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IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.14655 of 2015

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Idea Cellular Infrastructure Services Limited, a Company registered under the Companies Act, 1956 having its office at 1st Floor, Sumitra Sadan, Boring Canal Road Crossing, P.O. and P.S. Budha Colony, District Patna through its Assistant General Manager (Legal) Vipul Tripathi Son of Shri R. L. Tripathi resident of Flat No. 404, Taluka Apartment Budha Colony, East Boring Canal Road, P.O. GPO P.S. Budha Colony, District - Patna

.... Petitioner/s

Versus

1. The State of Bihar through the Commissioner of Commercial Taxes, Bihar Patna having its office at Vikash Bhawan, Bailey Road, Patna
2. Commercial Taxes Tribunal having its Office at Kautilya Bhawan, Anta Ghat, Patna
3. Commercial Taxes Officer, Patliputra Circle, Patna

.... Respondent/s

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.... Respondent/s

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Appearance :

(In CWJC No.14655 of 2015)

For the Petitioner : Mr. D.V.Pathy
Mrs. Manju Jha
Mr. P.K. Mishra

For the Respondents : Mr. Vikash Kumar, A.C. to PAAG

(In CWJC No.14656 of 2015)

For the Petitioner : Mr. D.V.Pathy
Mrs. Manju Jha
Mr. P.K. Mishra

For the Respondents : Mr. Vikash Kumar, PAAG

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CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA
and
HONOURABLE MR. JUSTICE SUDHIR SINGH

ORAL ORDER

(Per: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA)

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6 07-01-2016 Heard learned counsel for the petitioner and learned counsel for the State.

Both the writ applications have been filed for quashing the orders dated 25.08.2015 passed by the Commercial Taxes Tribunal in Appeal Case No.PT/68 of 2015 and Appeal Case No.PT/69 of 2015 for the periods 2008-09 and 2009-10 respectively, by which it has refused to waive the precondition of deposit. Originally the relief sought was for declaration that the explanation appended to Section 73 (2) of the Bihar Value Added Tax Act, 2005 does not expand the scope and ambit of the main provision of Section 73 (2) of the Act, but subsequently by an interlocutory application the original relief sought was amended by seeking a declaration that the explanation amended to Section 73 (2) of the Act is violative of Article 14 of the Constitution of India.

The petitioner was assessed for the periods 2008-09 and 2009-10 under Section 31 of the Bihar Value Added Tax Act read with Section 8 of the Bihar Tax on Entry of Goods into Local Areas for Consumption Use or Sale Therein Act, 1993 by the Commercial Taxes Officer, Patliputra Circle, Patna holding that the telecommunication equipments as mentioned at internal page Nos. 3 and 4 are electrical goods falling under Item 17 of Schedule to the Entry Tax Act and as such are leviable to tax at the rate of 8% and interest at the rate of 1.5 % per month was also charged on the entry tax unpaid.

Aggrieved by the orders of assessment, the appellant filed an appeal before the Joint Commissioner of Commercial Taxes (Appeals), Central Division, Patna, which was allowed by order dated 26.07.2013. Ultimately, the said order was set aside and reversed by the Commissioner of Commercial Taxes in a proceeding under Section 74 of the Act. Aggrieved by the Commissioner's order, the petitioner filed appeals before the Commercial Taxes Tribunal with applications for waiver of the pre-deposit as condition precedent for filing the appeal in terms of the proviso to Section 73 (2) of the Act stating that the petitioner had deposited 43 % and 49% of the total tax and interest and 59% and 55% (average 57 %) of the disputed tax amount and thus the requirement of deposit of 20% of the amount in dispute may be waived. The Tribunal, however, rejected the application for waiver holding that in terms of the provisions of Section 73 (2) of the Act read with its explanation, the 20% is to be calculated after deducting the amount of tax deposited by the dealer in respect of the periods 2008-09 and 2009-10 and further that the petitioner has not produced any reliable evidence that it was financially incapable to deposit the said amount. Aggrieved by the same, the petitioner has approached this Court by filing the present writ petitions.

Learned counsel for the petitioner submits that the provision of Section 73 (2) of the Act is crystal clear but by way of amendment brought therein the explanation has been introduced, the effect of which is to discriminate between similarly situated assessees who have exercised their right of appeal before the Tribunal, giving better benefit to a person who has not paid any amount of tax in dispute and put it in a better position than one who has obeyed the law and paid a sum higher than the amount of 20% of the amount in dispute.

It is submitted by learned counsel for the petitioner that word “amount in dispute” is clearly understood by any person who has to exercise the right of appeal as the amount in the orders of assessment or previous appellate order which are not being disputed in the appeal before the Tribunal. However, it is submitted by learned counsel for the petitioner that the explanation what has been sought to be made a pre-condition for filing the appeal is not only the actual amount of dispute but 20% of the difference between the amount in dispute and the amount of tax that have been deposited by the dealer. It is, thus, submitted that the dealer who has paid 50% of the amount in dispute would still require to pay 20% of the balance amount, i.e., 60% of the amount in dispute in order to exercise its right of appeal, whereas a dealer who has not paid a penny would be required only to pay 20% of the total amount in dispute. Thus, the more the dealer has deposited, the worse is his position for exercising his right of appeal before the Tribunal which is in clear violation of the mandate of Article 14 of the Constitution as similarly situated persons are sought to be discriminated.

Learned counsel for the petitioner further submits that an explanation is meant to harmonize and clear up any ambiguity in the main Section and should not be so read as to widen the scope and ambit of the main Section and thus for the said reason also it ought to be declared as ultra vires.

In support of the same, learned counsel for the petitioner relies upon a decision of the Supreme Court in the case of Zakiya Begum and others vs. Shanaz Ali and others: (2010) 9 Supreme Court cases 280, in paragraph No.19 of which it has been held as follows:-

> "19. An Explanation to a section should normally be read to "harmonise with and clear up any ambiguity in the main section" and normally not

> to widen its ambit.[See Bihta Coop. Development and Cane Mktg. Union Ltd. v. Bank of Bihar, AIR at p. 393 and Oblum Electrical Industries (P) Ltd.v. Collector of Customs, SCC P.587:AIR at P.3471.]"

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Learned counsel for the State, on the other hand, submits that the explanation does not widen and add to the scope of the main Section, rather the same is clarificatory in nature and, therefore, it is only explaining what is meant by the main part of Section 73 (2) of the Act and all that it requires is that the dealer has to deposit 20% of the amount in dispute which is the requirement for all the dealers and thus there is no discrimination involved.

It is further submitted that the different layers of redressal mechanism under the Bihar VAT Act, 2005 manifests the gradual progression whereby the appellant is to deposit 20% of the assessed tax (or admitted tax, which is higher) before the Joint Commissioner at the stage of appeal and 20% of the disputed amount at the stage of appeal to the Tribunal and therefore, the question of violation of Article 14 of the Constitution does not arise.

It is further submitted that the assumption that a person will be moving to the Tribunal against an order of the lower court after payment of 50% of the disputed amount is erroneous.

In support of his stand, learned counsel for the State relies upon a decision of this Court in the case of Jaiswal Soap Factory, Simri Bakhtiarpur vs. The State of Bihar and Another: 2008 (4) PLJR 572, in paragraph Nos. 24 and 25 of which it has been held as follows:-

> "24. Having already noticed that the alternative remedy provided in the statute is not unduly onerous and that neither the Assessing Officer lacked jurisdiction in passing the impugned assessment orders nor these orders have been passed in breach of principles of natural justice, we find no justification in invoking high prerogative jurisdiction under Article 226 by-passing the statutory remedy of appeal and revision.
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> 25. We find ourselves unable to accept the submission of the counsel for the petitioner that since error of law has been committed by the Assessing Officer in holding that the soaps sold by the petitioner are registered under the Trade Marks Act, the orders

of assessment are rendered without jurisdiction. As to whether the view of the Assessing Officer is right or wrong has to be examined and considered by the statutory appellate authority or the revisional authority, as the case may be. Even if we assume that a wrong view has been taken by the Assessing Office, that does not render the order without jurisdiction. Unless a case falls under the exceptions highlighted by the Supreme Court in the case **A.V. Venkateshwaran**, which the present case does not, we are afraid there may not be any justification in bypassing alternative remedy provided in statute. In this view of the matter, the decision relied upon by the counsel for petitioner in the case of Mafatlal Industries Ltd. has no application to the present fact situation."

Learned counsel for the State further relies upon a decision of the Supreme Court in the case of State of Bihar and others vs. Sachchidanand Kishore Prasad Sinha and others: (1995) 3 SCC 86, in paragraph No.11 of which it has been held as follows:-

"11. In Twyford Tea Co. Ltd. v. State of Kerala

Hidayatullah, C.J. speaking for the majority of the Constitution Bench, observed: (SCC p.197. paras 15-16)

"This indicates a wide range of selection and freedom in appraisal not only in the objects of taxation and the manner of taxation but also in the determination of the rate or rates applicable.

…The burden of proving discrimination is always heavy and heavier still when a taxing statute is under attack…The burden is on a person complaining of discrimination. The burden is proving not possible 'inequality' but hostile 'unequal' treatment. This is more so when uniform taxes are levied."

Learned counsel for the State further relies upon the decision of a Division Bench of the Orissa High Court in the case of Jindal Stainless Ltd. vs. State of Orissa and others: (2012) 54 VST 1 (Orissa), in paragraph No.27 of which it has been held as follows:

"27. In view of the above, we are of the considered view that the provisions of section 77

(4) of the OVAT Act requiring deposit of 20 per cent of the tax or interest or both in dispute as a precondition for entertaining an appeal against the order enumerated under section 77 (1) of the OVAT Act does not make the right of appeal illusory and such a condition is within the legislative power of the State Legislature and cannot be held to be unreasonable and violative of article 14 of the Constitution."

Learned counsel for the State also cites the decision of the Supreme Court in the case of M/s. Hiralal Ratan Lal v. The Sales Tax Officer, Section III, Kanpur and others: AIR 1973 Supreme Court 1043, in paragraph Nos. 23 and 24 of which it has been held as follows:-

"23. In Bihta Co-operative Development & Cane Marketing Union Ltd. vs. Bank of Bihar, (1967) 1 SCR 848 = (AIR 1967 SC 389), this Court was called upon to consider the Explanation to Section 48 (1) of the Bihar and Orissa Co-operative Societies Act, 1935. Therein this Court observed:

"The question then arises whether the first

Explanation to the section widens the scope of sub-section (1) of Section 48 so as to include claims by registered societies against non-members even if the same are not covered by clause (c)".

24. On the basis of the language of the Explanation this Court held that it did not widen the scope of clause (c). But from what has been said in the case, it is clear that if on a true reading of an Explanation it appears that it has widened the scope of the main section, effect must be given to legislative intent notwithstanding the fact that the legislature named that provision as an Explanation. In all these matters the Courts have to find out the true intention of the legislature."

We have considered the rival submissions of learned counsels for the parties. For a proper appreciation of the scheme of filing of appeals under the Bihar VAT Act, 2005, reference may be made to Section 72 (1) and (2) and Section 73 (1) and (2) of the Bihar VAT Act read with its Explanation, the vires of which is under challenge before us:-

"S.72. Appeal to Deputy Commissioner and Joint

Commissioner- (1) Subject to such rules as may be made by the State Government under this Act, any dealer, objecting to an order of assessment or an order levying interest or penalty passed by the prescribed authority against him, or an order under section 25 or a person, objecting to an order of penalty passed against him or an order under Section 47, may appeal to the Joint Commissioner, or the Deputy Commissioner specially authorized in this behalf.

(2) No appeal under sub-section (1) shall be admitted unless the dealer objecting to an order of assessment has paid twenty per cent of the tax assessed or full amount of admitted tax, whichever is higher.

S. 73. Appeal to Tribunal- (1) Subject to such rules as may be made by the State Government, any of the authorities mentioned in section 10 or dealer or any other person aggrieved by an order made by the Deputy Commissioner or Joint Commissioner under section 72 or the Commissioner under Section 74 or section 77, may, prefer an appeal to the Tribunal.

(2) Where an appeal is preferred by a dealer, such appeal shall not be entertained by the Tribunal unless such dealer or any other person has deposited in the manner

specified by the Tribunal, twenty per cent of the amount in dispute:

Provided that the Tribunal, may for reasons to be recorded in writing, waive or reduce the amount required to be deposited under this section.

Explanation- For the purposes of this sub-Section, the expression "amount in dispute" shall mean the sum remaining after deducting from the tax assessed, the amount of tax deposited by the dealer in respect of the year to which the dispute relates."

It is evident from the scheme of the Act that as against an order of assessment or other appealable order the appeal may be filed before the Joint Commissioner or the Deputy Commissioner specially authorized in that behalf. It is further provided by sub-section (2) of Section 72 of the Act that no appeal shall be admitted unless the dealer objecting to the order of assessment has paid 20% of the tax assessed or full amount of admitted tax, whichever is higher. Thus, at the first appellate stage the requirement for availing of the remedy of appeal is to deposit either the admitted tax or 20% of the tax assessed, whichever amount is found to be higher. The rationale of such provision is that a person may avail the remedy of appeal only after depositing

20% of the tax assessed in the order of assessment but in case he admits a higher amount of tax than 20%, then he must pay that admitted amount in order to file an appeal.

So far as the appeal to the Tribunal is concerned, the provision of sub-section (2) of Section 73 of the Act merely provides that the appeal shall not be entertained by the Tribunal unless the dealer or any other person has deposited 20% of the "amount in dispute". This is subject to the power of the Tribunal to waive or reduce the amount required to be deposited under the said sub-section for reasons to be recorded in writing. The petitioner in the present matter had filed such an application for waiver before the Tribunal which has been rejected taking recourse to the said proviso. Subsequently by amending Act 8 of 2011, the Explanation has been introduced in the Act, which lays down that for the purpose of sub-section (2) of Section 73 the expression "amount in dispute" shall mean the sum remaining after deducting from the tax assessed, the amount of tax deposited by the dealer in respect of the year to which the dispute relates.

So far as the main part of the provision of Section 73 (2) of the Act is concerned, the words "amount in dispute" does not by itself appear to be vague. The expression 'amount in dispute' is normally used in a tax legislation as that part of the amount in the order of assessment or of appeal or a revisional order, which is sought to be challenged by preferring an appeal, etc. before the appellate authority. Thus, the introduction of Explanation in Section 73 was certainly not to clarify an expression which is commonly used in tax legislation. It is also clear from the manner in which the Explanation is couched that it is a restrictive meaning given to the expression "amount in dispute" by stating that it "shall mean". It is thus an attempt to give special meaning to the said expression "amount in dispute" which is normally very much within the domain of the legislature. Thus effect of the Explanation to Section 73 (2) of the Act is to restrict the meaning of the well known expression "amount in dispute" to such amount which remains after the amount of tax deposited by the dealer is deducted from the tax assessed with respect to the year to which the dispute relates. It is this restriction of the expression "amount in dispute" which according to learned counsel for the petitioner has led to the provision becoming discriminatory and thus violative of Article 14 of the Constitution.

The petitioner has sought to highlight the discrimination by a simple example of a dealer who has already deposited 50% of the tax out of the amount in dispute vis-à-vis a dealer who has deposited no part of the said amount in order to show that such a dealer which has deposited 50% of the amount in dispute would be required further to deposit 20% of the balance amount, i.e., 60% of the total amount in dispute in order to exercise his right of appeal, whereas a dealer who has not deposited any part of the amount in dispute shall have to deposit only 20% of the said amount. In fact the said discrimination shall be further enlarged where a dealer has already deposited even higher amounts till 99% of the amount in dispute but would still be required to deposit further 20% of the balance amount in order to avail of the right of appeal. Such operation of Section 73 (2) by virtue of the explanation clearly leads to the situation that for exercising right of appeal one person would be required to deposit 20% of the amount in dispute, whereas another person would be required to deposit 20% of the balance amount even after much higher amount has been deposited either voluntarily or by coercive action, and a substantial portion of the amount has been recovered. This can even be by virtue of attachment of the bank account of the dealer in question whereby the Department may have realized whatever was available with the dealer or person and he may not be even in a position to deposit 20% of the amount in dispute to avail of the opportunity of filing the appeal.

Thus, the effect of the provision is to put an unjustified burden upon those who have already paid some portion of the amount actually in dispute vis-à-vis those who have not paid any amount and also among those who have paid higher proportion vis-à-vis who have deposited a lower proportion of the amount actually in dispute.

The right of appeal, no doubt, is a creature of statute and no one can claim it on any common law principles as a legal right but once such right is provided then it must operate equally for those who have to avail of such a right. It is not open to the legislature to cast a more onerous burden on the exercise of such right of appeal upon certain persons who otherwise fall in the same category vis-à-vis others.

We may, at this stage, deal with the submissions of learned counsel with respect to the legislative intent, whereas learned counsel for the petitioner has sought to rely upon the judgment of the Apex Court in Zakiya Begum's case (supra) in which it has been held that an Explanation to a Section should normally be read to harmonize with and clear up any ambiguity in the main Section and normally not to widen its ambit.

On the other hand, learned counsel for the State has relied upon the decision in M/s. Heera Lal Ratan's case (supra), in which case reliance has been placed earlier in the case of Bihta Co-operative: AIR 1996 SC 389 wherein it has been clarified that if on a true reading of an Explanation it appears that it has widened the scope of the main Section, the effect must be given to the legislative intent notwithstanding the fact that the legislature named that provision as an Explanation and further that the Courts have to find out the true intention of the legislature. It is evident that the decision in Zakiya Begum's case, the Apex Court has twice used the word "normally" and was not laying an absolute rule with regard to an Explanation. Such is not the position in all the cases. It is also clear from Justice G.P. Singh's, "The Principle of Statutory Interpretation" wherein while dealing with the interpretation of an explanation it has been stated that the meaning to be given to an Explanation must depend upon its terms, and no theory of its purpose can be entertained unless it is to be inferred from the language used; for which reference has been made to a catena of decisions starting from Krishna Ayyangar vs. Nattaperumal Pillai: ILR 43 Mad 550, p. 564 (PC); Dattatraya Govind Mahajan v. State of Maharashtra: AIR 1977 SC 915, p.928 : 1977 (2) SCC 548, Aphali Pharmaceuticals Ltd. v. State of Maharashtra: AIR 1989 SC 2227, p. 2238 and Keshavji Raoji and Co.v. Commissioner of Income-tax: AIR 1991 SC 1806, p.1818.

In M/s. Hira Lal's case also the four Judge Bench of the Apex Court has clearly held that the effect has to be given to the legislative intent behind the Explanation and notwithstanding the fact that the provision has been referred to as an Explanation.

We have already held that the Explanation to Section 73 (2) of the Act is in the form of a definition stating what the term "amount in dispute" shall mean for the purpose of the said sub-section and thus it cannot be said that it is in conflict with the main provision of section 73 (2) and has to be ignored. The full effect to the same has to be given, as the intent of the legislature was to give a particular meaning to the expression "amount in dispute". However, it is a different matter if the Explanation leads to violation of any Constitutional provision, as it has done in the present matter, discriminating between similarly situated class of persons, in which case the same may be struck down for the said reason.

So far as the other decisions relied upon by learned counsel for the State are concerned, they do not appear to be of any relevance to the issues before us. In Jaiswal Soap Factory's case (supra), a Division Bench of this Court has considered the issue of alternative remedy while entertaining a writ petition in which no vires of Statute was under challenge. Since the Tribunal itself is a creature of the Statute it cannot look into the validity of the statute in question.

Similarly, in Sachidanand Kishore's case what has been laid down is that the onus of proving discrimination is upon a person who complains of it and the burden is to prove not possible 'inequality' but hostile 'unequal' treatment. In the present matter, according to us, the petitioner has succeeded in showing that the

Explanation introduced to Section 73 (2) by the Amendment Act, 2011 leads to the situation of hostile unequal treatment to a person like the petitioner who claims to have paid a substantial part of the amount in dispute, yet is required to further deposit 20% of the balance amount in order to avail of its remedy of appeal.

So far as the reliance placed upon the judgment of the Orissa High Court in Jindal Steel's case (supra) is concerned, the provisions of the Section in question therein are not in pari materia with the provisions under question before us and from the said judgment, it is evident that the requirement therein was to deposit the admitted tax in full or 20% of the tax or interest or both in dispute. There was no such provision in the Orissa VAT Act, which has been discussed in the said judgment with regard to further deposit of amount even if the deposit of 20% of disputed amount has been made, whereas the Explanation under the Bihar VAT Act provides for deposit of 20% further tax even if any tax out of the disputed amount has already been paid.

Thus, in the light of the aforesaid discussions, we hold that the Explanation to sub-section (2) of Section 73 of the Bihar VAT Act, 2005 is violative of the provision of Article 14 of the Constitution. It is, accordingly, declared as ultra vires and struck down.

In view of our finding, the matter shall go back to the

Tribunal to consider the appeal in accordance with law after verifying whether the petitioner has paid at least 20% of the disputed amount as is the requirement of the main sub-section (2) of Section 73 of the VAT Act or not and in case the petitioner has done so, as stated by the petitioner, the Tribunal shall decide the same in accordance with law.

We may however, at this stage, refer to the observations of the Tribunal that the benefit of grant of waiver as provided under Section 73 (2) of the Act is only available to those who are able to show that they have no capacity to deposit the amount in dispute. According to us, that cannot be a sole ground for either allowing or denying the said benefit and all the other relevant factors which come into play while considering the grant of any interim order of stay ought to be considered by the Tribunal while deciding any such application before it.

Both the writ applications are, accordingly, allowed with the aforesaid observations and directions.

V.P.Sinha/-

(Ramesh Kumar Datta, J)

(Sudhir Singh, J)

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