IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No. 210 of 2008

Bankipore Club Ltd., Collectorate Road, Patna, through its Honorary Secretary Patna.

... ... Appellant/s

Versus

1. The State of Bihar.
2. The Commissioner of Commercial Taxes and Special Secretary, Government of Bihar, Patna.
3. The Deputy Commissioner of Commercial Taxes, Patna North Circle, Patna.

... ... Respondent/s

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with

Miscellaneous Appeal No. 975 of 2010

Bankipur Club Ltd. a Company incorporated under the provisions of the Companies Act having its Office Situated at Judges Court Road, P.S.- Pirbahore, District- Patna through its Honorary Secretary, Nikesh Prasad, S/o Late Singheshwar Prasad, Resident of Flat No.- 201-202, Amrapali Apartment, Behind SBI, NMCH Branch, Bhootnath Road, P.O.- Bahadurpur, P.S.- Agamkuan, District- Patna.

... ... Appellant/s

Versus

1. The State of Bihar.
2. The Commercial Taxes Tribunal, Bihar, having its Office situated at Old Secretariat, Barrack, Bailey Road, Patna through its Secretary.
3. The Principal Secretary -Cum- Commissioner of Commercial Taxes, Government of Bihar, Vikash Bhawan, Bailey Road, Patna.
4. The Dy. Commissioner of Commercial Taxes, Patna North Circle, Judges Court Road, Patna.

... ... Respondent/s

Appearance :
(In Miscellaneous Appeal No. 210 of 2008)
For the Appellant/s : Mr. Alok Kumar Shahi, Advocate
Ms. Archana Sinha, Advocate
Mr. Mohit Agrawal, Advocate

		Mr. Vishal Kumar, Advocate
		Mr. Lokesh Kumar, Advocate
		Ms. Sushmita Mishra, Advocate
		Mr. Sandeep Kumar, Advocate
For the Respondent/s	:	Mr. P.K. Shahi, Advocate General
		Mr. Naman Nayak, AC to AAG-13
		Mr. Rohitabh Das, AC to AAG-13
(In Miscellaneous Appeal No. 975 of 2010)		
For the Appellant/s	:	Mr. Gautam Kumar Kejriwal, Advocate
		Mr. Alok Kumar Shahi, Advocate
		Ms. Archana Sinha, Advocate
For the Respondent/s	:	Mr. P.K. Shahi, Advocate General
		Mr. Rohitabh Das, AC to AAG-13

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE PARTHA SARTHY
CAV JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 19-12-2024

The above appeals essentially agitate the identical order of the Commercial Taxes Tribunal, as constituted under the Bihar Finance Act, 1981, (for brevity, the Act of 1981). The challenge raised in the appeals are distinct insofar as M.A. No. 210 of 2008 challenge an order rejecting a review filed against the order of the Tribunal and the other appeal seeks an order under sub-section (3) of Section 48 of the Act of 1981 compelling the Tribunal to state a case and refer it to the High Court.

2. We first consider M.A. No. 210 of 2008, in which the application for review under Section 47 of the Act of 1981 was considered by the Tribunal and rejected. Section 47 of

the Act of 1981, confers the power on the Tribunal to review its own order, if found necessary, on account of a mistake which is apparent from the record. The appellant-assessee had filed the above review application on various grounds; viz: (i), that the Tribunal failed to consider the order of assessment, as confirmed by the learned Commissioner, on its own basis; (ii) that the Tribunal built a new case to support the levy of tax and penalty, (iii) that the Tribunal erred insofar as rejection of the 'claim of mutuality' and (iv) the Tribunal committed a glaring error in ignoring the implication of specific clauses referred to from the Memorandum of Association and Articles of Association. There was also a ground raised as to the notice having not been properly served on the assessee.

3. The Tribunal having considered the prayer for review; with respect to the notice having not been properly served, found that it has been considered elaborately in the order under review. It was also found that there was no ground to review the order, on the other aspects, in the confined jurisdiction exercised by the Tribunal. We are also of the opinion that the contentions raised, are an attempt to rehear the matter itself, which does not come under the restricted jurisdiction of Section 47 of the Act of 1981; which permits only correction of

mistakes apparent on the face of the record.

4. As far as M.A. No. 975 of 2010, the learned Counsel appearing for the appellant-assessee, Mr. Alok Kumar Shahi, would argue that the Tribunal committed an error in having refused to refer the case to the High Court for reason of the Tribunal having dealt with each and every question raised in an exhaustive manner and no question of law arising out of the judgment. The learned Counsel would contend that the 'claim of mutuality' has to be allowed especially going by the judgment of the Hon'ble Supreme Court in ***State of W.B. v. Calcutta Club Ltd., (2019) 19 SCC 107***. It is pointed out that the notice issued did not contain any details and the assessee was not afforded proper opportunity to reply and raise objections. None of the points on which the demand was raised, were proposed in the notice.

5. Further, it is pointed out that the Tribunal had created an artificial division of the sale of food and beverages made to the permanent members, temporary members, honorary members, lady members and guest members. Even the Assessing Officer had not made an enquiry into the proportion at which such sale was made to the various category of members and the Tribunal merely based on surmises and conjectures took a ratio of 3:1 as against the honorary members and permanent

members, which cannot be sustained. The learned Counsel for the petitioner argues that the Tribunal also erred in rejecting the claim of 'principles of mutuality'; that could be applied to the sale of food and beverages carried out by a club to its own members as has been held in the cited judgment. The Tribunal also did not correctly appreciate the various clauses in the Memorandum & Articles of Association of the appellant-club.

6. The learned Advocate General on the other hand relied on ***Secunderabad Club v. Commissioner of Income-tax & Ors.; 2023 SCCOnline SC 1004*** to contend that the 'doctrine of mutuality' cannot apply to the assessee-club.

7. We cannot but notice that ***Secunderabad Club*** (supra) was a decision in the context of the Income Tax Act, the principles of which cannot be applied to an indirect tax like sales tax. The specific reference was also to paragraph 93 of the decision, wherein, the Hon'ble Supreme Court found that the 'principles of mutuality' applies only when a number of people who contribute to a fund are ultimately paid the surplus, from the fund, which alone makes it a repayment of the contributor's own money. Therein, the surplus fund was not applied for the common purpose of the club or towards the benefit of the members of the club directly. It was invested with a third party,

a bank, for the purpose of using it later. The interest generated on the fixed deposits or the investments made hence, becomes a commercial activity, thus permitting the bank to utilize the fixed deposit amount for its banking business and derive profit thereof. Thus, the identicality between the contributors to the common fund and the participation in it, which is a *sine qua non* for the application of ‘principles of mutuality’ would get ruptured. At the risk of the repetition, we have to reiterate that this is in the context of levy of income tax.

8. More apposite would be the judgment of the Hon'ble Supreme Court in ***Calcutta Club Ltd.*** (supra), wherein the ‘doctrine of mutuality’ was applied when persons carrying on a certain activity, in a manner, indicating absolute identity between contributors and participators. This identity according to the learned Judges would not be snapped because the surplus that arises from the common fund is not distributed among members. What was emphasized was that, while applying the doctrine there is no sale transaction between an incorporated legal entity in the nature of a club and its own members.

9. In the present case, on a reading of the order of the Tribunal, it is clear that the proceedings were initiated on the basis of an inspection report of the Investigation Bureau of

Patna division under Section 17(5) of the Act of 1981 and tax of Rs. 13,91,285.12 was imposed with an equivalent penalty. The Tribunal rejected the claim of the appellant that the club is not a dealer liable to pay tax under the Act. The 'doctrine of mutuality' was refused to be applied on the ground that majority of the members of the different categories other than the permanent members were persons with no voting right or any right to participate in the affairs of the management of the club.

10. On a consideration of the totality of the facts and circumstances, the order of the Tribunal confirming the assessment made and the law on the point, as *prima facie* occurs to us, we are of the opinion that the following questions of law arise: -

(i) Whether the Tribunal was correct in having declined the application of 'doctrine of mutuality' on the transactions entered into by the appellant?

(ii) Whether the appreciation of facts by the Tribunal was correct and was it not perverse since the findings were on mere surmises and conjectures?

(iii) Whether the Tribunal was correct in having determined a proportion of members to decline application of the 'doctrine of mutuality' with respect to certain transactions, on the finding that certain category of members did not have any control over the affairs of the club and thus could not be included within the ambit of ‘doctrine of mutuality’?

11. We direct the Tribunal to state the case and make a reference to this Court on the above noted questions of law arising from the order of the Tribunal under Section 48 (3) of the Bihar Finance Act.

(K. Vinod Chandran, CJ)

Partha Sarthy, J: I agree

(Partha Sarthy, J)

aditya/ranjan

AFR/NAFR	
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