IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.16973 of 2018

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Rahul Kirti S/o Hari Kirti Singh, Resident of 47 B Sri Krishna Puri, Patna 800001, Bihar, P.O. G.P.O., P.S. S.K.Puri, Partner of M/s Krishna Concrete Enterprises, 47 B Sri Krishna Pure, Patna 800001.

... ... Petitioner/s

Versus

1. The State of Bihar
2. The Joint Commissioner, Commercial Taxes, Muzaffarpur.
3. Dy Commissioner Commercial Taxes, Sales Tax Office East Champaran, Motihari.
4. The Assistant Commissioner, Commercial Taxes, Sales Tax Office East Champaran, Motihari.
5. The Commercial Tax Officer, Sales Tax Office, East Champaran, Motihari.
6. Director General of Police, Old Secretariat Patna 800001
7. Superintending of Police, Betiah.

... ... Respondent/s

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with

Civil Writ Jurisdiction Case No. 189 of 2019

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Metcon India Realty And Infrastructure Pvt. Ltd. having its Office at 6/2 Mount View Apartment, L.J. Road, Mahim West Mumbai 400016 and Branch Office at Main Road Atardah, Musahri, Muzaffarpur a through its Project Corrdinator Satvinder Singh Sathi Son of Late Har Charan Singh sethi resident of C53, Rameshwar Society, S.V. Road, P.O.-P.S. Santa Cruz West Mumbai 400054.

... ... Petitioner/s

Versus

1. The State of Bihar through the Commissioner of Commercial Taxes, Bihar, Patna having its Office at Vikas Bhawan, Patna
2. Asst. Commissioner of Commercial Taxes Officer, Muzaffarpur East Circle, Muzaffarpur.

... ... Respondent/s

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with

Civil Writ Jurisdiction Case No. 4935 of 2019

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Raj Construction A Proprietary concern having its office at Dudpur Kothi, Laxmi Chowk Brahmpura, Muzaffarpur through its partner Arun Kumar Singh son of Late Brij Kishor Singh Resident of Mataiya P.O.- Baburban Birhma Bazar P.S Baruraj, Muzaffarpur.

... ... Petitioner/s

Versus

1. The State of Bihar through the Commissioner of State Tax, Bihar, Patna having its office at Vikas Bhawan, Patna.
2. Commercial Taxes Officer Muzaffarpur East Circle, Muzaffarpur.

... ... Respondent/s

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with

Civil Writ Jurisdiction Case No. 329 of 2019

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Metcon India Realty and Infrastructure Pvt. Ltd. having its Office at 6/2 Mount View Apartment, L.J. Road, Mahim West Mumbai 400016 and Branch Office at Main Road Atardah, Musahri, Muzaffarpur a through its Project Corrdinator Satvinder Singh Sathi Son of Late Har Charan Singh sethi resident of C53, Rameshwar Society, S.V. Road, P.O.-P.S. Santa Cruz West Mumbai 400054.son of Late Har Charan Singh Sethi, resident of C 53, Rameshwar Society, S.V. Road, P.O. P.S. Santa Cruz West, Mumbai 400054.

... ... Petitioner/s

Versus

1. The State of Bihar
2. Asst. Commissioner of Commercial Taxes Officer, Muzaffarpur East Circle, Muzaffarpur.

... ... Respondent/s

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Appearance :

(In Civil Writ Jurisdiction Case No. 16973 of 2018)

For the Petitioner/s : Mr. D.V. Pathy, Adv.
Mr. Manju Jha, Adv.
Mr. Sadashiv Tiwari, Adv.
Mr. Prakash Sahay, Adv.

For the Respondent/s : Mr. Vikash Kumar- SC11

(In Civil Writ Jurisdiction Case No. 189 of 2019)

For the Petitioner/s : Mr. D.V. Pathy, Adv.
Mr. Manju Jha, Adv.
Mr. Sadashiv Tiwari, Adv.
Mr. Prakash Sahay, Adv.

For the Respondent/s : Mr.Vikash Kumar, S.C.11

(In Civil Writ Jurisdiction Case No. 4935 of 2019)

For the Petitioner/s : Mr. D.V. Pathy, Adv.
Mr. Manju Jha, Adv.
Mr. Sadashiv Tiwari, Adv.
Mr. Prakash Sahay, Adv.

For the Respondent/s : Mr.Vikash Kumar, S.C.11

(In Civil Writ Jurisdiction Case No. 329 of 2019)

For the Petitioner/s : Mr. D.V. Pathy, Adv.
Mr. Manju Jha, Adv.
Mr. Sadashiv Tiwari, Adv.
Mr. Prakash Sahay, Adv.

For the Respondent/s : Mr.Vikash Kumar -SC11

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN
and
HONOURABLE MR. JUSTICE ANJANI KUMAR SHARAN

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE JYOTI SARAN)

Date : 21-06-2019

Since all these writ petitions raise common issues of facts and law that they have been heard analogous and with the consent of the parties are being disposed of at the stage of admission by this common judgment.

In each of the cases the petitioners have questioned the order of assessment passed by the Assessing authority inter alia on grounds that it is based on no evidence and that the tax liability has been imposed for a transaction, which has not been carried out by the respective petitioners.

A common grievance thus engages this Court in all the writ petitions which is in regard to illegal import of stone chips into the State. The tax liability has been fastened on the respective petitioners because it is either by using their Tax Identification Number or by posing as the petitioners, that these imports of stone chips have been made, as alleged. According to Mr. D.V. Pathy, learned counsel for the petitioners in each of the cases, the fraud is committed by electronic hacking since the respective petitioners have not made the transactions in question.

For the sake of convenience we are persuaded to record bare essential facts accompanying each of the writ petitions:

(1) **Re: C.W.J.C. No. 16973 of 2018**

The petitioner in this case has questioned the order dated 31.07.2018 passed by the Assistant Commissioner, Champaran Circle, Motihari impugned at Annexure-3 to the writ petition for import of stone chips through railways vide Challan No. 148 dated 10.01.2017 and Challan No. 280 dated 28.11.2016. The assessment order at Annexure-3 admits to deposit of Value Added Tax as well as Entry tax to the tune of Rs. 37,7425/- giving a credit of Rs. 79847/- to the petitioner. The tax liability has been accepted as nil but for a delayed deposit of tax, a penalty together with interest, have been levied which is to the tune of Rs. 14,11,698/-. A demand notice has consequently been issued which forms part of Annexure-3.

Mr. Pathy has invited the attention of this Court to the F.I.R at Annexure-1 to submit that no sooner the petitioner gathered information about the transaction in question that he instituted an F.I.R. and the matter is now pending for trial before the court below. In reference to an affidavit of the accused Krishna Kant Mishra at running page 50 of the writ petition, he submits that the said accused has accepted the guilt that he used the name of the Company of the petitioner for the transaction. He submits that the accused has also accepted that whatever was the admissible tax on the transaction, has been deposited by him and that he may be granted pardon to correct his mistakes.

Mr. Pathy learned counsel for the petitioner thus submits that where the accused has admitted to the guilt and where the accused has also admitted to deposit of tax payable on the transaction which fact has also been admitted by the Assessing authority in the assessment order impugned at Annexure-3, there was no occasion either for levy of tax or penalty or for calculation of interest and the order is fit to be quashed.

(2) **Re: C.W.J.C. No. 189 of 2019**
with
C.W.J.C. No.329 of 2019

These two writ petitions relate to the same petitioner and while in C.W.J.C. No.189 of 2019 the petitioner has questioned the order dated 10.10.2018 passed by the Assistant Commissioner, Commercial Taxes Officer, Muzaffarpur East Circle, Muzaffarpur in purported exercise of powers vested in him under Section 31 of the Bihar Value Added Tax Act, 2005 (hereinafter referred to as 'the Act') to fasten liability on the petitioner for import of stone chips, in C.W.J.C. No. 329 of 2019 the petitioner has questioned the order dated 29.10.2018 passed by the Assistant Commissioner, Commercial Taxes Officer, Muzaffarpur East Circle, Muzaffarpur whereby the order of penalty has been passed in purported exercise of power vested under Section 31(2) of 'the Act' for the transactions made which is subject matter of C.W.J.C. No. 189 of 2019 impugned at Annexure-4 series.

Mr. Pathy, learned counsel for the petitioner while questioning the assessment order as well as the penalty order passed by the Assessing authority, has reiterated his argument to submit that even when the petitioner has denied the transaction and has informed the Assessing authority that he did not import the stone chips in question, yet simply because the Tax Identification Number of the petitioner was used that the liability has been fastened on the petitioner on his failure to show that he did not make the transactions. According to Mr. Pathy, the conclusion drawn is unilateral and is not based on cogent material to attach the petitioner with the alleged transactions.

(3) **Re: C.W.J.C. No.4935 of 2019**

The petitioner in this writ petition has questioned the order dated 30.06.2018 passed by the respondent Commercial Taxes Officer, East Circle, Muzaffarpur in purported exercise of powers vested under Section 31 of 'the Act' for the period 2016-17 whereby a tax liability of Rs. 25,84,155/- has been raised and recovered from the bank account of the petitioner by exercise of powers vested in the authority under Section 47 of 'the Act'. According to Mr. Pathy, it is without proper service of notice that the assessment has been carried out simply because the information received by the respondent department showed some similarity in the name of the dealer who had imported the stone chips in question and since the said transaction was not reflected in the returns filed by the petitioner that treating it to be a purchase made by the petitioner escaping assessment that the order impugned was passed raising the liability in question which has also been since recovered which is inclusive of interest.

Mr. Pathy has simply invited the attention of this Court to the information which lies at the foundation of the proceedings as also admitted by the Commissioner while filing the counter affidavit at Annexure- A series and in particular reference to the entry at item No. 66 to 69 he submits that while the name of the dealer who made the import is 'Raj Construction Pvt. Ltd.', the petitioner Company is a partnership firm registered in the name of 'Raj Construction'. According to Mr. Pathy, it is on completely vague information which nowhere connected the petitioner and even in absence of any material to connect the petitioner with the transaction that the proceedings in question was initiated and has resulted in the order impugned at Annexure-1 series which is not based on any evidence. According to learned counsel for the petitioner, the respondent Assessing authority without drawing satisfaction on the issue whether in fact and in reality the transactions were made by the petitioner, has concluded otherwise to fasten the liability on the petitioner which discharge is mechanical and dehors the statutory provisions.

It is contesting the position advanced by the petitioners in the respective writ petitions in question that counter affidavits have been filed and the respondent department in justification of the impugned action has canvassed that since the petitioner has failed to adduce evidence disassociating themselves from the transactions that the orders impugned have been passed.

Mr. Vikash Kumar, learned counsel appearing for the Commercial Tax Department in reference to the exhaustive affidavit filed by the Commissioner, Commercial Taxes in compliance of the order passed by this Court in C.W.J.C. No. 4935 of 2019, has while supporting the impugned action submitted that the transaction of the present kind have become routine matter as is manifest from the details present at Annexure-6 series to the counter affidavit which lists a number of consignees who have tried to evade payment of tax and which includes the present petitioners as well. He submits that the information received from the respondent railways confirms to the allegation of import of stone chips in the State and since these transactions are relatable to these petitioners that the proceedings in question has been drawn which have culminated in the orders which are sought to be questioned in the respective writ petitions but in fact they do not suffer any infirmity because even when the petitioners are trying to disown the transactions, the accompanying circumstances discussed in the order are supportive of the action taken by the Assessing authority.

Mr. Pathy, learned counsel for the petitioners responding to the arguments advanced by Mr. Vikash Kumar, learned S.C.11 on the issue raised has made reference to the provisions underlying Section 12 of 'the Act' to submit that even when the statutory authorities have been vested with the powers of Civil Court as provided under the Code of Civil Procedure, to summon and enforce attendance of any person as well as to compel production of documents and even when the petitioners have categorically denied the transactions, no effort has been made by the respective Assessing authority to exercise jurisdiction under Section 12 of 'the Act' to examine evidence for reaching a just conclusion. According to Mr. Pathy, there are several role players in this transaction, each of whom needs to be examined by the Assessing authority to reach a conclusion on the fastening of liability but which essential discharge is lacking in the present case.

We have heard learned counsel for the parties and we have perused the records.

While it is the specific case of the petitioners that they are not party to the transactions which are subject matter of the respective writ petitions, it is simply on the basis of information gathered by the respondent Commercial Taxes Department from the Railways as regarding the transactions of import of stone chips through railway wagons and since either the Tax Identification Number of the dealer was utilized or there was a similarity in the name of the dealer, that they have proceeded to fasten the liability on the petitioners. A cursory glance on the assessment order so passed would confirm that in the case of the petitioner in C.W.J.C. No.16973 of 2018, one Krishna Kant Mishra has accepted the illegal transaction as manifest from the affidavit present at running page 50 of the writ petition and who has also admitted to the deposit of tax. Now even if the said issue is subject matter of a criminal case instituted at the behest of the petitioner, we find nothing in the order impugned at Annexure-3 to the said writ petition which connects the said petitioner to the transaction except that it was made by using his Tax Identification Number.

We are of the considered opinion that even if the Assessing authority prima facie was of the view that the information received from the railways confirmed to the illegal transaction since it was not disclosed in the returns filed by the petitioners and thus was a case of escaped turn over, in absence of any evidence that the transaction had been made by the petitioners, the Assessing authority could not have drawn satisfaction on his prima facie opinion.

Mr. Vikash Kumar learned State counsel has canvassed in support of the impugned orders by submitting that it is on failure of the petitioners to respond to the notice which has led to the orders impugned and perhaps he is right in so far as petitioner in C.W.J.C. No.16973 of 2018 is concerned, but then where it is a question of fastening of tax liability and where the petitioners have disowned the transactions and we find nothing as of now to attach the transaction with the respective petitioners, we cannot shut ourselves to the accompanying circumstances.

We are of the opinion that the stand taken by the petitioner before this Court needs a fresh examination and consequentially a fresh order needs to be passed in consideration of the materials if any, to connect the petitioner with the alleged transactions.

In so far as the petitioner in C.W.J.C. No. 189 of 2019 and C.W.J.C. No.329 of 2019 is concerned, we find from the impugned order that a categorical stand is taken by the representative of the petitioner that the consignment mentioned in the notice had not been booked by the petitioner. It was also specifically pleaded that neither the petitioner had booked the consignment nor the railway rack was picked by him nor the freight charge was paid by the petitioner for the goods in question. It is surprising that even when such specific denial was made by the representative of the petitioners before the Assessing authority yet he has fastened the liability by holding that the dealer could not prove that the transaction was not booked by him. In my opinion, the rejection of the stand taken by the petitioners before the Assessing authority to deny the transaction is mechanical for even if some information had been received by the respondent Department through railways as regarding the transactions which showed involvement of the said petitioner, in view of the categorical denial made by the said petitioner, until such time that materials associating him with the transaction came into possession with the Commercial Taxes Department, a simple information even if could be a basis for initiation of proceeding, cannot be held conclusive for fastening of liability in absence of corroborative evidence.

In so far as the petitioner in C.W.J.C. No. 4935 of 2019 is concerned although exhaustive counter affidavit is filed by the Commissioner, Commercial Taxes but unfortunately the Commissioner, even while relying upon the information furnished by the Investigation Bureau of the Department enclosed at Annexure A to the counter affidavit filed on her behalf, has failed to take notice of the fact that the entries at Item No.66 to 69 relates to a company by the name of 'Raj Construction Pvt. Ltd.' and while the purchases made by the said company does tally with the purchase which is the subject matter of the assessment proceeding at Annexure-1 series but whereas the petitioner is a partnership firm running in the name of 'Raj Construction', the name of the consignee present in the information enclosed at Annexure- A series to the counter affidavit of the Commissioner is, 'Raj Construction Pvt. Ltd' and not 'Raj Construction' who is the petitioner before this Court. The Commissioner, Commercial Taxes has admitted that the proceeding was initiated on the basis of information received from the investigating bureau of the headquarters as manifest from the statement present at paragraph 4(1) of her affidavit but then the enclosure to such information removes the very basis because it does not name the petitioner rather it names a company by the name of 'Raj Construction Pvt. Ltd'.

In the nature of the dispute that arises for consideration we are persuaded to take note of the statutory prescriptions present in Section 12 of 'the Act' and which has been strongly relied upon by Mr. Pathy to canvass his point and rightly so because in a matter which involves disputed issues of fact of the present nature, the Assessing authority statutorily empowered, is under a bounden duty to take recourse to the powers that is vested in him under the provisions of Section 12 which reads under:

> "**12. Power to issue summons and examine on oath.**–(1) The Tribunal constituted under Section 9, or the Commissioner or any officer or authority appointed under Section 10 [or Section 46A] or Section 86 shall, for carrying out the purposes of this Act, have all the powers of a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908) and in particular in respect of the following matters, namely:–
>
> (a) to summon and enforce attendance of any person, including any officer of a banking company, and examine him on oath or affirmation;
>
> (b) to compel the production of documents

or accounts and to impound and retain them;
(c) to issue commissions for the examination of witness.
(2) Every proceeding under this Act before the Tribunal, shall be deemed to be a judicial proceeding within the meaning of Section 193 and Section 228 of the Indian Penal Code, 1860 (45 of 1860)."

The issue in hand relates to fastening of tax liability on the petitioners on the basis of information received by the respondents relating to import of stone chips from outside the State. Now just like any allegation in a complaint or an FIR, instituted under the Code of Criminal Procedure merely sets the criminal justice law into motion, and cannot be held conclusive on the charge, similarly, the information received by the Commissioner, Commercial Taxes department even if, empowers the department to set the tax assessment law in motion but such information is not sacrosanct for fastening of tax liability or penalty rather before the assessing authority arrives at such conclusion, he needs to examine some facts which are essential for the adjudication of the dispute of the present kind, viz:

(a) The consignor who purchased the stone chips and booked the consignment.

(b) The seller from whom the stone chips in question was purchased.

(c) Any correspondence made between the seller of the stone chips and the consignor/purchaser on the purchase of stone chips together with the mode of payment of price thereof.

(d) In case the mode of payment of sale price is through bank drafts then the bank on which the drafts were drawn as well as identity of the person who got the draft prepared.

(e) The person who booked the consignment at the originating station as well as the railway staff who accepted the consignment.

(f) The consignee who took the delivery of the stone chips at the destination as well as railway staff who released the consignment in favour of the consignee or his representative.

We have simply outlined some of the issues which were relevant for the Assessing authority for arriving at a just conclusion on the identity of the person who imported the stone chips in question within the State, for fastening of the tax liability. Section 12 of 'the Act', in the circumstances discussed, is an answer to the poser because it amply empowers the Assessing authority to summon and enforce attendance of person as well as to compel production of documents and to issue summon for examining witnesses for reaching such conclusion.

In our considered opinion, the exercise which lies at the foundation of the orders impugned in the respective writ petitions are bereft of such essential discharge rather is entirely resting on the information received by the department either from the respondent railways or from the investigating bureau of the department.

We are conscious that such information at the hands of the investigating bureau of the department definitely is a source for initiation of the proceeding but as observed above, the information ipso facto cannot be held conclusive for fastening of a tax liability until there are satisfactory evidence available to support the information on the culpability thereunder. Unfortunately, these essentials are lacking in the present case rather the Assessing authority has simply decided to go by the information supplied by the investigation bureau for fastening the tax liability.

Taxing laws howsoever stringent, are not to be applied mechanically simply because the State revenue is involved rather the right of the assessee is equally important and while tax avoidance is to be treated rather seriously, where the assessees themselves become victims of fraud, as canvassed in this batch of writ petitions, the department needs to exercise prudence and resolve the matter with aid of statutory power vested in them under Section 12 of ‘the Act’.

In result, the order dated 31.07.2018 passed by the Assistant Commissioner, Champaran Circle, Motihari, impugned at Annexure-3 to C.W.J.C. No.16973 of 2018; order dated 10.10.2018 passed by the Assistant Commissioner, Commercial Taxes Officer, Muzaffarpur East Circle, Muzaffarpur, impugned at Annexure-2 series to C.W.J.C. No.189 of 2009; order dated 29.10.2018 passed by the Assistant Commissioner of Commercial Taxes Officer, Muzaffarpur East Circle, Muzaffarpur, impugned at Annexure-4 series to C.W.J.C. No. 329 of 2019 and the order dated 30.06.2018 passed by the respondent Commercial Taxes Officer, Muzaffarpur East Circle, Muzaffarpur, impugned at Annexure- 1 series to C.W.J.C. No.4935 of 2019 together with the demand notices issued pursuant thereto, are quashed and set aside and the matter is remitted to the respective Assessing authorities for proceeding afresh but in accordance with law and since the assessees have denied the import of stone chips in question thus disputing their participation in the transaction, the respective Assessing authority would be well advised to bear note of the power vested in him under Section 12 of ‘the Act’ for arriving at a just conclusion because until such time that the import of the goods are attached to the respective assessees by material evidence, in our opinion prima facie, no tax liability can be fastened on them on the imported stone chips.

The assessees would appear before the respective Assessing authority on or before 08.07.2019 together with a copy of this order and when the Assessing authority shall proceed to dispose of the matter expeditiously and preferably within 3 months of receipt/production of a copy of the judgment.

It goes without saying that since the issue is to be concluded on the basis of evidence hence the parties would have their right reserved for cross examination of the witnesses.

It also goes without saying that whatever taxes that may have been recovered by the department from the petitioners, would be subject to the final outcome of the proceeding(s).

The writ petitions are allowed with the directions above.

(Jyoti Saran, J)

(Anjani Kumar Sharan, J)

Bibhash

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	03.07.2019
Transmission Date	NA