circumstance, the assessee paid up 20% of the tax in dispute being Rs. 5.70 crores as per Section 112(8) of the Central Goods and Services Tax Act, 2017 on 21.10.2022. At the time of filing of the appeal, admittedly, 10% of the tax in dispute was paid, which is mandated for the institution of a proper appeal before the first Appellate Authority. Despite the payment of 20% of the tax in dispute having been made after the first Appellate Authority rejected the appeal, a demand was issued at 05.01.2023. Apprehending coercive action, the petitioner, a public sector undertaking filed the above writ petition on 06.01.2023. The tax authorities, presumably, in retaliation recovered the entire balance remaining payable, under Section 79 of the Central Goods and Services Tax Act, 2017 on 07.01.2023.

4. In a similar circumstance we deprecated the manner in which such recovery is made, even when 20% of the tax is paid up after the first appeal is rejected. In fact, if the Tribunal was constituted and an appeal is filed there could be no further proceedings taken for recovery of the balance amounts till the appeal is disposed off. Hence, when a Tribunal is not constituted, obviously no such recovery could have been made.

5. We have in C.W.J.C. No. 5407 of 2023 titled as Sita Pandey v. State of Bihar and Ors. by decision on 23.08.2023, held so in paragraph nos. 8 to 15:-

8. The CGST Act provides for constitution of Appellate Tribunal for hearing appeals against the orders passed by the Appellate Authority or the Revisional Authority and Section 109 of the BGST Act provides for the said Appellate Tribunal constituted under the CGST Act to also hear the appeals under the BGST Act. Section 112 enables any person aggrieved by an order passed against him under Section 107 or Section 108 of the BGST Act or the CGST Act to appeal to the Appellate Tribunal against such order within three months from the date on which the order sought to be appealed against is communicated to the person preferring the appeal. Sub-section (8) of Section 112 makes it mandatory for an appeal to be instituted; that the appellant pays in full the amount of tax, interest, fine, fee and penalty arising from the impugned order as admitted by him and a sum equal to twenty per cent of the remaining amount of tax in dispute, in addition to the amount paid under Section 107(6).

Hence, the admitted amount of tax and other dues have to be satisfied along with twenty per cent of the tax in dispute; in addition to the ten per cent paid under Section 107 (6). On such payment being made, not only is the instituted appeal maintainable; under sub-section (9) of Section 112, there is a deemed stay of the recovery proceedings for the balance amount till the disposal of the appeal. Hence, when a proper appeal is instituted before the Appellate Tribunal, with the payments as required for maintaining the appeal, then there is a statutory embargo from making any recovery based on the assessment order or the first appellate order.

9. It is in this context that the proviso to Section 78 has to be looked at. Section 78 has the nominal heading "Initiation of recovery proceedings" and requires a taxable person to satisfy an order passed under the BGST Act by paying up the amounts due within a period of three months from the date of service of such order. The proviso enables the proper officer in expedient situations, in the interest of revenue, for reasons recorded in writing, to require the taxable person to make such payment within such period, less than a period of three months, as may be specified by him. In the present case, admittedly there is no notice issued specifying the time

within three months, within which time the assessee was supposed to pay the amounts as per the order.

10. The contention of the learned Government Advocate is also that there is no requirement for a notice and reasons alone are to be recorded, which is available in the files, an extract of which is produced as Annexure-D along with the supplementary counter affidavit dated 10.05.2023 filed on behalf of Respondent Nos. 2 and 3. The reasons stated, as evident from the extract of the file which is also dated 27.03.2023 is that the financial year 2022-23 is coming to an end and there are bank holidays on the immediate days following. We cannot but express our deep anguish and dissatisfaction in the reasons recorded by the officer. The imminent bank holidays of 2 or 3 days and the close of the financial year, we are afraid, cannot be termed valid reasons to justify an expedient recovery under the proviso to Section 78 and it is not clear as to how the interest of the revenue would suffer, if the recovery is kept in abeyance for three months or at least a notice is issued to the assessee before the recovery is effectuated from the banks, behind the back of the assessee. The counter affidavit does not speak of any notice having been given to the assessee before recovery. Notices were issued to the banks of the assessee and the amounts remaining in the various accounts forcefully forfeited and paid over to the Tax Department.

11. As far as the statutory provision not requiring a notice to the assessee, we need only refer to the Constitution Bench decision of the Hon'ble Supreme Court in Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others; AIR 1978 Supreme Court 851 from which we extract hereunder Paragraphs 75 and 76:-

"75. Fair hearing is thus a postulate of decision-making cancelling a poll, although fair abridgement of that process is permissible. It can be fair without the rules of evidence or forms of trial. It cannot be fair if apprising the affected and appraising the representations is absent. The philosophy behind natural justice is, in one sense, participatory justice in the process of democratic rule of law.

76. We have been told that wherever the Parliament has intended a hearing it has said so in the Act and the rules and inferentially where it has not specificated it is otiose. There is no such sequatur. The silence of a statute has no exclusionary effect except where it flows from necessary implication. Article 324 vests a wide power and where some direct consequence on candidates emanates from its exercise we must read this functional obligation."

[underlining by us for emphasis]

12. The aforesaid declaration of law made with respect to a decision cancelling a poll, applies across the board to every judicial and quasi-judicial order and action taken. The principles of natural justice stand embedded in every coercive action taken by a statutory authority, even within the four corners of the law; when it could, in the normal circumstances cause prejudice to the person against whom such proceedings are levelled. The recording of reasons as coming forth in the provision to Section 78 are not to be recorded surreptitiously and kept in the files, but to be informed to the assessee and a time specified within three months for the payment to be made. In fact, on a reading of the proviso we are of the definite opinion that there is a requirement of notice, if not prior to the recording of reasons; at least intimation of the reasons which motivates the proper officer to recover the amounts due, considering such recovery to be expedient in the interest of revenue

with clear specification of the period; less than a period of three months, within which the amounts are to be paid.

13. Section 78 provides that a person against whom an order is passed shall satisfy the amounts payable within a period of three months and the proviso empowers the Assessing Officer to seek satisfaction of such dues even during a period lesser than three months. The provision is worded so:-

"78. Initiation of recovery proceedings.- *Any amount payable by a taxable person in pursuance of an order passed under this Act shall be paid by such person within a period of three months from the date of service of such order failing which recovery proceedings shall be initiated:*

Provided that where the proper officer considers it expedient in the interest of revenue, he may, for reasons to be recorded in writing, require the said taxable person to make such payment within such period less than a period of three months as may be specified by him."

[underlining by us for emphasis]

Hence, when reasons are recorded in writing, there is a duty on the Assessing Officer to specify the time within which the amounts are to be paid which intimation has to go to the assessee.

14. In this context, we also have to notice that the Appellate Tribunal under Section 109 of the CGST Act has not yet been constituted. We would not rely at all on the equitable directions issued by this Court in various petitions staying recovery on payment of twenty per cent of the balance tax due as provided under Section 112(8). However, it is very evident that even the Central Government and the State Government was conscious of the fact of the Tribunal having not yet been constituted. Two notifications, one of the Central Government and the other of the State Government, are produced as Annexure 8 and 9 along with the writ petition. Both these notifications invoke the power conferred respectively under Section 172 of the CGST and BGST Act. For removal of difficulties, presumably for reason of the non-constitution of the Tribunal, the three months limitation period stipulated under sub-section (1) of Section 112 of both the enactments are extended to the latter of the following dates; (i) of communication of order or (ii) the date on which the President or the State President, as the case may be, of the Appellate Tribunal after its constitution under Section 109, enters office. It is also stipulated that the six month period provided under Section 112(3) shall also stand extended by the very same period from the aforesaid dates; whichever date falls later. Hence, there could not have been a recovery surreptitiously, by issuing notices to the banks and coercing them to pay the amounts, that too the entire due amounts, including the tax, interest and penalty.

15. The Legislature had, in the event of an appeal filed to the Tribunal, only intended twenty percent of the tax dues alone to be paid; on which payment the entire demand was liable to be stayed till the disposal of the appeal. However, admitted tax; interest, fine and penalty also have to be satisfied. Hence even if coercive action could have been taken the tax officer should have confined it to the twenty percent of the total amounts assessed, in addition to the ten percent paid at the first appellate stage and any admitted tax, if remaining unpaid. The tax officer had definitely erred, that too egregiously, to the extent of his action being termed high-handed, in surreptitiously making the recovery of the entire amounts due as tax, interest and penalty, even contrary to the legislative mandate. As we found, the

reasons stated are unconvincing and clearly untenable and the approaching closure of the financial year end can only be a motivation to enhance the individual targets assigned by the higher authorities.

6. We had in the aforesaid matter directed the refund of the tax recovered and also imposed a cost on the Assessing Officer, who acted peremptorily that too against the statutory provision.

7. In the present case, also we direct the entire amounts recovered as on 07.01.2023, be refunded to the assessee within a period of two weeks from today, failing which interest shall run at the rate of 12 per cent per annum. If the amounts are satisfied within two weeks, as directed hereinabove, it is made clear that if eventually the demand is confirmed against the assessee, there shall not be any interest claimed under the statute between the date on which the amounts were credited by the bank and the date of refund as directed hereinabove; since the State had the benefit of the amounts in its coffers. If the liability is set aside then for the period the assessee was deprived of the amounts peremptorily recovered, the petitioner shall be entitled to claim interest from the department.

8. Following the very same judgment, we also impose a cost of Rs. 5000/- on the Officer, who issued the demand produced as Annexure-16 and appropriated the money from the bank account of the assessee/petitioner.

9. The writ petition stands allowed on the above terms.