

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.17860 of 2024

Kaushlendra Kumar, a Proprietorship firm having its Office at Bazar Samiti, Raja Bazar, Jehanabad, Bihar-804408 through its Proprietor Kaushlendra Kumar, an adult Male, aged about 39 Years, Son of Madan Sharma, Bazar Samiti Raja Bazar, Jehanabad, Bihar- 804408.

... .. Petitioner

Versus

1. The State of Bihar through the Commissioner of State Tax, Patna.
2. The Assistant Commissioner of State Tax, Jehanabad, Magadh, Bihar.
3. The Additional Commissioner of State Tax, Magadh Division, Gaya, Bihar.
4. The Deputy General Manager of Bihar State Building Construction Corporation Limited, PIU, Gaya.

... .. Respondents

Appearance :

For the Petitioner	:	Mr. Akshansh Ankit, Advocate Mr. Rudra Pratap Singh, Advocate Mr. Aditya Prakash, Advocate Mr. Prakash Kumar, Advocate
For the Resp Nos. 1 to 3 :	:	Mr. Vikash Kumar, SC-11
For the Resp No. 4	:	Ms. Rushali, Advocate

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
and
HONOURABLE MR. JUSTICE ASHOK KUMAR PANDEY
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date : 01-05-2025

Heard learned counsel for the petitioner and Mr. Vikash Kumar, learned SC-11 for the Respondent Nos. 1 to 3. Learned counsel for Respondent No. 4 is present.

2. This writ application has been filed seeking the following reliefs:-

“a) For quashing of order dated 30.11.2022 passed by the Additional Commissioner of State Tax (Appeal), Magadh Division, Gaya in Appeal Case No. JB/GST-45/2020-21 by which the order dated 09.02.2021



passed by the Assistant Commissioner of State Tax, Jehanabad was upheld and the petitioner was directed to pay the amount of Rs.48,91,868 [Rs. 24,45,934/- of CGST + Rs.24,45,934/- of SGST] along with interest and penalty totally Rs.6,72,534/-.

b) For quashing of order dated 09.02.2021 having Reference No. ZD1002210074748 passed by the Assistant Commissioner of State Tax, Jehanabad by which the petitioner was directed to pay total amount of Rs.55,64,402/- [including tax + penalty + interest] failing which a recovery proceeding was to directed to be initiated.

c) For quashing of notice having Reference No.- ZD101220030391G dated 31.12.2020 issued by the Assistant Commissioner of State Tax, Jehanabad by which the petitioner was asked to show cause as to why CGST and SGST of Rs.24,45,934/- each totally Rs.48,91,868/- should not be recovered from him.

d) For issuance of writ or direction to refund the amount of Rs.50,75,214/- deducted from the beneficiary account of the petitioner bearing account no. PLA-238 available with the Bihar State Building Construction Corporation Limited with penal interest.

e) During the pendency of the writ application stay the operation of impugned orders.

f) And for any other relief/reliefs that your lordships may deem fit and proper in the interest of justice.”

Brief Facts of the Case

3. The petitioner is a proprietorship firm engaged in providing works contract services to the Government of Bihar. It is



engaged in construction of buildings for the Government. The petitioner is registered with the GST, Jehanabad Circle.

4. The petitioner filed its return in Form GSTR 3B only for March 2020 on 07.12.2020. In its return, the petitioner claimed Input Tax Credit (in short 'ITC') to the extent of Central Goods and Services Tax and State Goods and Services Tax of Rs.24,45,934.00/- and Rs.24,45,934.00/- respectively. He was, however, served with an intimation of tax liability in Form GST DRC-01A determined under Section 73(5) of the Central Goods and Services Tax Act, 2017/ Bihar Goods and Services Tax Act, 2017 (hereinafter referred to as the 'CGST/BGST Act, 2017') dated 22.12.2020.

5. The respondent Assistant Commissioner of State Tax, Division Jehanabad issued show cause notice to the petitioner saying that on analysis of the return in Form GSTR-3B of March 2020, it has been found that the return was filed after the due date prescribed under Section 16(4) of the CGST Act, 2017/ BGST Act, 2017. The Assistant Commissioner State Tax, therefore, called upon the petitioner to show cause. The petitioner replied to the same and contended that during the relevant period, he was suffering from Covid-19 infection and had acute fever as a result whereof he was put in complete isolation for 21 days. Due to this



reason, the petitioner could not file GSTR-3B for the period under question within the time limit prescribed by Section 16(4). The plea of the petitioner, however, failed and the Assistant Commissioner of the State Tax, Magadh Division determined the tax liability as mentioned hereinabove and called upon the petitioner to pay a total amount of Rs.55,64,402/- which included interest and penalty.

6. The petitioner filed an appeal before the Additional Commissioner of State Tax (Appeals), however, the Appellate Authority has also rejected the appeal on the solitary ground that he has no power to extend the period for filing of the return. The Appellate Authority has taken a view that in terms of Section 16(4) of the BGST Act, 2017, the claim for ITC is liable to be rejected.

Submissions on behalf of the Petitioner

7. Before this Court, learned counsel for assessee-petitioner has placed sub-Section (5) of Section 16 of the CGST/BGST Act, 2017. It is submitted that sub-Section (5) has been inserted by the Finance Act No. 2 of 2024 with retrospective effect from 01.07.2017 vide Notification No. 17/2024 (S.O. 4253 (E)) – Central Tax, dated 27.09.2024.

8. It is submitted that by virtue of sub-Section (5) of Section 16, the return for the period from financial year 2017-18 to



the financial year 2020-21 may be filed up to 30th day of November, 2021 and the registered person shall be entitled to take ITC in any return under Section 39 which would be filed up to this date.

Submissions on behalf of the State

9. Mr. Vikash Kumar, learned SC-11 has though initially opposed the writ application but after going through sub-Section (5) of Section 16 of the CGST/BGST Act, 2017, learned counsel submits that in view of the insertion of a new provision which starts with a non-obstante clause, it would be appropriate to remand the matter to the Appellate Authority for a fresh consideration.

Consideration

10. Having heard learned counsel for the petitioner and learned SC-11 for the State, this Court would reproduce sub-Section (5) of Section 16 of the CGST/BGST Act, 2017 as under:-

“16 Eligibility and conditions for taking input tax credit

²[(5) Notwithstanding anything contained in sub-section (4), in respect of an invoice or debit note for supply of goods or services or both pertaining to the Financial Years 2017-18, 2018-19, 2019-20 and 2020-21, the registered person shall be entitled to take input tax credit in any return under section 39 which is filed upto the thirtieth day of November, 2021.]”

1. Enforced w.e.f. 1-7-2017 vide Noti. No. 9/2017-Central Tax, dt. 28-6-2017.

2. Inserted by Finance (No. 2) Act, 2024 (15 of 2024), dt. 16-8-2024, w.e.f. 27-9-2024 vide S.O. 4253 (E), dt. w.r.e.f. 01-07-2017.



11. On a bare reading of the aforesaid provision, it appears that the legislature had extended the date for claiming ITC and they were made entitled to have credit in any return under Section 39 which is filed up to 30th Day of November, 2021.

12. Apparently, it appears that sub-Section (5) of Section 16 has been inserted recently and much after the impugned order of the Appellate Authority. The Appellate Authority had no occasion to consider sub-Section (5) of Section 16 of the CGST/BGST Act, 2017.

13. In view of the developments noted hereinabove, we set aside the impugned order as contained in Annexure 'P1' to the writ application and the consequential recovery. The matter is remanded to the Appellate Authority for a fresh consideration.

14. At this stage, learned counsel for the petitioner has pointed out that in this case, the appeal of the petitioner was dismissed on 30.11.2022. Thereafter, no notice was issued to the petitioner calling upon him to pay the amount in question but a notice was directly sent to the employer of the petitioner on 28.12.2022 i.e. within 28 days of the passing of the impugned order and the Department recovered the amount on 02.01.2023. Referring to Section 78 of the CGST/BGST Act, 2017, learned



counsel submits that the recovery is in violation of the statutory provision.

15. It is submitted that the statute provided for three months' time to the petitioner after service of a copy of the order to pay the amount but in this case, the Recovery Officer did not wait for the same and for no reason recorded by him in writing, recovery was effected by directly writing to the employer.

16. Learned counsel has relied upon a judgment of learned Co-ordinate Bench of this Court in the case of **Sita Pandey versus the State of Bihar and Others** reported in **(2024) 128 GSTR 137 : 2023 SCC OnLine Pat 2827**. It is submitted that in the said case, the recovery was effected only on the next day of the dismissal of the appeal. The learned Co-ordinate Bench has considered Section 78 of the CGST/BGST Act, 2017 and has quoted the guidelines with regard to the recoveries as laid down in **UTI Mutual Fund versus Income-Tax Officer and Others** reported in **(2012) 345 ITR 71 (Bom) : (2012) SCC OnLine Bom 390**.

17. In the case of **Sita Pandey** (supra), the learned Co-ordinate Bench directed for refund of Rs.69,88,322/- after deducting Rs.7,56,644/- out of the total amount recovered by the Recovery Officer. The learned Co-ordinate Bench held that for



maintaining an appeal before the Appellate Tribunal, if constituted, the appellant could have been obliged to pay Rs.7,56,644/- i.e. 20% of the tax dues. A cost of Rs.5,000/- was also imposed upon the Officer who issued Annexure '3' (order in the said case) in complete derogation of the statutory provisions and established principles of law. It is submitted that the ratio of the said judgment would equally apply in the present case.

18. Mr. Vikash Kumar, learned SC-11 has submitted that the notice given by the Recovery Officer to the employer of the petitioner was in accordance with Section 79 of the CGST/BGST Act, 2017 as it permits recovery of the amount by following one or more modes provided under sub-Section (1) of Section 79.

Consideration – Recovery held Illegal

19. This Court has considered the rival submissions on this point. What is finally culled out from the submissions of the parties is that once the appeal of the petitioner was dismissed by the Appellate Authority, the petitioner had three months' time to prefer a second appeal under Section 112 of the CGST/BGST Act, 2017. It is an admitted position that the second appeal could not have been preferred by the petitioner because the Tribunal where the second appeal was to be presented had not been constituted. Till date, it has not been constituted.



20. In the case of **Sita Pandey** (supra), the learned Co-ordinate Bench has taken note of it that for purpose of filing of second appeal, 20% of the tax dues was to be deposited by the petitioner in the said case.

21. Section 78 of the CGST/BGST Act, 2017 reads as under:-

“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.”

22. So far as the application of Section 79 of the CGST/BGST Act, 2017 is concerned, in order to appreciate the said provision, we would take note of Section 79 hereunder:-

“79. Recovery of Tax

(1) Where any amount payable by a person to the Government under any of the provisions of this Act or the rules made thereunder is not paid, the proper officer shall proceed to recover the amount by one or more of the following modes, namely:--

(a) the proper officer may deduct or may require any other specified officer to deduct the amount so payable from any money owing to such person



which may be under the control of the proper officer or such other specified officer;

- (b) the proper officer may recover or may require any other specified officer to recover the amount so payable by detaining and selling any goods belonging to such person which are under the control of the proper officer or such other specified officer;
- (c) (i) the proper officer may, by a notice in writing, require any other person from whom money is due or may become due to such person or who holds or may subsequently hold money for or on account of such person, to pay to the Government either forthwith upon the money becoming due or being held, or within the time specified in the notice not being before the money becomes due or is held, so much of the money as is sufficient to pay the amount due from such person or the whole of the money when it is equal to or less than that amount;
- (ii) every person to whom the notice is issued under sub-clause (i) shall be bound to comply with such notice, and in particular, where any such notice is issued to a post office, banking company or an insurer, it shall not be necessary to produce any pass book, deposit receipt, policy or any other document for the purpose of any entry, endorsement or the like being made before payment is made, notwithstanding any rule, practice or requirement to the contrary;
- (iii) in case the person to whom a notice under sub-clause (i) has been issued, fails to make the payment in pursuance thereof to the Government, he shall be deemed to be a defaulter in respect of the amount specified in the notice and all the consequences of this Act or the rules made thereunder shall follow;
- (iv) the officer issuing a notice under sub-clause (i) may, at any time, amend or revoke such notice or extend the time for making any payment in pursuance of the notice;
- (v) any person making any payment in compliance with a notice issued under sub-clause (i) shall be deemed to have made the payment under the authority of the person in default and such



payment being credited to the Government shall be deemed to constitute a good and sufficient discharge of the liability of such person to the person in default to the extent of the amount specified in the receipt;

- (vi) any person discharging any liability to the person in default after service on him of the notice issued under sub-clause (i) shall be personally liable to the Government to the extent of the liability discharged or to the extent of the liability of the person in default for tax, interest and penalty, whichever is less;
- (vii) where a person on whom a notice is served under sub-clause (i) proves to the satisfaction of the officer issuing the notice that the money demanded or any part thereof was not due to the person in default or that he did not hold any money for or on account of the person in default, at the time the notice was served on him, nor is the money demanded or any part thereof, likely to become due to the said person or be held for or on account of such person, nothing contained in this section shall be deemed to require the person on whom the notice has been served to pay to the Government any such money or part thereof;
- (d) the proper officer may, in accordance with the rules to be made in this behalf, distrain any movable or immovable property belonging to or under the control of such person, and detain the same until the amount payable is paid; and in case, any part of the said amount payable or of the cost of the distress or keeping of the property, remains unpaid for a period of thirty days next after any such distress, may cause the said property to be sold and with the proceeds of such sale, may satisfy the amount payable and the costs including cost of sale remaining unpaid and shall render the surplus amount, if any, to such person;
- (e) the proper officer may prepare a certificate signed by him specifying the amount due from such person and send it to the Collector of the district in which such person owns any property or resides or carries on his business or to any officer authorised by the Government and the said



Collector or the said officer, on receipt of such certificate, shall proceed to recover from such person the amount specified thereunder as if it were an arrear of land revenue;

(f) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the proper officer may file an application to the appropriate Magistrate and such Magistrate shall proceed to recover from such person the amount specified thereunder as if it were a fine imposed by him.

(2) Where the terms of any bond or other instrument executed under this Act or any rules or regulations made thereunder provide that any amount due under such instrument may be recovered in the manner laid down in sub-section (1), the amount may, without prejudice to any other mode of recovery, be recovered in accordance with the provisions of that sub-section.

(3) Where any amount of tax, interest or penalty is payable by a person to the Government under any of the provisions of this Act or the rules made thereunder and which remains unpaid, the proper officer of State tax or Union territory tax, during the course of recovery of said tax arrears, may recover the amount from the said person as if it were an arrear of State tax or Union territory tax and credit the amount so recovered to the account of the Government.

(4) Where the amount recovered under sub-section (3) is less than the amount due to the Central Government and State Government, the amount to be credited to the account of the respective Governments shall be in proportion to the amount due to each such Government.

¹[*Explanation.*—For the purposes of this section, the word person shall include “distinct persons” as referred to in sub-section (4) or, as the case may be, sub-section (5) of section 25.]”

1. Inserted by the CGST (Amdt.) Act, 2018 (31 of 2018), dt. 30-8-2018, w.e.f. 1-2-2019 vide Noti. No.02/2019-Central Tax, dt. 29-1-2019



23. On a bare reading of the aforementioned provision, it would appear that it talks of taking a step towards the recovery of amount by the Proper Officer but only where any tax amount payable by a person to the Government is not paid within the stipulated period under Section 78. A conjoint reading of Sections 78 and 79 would show that while Section 78 prescribes a period of three months to a taxable person to pay the amount in pursuance of an order passed under this Act from the date of service of the order and then only a recovery proceeding is to be initiated, Section 79 is in consonance with Section 78 but it provides other modes of recovery of the tax amount. It is in the nature of a garnishee proceeding where the tax dues may be recovered by adopting any one or more modes prescribed under sub-Section (1) of Section 79.

24. This Court has no iota of doubt that the Recovery Officer had to wait for a period of three months from the date of service of the order for deposit of the payable amount by the petitioner. Only in case of the petitioner failing to deposit the amount within the prescribed period of three months, one of the modes as prescribed under Section 79 of the CGST/BGST Act, 2017 could have been invoked.

25. In course of submissions, learned SC-11 for the State has though initially attempted to justify the recovery but when this



Court called upon him to take a view as an Officer of the Court and to assist this Court in rendering justice with a correct interpretation of the two provisions i.e. Sections 78 and 79 of the CGST/BGST Act, 2017, Mr. Vikash Kumar, learned SC-11 has fairly submitted that a conjoint reading of both the provisions would give one and only one interpretation that the Taxing Authority has to wait for three months after service of the order before initiation of the recovery proceeding.

26. In view of the discussions made hereinabove, we find that the recovery of Rs.50,75,214/- effected from the bill of the petitioner through Respondent No. 4 was in haste and in violation of the statutory provision. We deprecate such approach on the part of the Taxing Authority. We are once against tempted to quote what has been observed in the case of **R.S. Joshi, Sales Tax Officer, Gujarat versus Ajit Mills Limited** reported in (1977) 40 STC 497 : (1977) 4 SCC 98 :-

“38.There is a tendency for valiant tax executives clothed with judicial powers to remember their former capacity at the expense of the latter. In a welfare state and in appreciation of the nature of the judicial process, such an attitude, motivated by various reasons, cannot be commended. The penalty for deviance from these norms is the peril to the order passed. The effect of mala fides on exercise of administrative power is well-established.”

27. In the case of **Sita Pandey** (supra), the learned Coordinate Bench of this Court has relied upon the Constitution



Bench judgment of the Hon'ble Supreme Court in the case of **Mohinder Singh Gill and Anr. versus Chief Election Commissioner, New Delhi and Others** reported in (1978) 1 SCC 405. Paragraphs '75 and '76' of the judgment in the case of **Mohinder Singh Gill** (supra) has been quoted and we reproduce the same hereunder:-

“75. Moreover Sri Rao's plea that when the Commission cancels viz., declares the poll void it is performing more than an administrative function merits attention, although we do not pause to decide it. We consider that in the vital area of elections where the people's faith in the democratic process is hyper-sensitive it is republican realism to keep alive *audi alteram* even in emergencies, 'even amidst the clash of arms'. Its protean shades apart we recognise that 'hearing' need not be an elaborate ritual and may, in situations of quick despatch, be minimal, even formal, nevertheless real. In this light, the Election Court will approach the problem. To scuttle the ship is not to save the cargo; to jettison may be.

76. 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 form 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.”

28. In paragraph '16' of its judgment, the learned Co-ordinate Bench in the case of **Sita Pandey** (supra) has taken note of the judgment of Hon'ble Bombay High Court in the case of **UTI Mutual Fund** (supra) and issued guidelines for the



recoveries. We reproduce paragraph ‘16’ of the judgment in **Sita**

Pandey (supra) hereunder:-

“16. Following the dictum laid down in *UTI Mutual Fund v. Income-tax Officer*¹, we issue the following guidelines in so far as the recoveries are concerned:

(1) There shall be no recovery of tax within the time limit for filing an appeal and when a stay application is filed in a properly instituted appeal, before the stay application is disposed of by the appellate authority;

(2) Even when the stay application in the appeal is disposed of, the recovery shall be initiated only after a reasonable period so as to enable the assessee to move a higher forum;

(3) However, in cases where the assessing officer has reason to believe that the assessee may defeat the demand or that it is expedient in the interest of revenue, as is provided under the proviso to section 78, there can be a recovery but with notice to the assessee, which notice shows the reasons for initiating it and specifies the lesser time within which the assessee is directed to satisfy the dues;

(4) Though a bank account could be attached; before withdrawing the amount, reasonable prior notice should be furnished to the assessee to enable the assessee to make a representation or seek recourse to a remedy in law;

(5) We also remind the tax authorities, as was done in the *UTI Mutual Fund*¹ that the “authorities under the tax enactment shall not act as a mere tax gatherer but act as a quasi-judicial authority vested with the public duty of protecting the interest of the Revenue while at the same time balancing the need to mitigate the hardship to the assessee” (sic-UTI Mutual Fund).”

1. [2012] 345 ITR 71 (Bom); 2012 SCC OnLine Bom 390.



29. The present case would be covered by the judgment of the learned Co-ordinate Bench in case of **Sita Pandey** (supra). We are required to take a similar view of the matter. The recovery made by the Respondent Authorities in this case is against the statutory mandate and the judicial pronouncement on the subject.

30. In result, we direct the Respondent Authorities to refund the recovered amount i.e. Rs.50,75,214/- within a period of two weeks from today, failing which interest shall run at the rate of 12% per annum.

31. We have been informed that the petitioner has already deposited 10% of the tax dues with the Appellate Authority and the same is still lying with the said Authority.

32. Since we have held that the recovery has been made in violation of the statutory provision and the procedure established by law, the State cannot be allowed to unduly rich itself by indulging into such kind of the recoveries and retaining the money. In this case, the money was recovered as back as on 02.01.2023 and it has remained with the Respondents for over two years four months by now.

33. This Court is of the considered opinion that in such circumstance, the respondent shall be liable to pay simple interest at the rate of 6% per annum on the amount recovered from the



petitioner from the date of recovery till the date of refund. Such payment shall also be made simultaneously within two weeks.

34. We take note of the unconditional apology sought by the Assistant Commissioner, State Tax, Jehanabad Circle in paragraph ‘32’ of the counter affidavit. We accept the apology and refrain from imposing any cost.

35. This writ application is allowed to the extent indicated hereinabove.

(Rajeev Ranjan Prasad, J)

(Ashok Kumar Pandey, J)

SUSHMA2/-

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Uploading Date	02.05.2025
Transmission Date	

