IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.5407 of 2023

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Sita Pandey, an adult female, aged about 53 years, Wife of Vishvnath Pandey, resident of Village-Kurthaul, Police Station-Parsa Bazar, District-Patna (Bihar). Proprietor of Om Shri Security Service having office at Kurthaul, Police Station- Parsa Bazar, District-Patna.

... ... Petitioner/s

Versus

1. The State of Bihar, through the Commissioner of State Tax, Patna.
2. The Joint Commissioner of State Tax (Appeal), Patna North Circle, Patna.
3. The Assistant Commissioner of State Tax Patna North Circle, Patna.
4. The Assistant Commissioner of State Tax, Patna North Circle, Patna.

... ... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Saket Tiwary, Advocate
Mr. Rakesh Kumar Singh, Advocate
Mr. Amritya Raj, Advocate

For the Respondent/s : Mr. Vivek Prasad (GP-7)

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE PARTHA SARTHY

ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 23-08-2023

1. *"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."*
> ***[R.S. Joshi, Sales Tax Officer, Gujarat and Others v. Ajit Mills Limited and Another;(1977) 4 SCC 98]***

2. This is a classic case of a valorous overreach by a tax executive; recovering the assessed tax due, just after a day of dismissal of the appeal; when there was a further appeal provided and the Tribunal before which such an appeal is to be filed was not constituted.

3. On facts, suffice it to notice that the assessee carries on the business of manpower supply including security and cleaning services to different establishments; in which is included Government Polytechnic Institutions. The issue arose as to whether the services provided to Government Polytechnic Institutes would fall under the exemption stipulated in Entry No. 66(b)(iii) of Notification No. 12/2017 dated 28.06.2017 clarifying it to be services provided by or to Educational Institutions up to Higher Secondary School or equivalent. Reliance was also placed on the memo issued by the Department of Education, Government of Bihar which considered Polytechnics to be equivalent to Intermediate i.e. Senior Secondary.

4. We would not dwell upon the legal issue raised as to exemption since the assessee has an appellate remedy which has not been exhausted and the forum where such appeal is to be instituted has not yet been constituted. We are only concerned with the recovery made, peremptorily and surreptitiously from the bank accounts of the assessee, on the very next day of the rejection of the appeal.

5. Learned counsel for the petitioner Shri Saket Tiwary asserts that the recovery was done in a most arbitrary manner, especially when there was no Appellate Tribunal constituted and there were notifications issued, both by the Central Government and the State Government providing for and extending the period of limitation to commence only from the date of constitution of such Tribunals. It is also pointed out that this Court in such matters have been consistently directing payment of 20 per cent, as provided for in Section 112(8) of the Bihar Goods and Services Tax Act, 2017 (hereinafter referred to as “BGST Act”) and staying recovery till the Tribunal is constituted and the limitation of three months from that date is crossed. In the present case, ignoring the statutory provisions and the notifications issued, the recovery was made arbitrarily and without any notice. Thus, frustrating the appellate remedy

of the petitioner assesee and putting the very business of the assessee into jeopardy. The petitioner prays for refund of the amounts recovered and stay of the assessment order confirmed in appeal till the Appellate Tribunal is constituted under Section 109 of the BGST Act. The learned counsel Shri Saket Tiwary also prays for interest on the amounts recovered and exceptional costs for the prejudice caused to the business of the petitioner, by the high-handed act of the tax authority.

6. Learned Government Advocate Shri Vivek Prasad, on the other hand, relies on Section 78 of the BGST Act and its proviso which enables recovery even within the period of three months, if the proper officer considers it expedient in the interest of Revenue. In the present case, there are reasons recorded in writing by the Recovery Officer and hence, the recovery has been made well within the contours of the statute. The decision with respect to stay of recovery on payment of 20 per cent of the tax liability came later to the recovery in the present case. There are absolutely no *mala fides* in the recovery effected and the same was done only considering the expediency which arose because of the close of the financial year. The learned Government Advocate would seek for dismissal of the writ petition.

7. The assessee was issued with an assessment order dated 14.12.2022 produced as Annexure-2. The tax dues under the BGST and CGST Act were Rs. 18,91,609.00 each. There was also a further liability of interest of Rs. 16,02,552.00 each and a penalty of Rs. 1,89,161.00 each under the two enactments. The total liability came to Rs. 73,66,644.00 which was directed to be paid on or before 14.03.2023 as per Annexure-2. The assessee filed an appeal which did not find favour with the Appellate Authority, who rejected it on 27.03.2023, as is evident from Annexure-1. Immediately on the next day, the Assessing Officer issued Annexure-3 notice to the Branch Managers of the four banks in which the assessee maintained accounts. A total amount of Rs. 69,88,322.00 was sought to be recovered which included the equal liabilities under the CGST and SGST enactments. The 10 per cent deposited under each of the enactments being Rs. 1,89,161.00 at the appellate stage was deducted when the recovery notice was issued. The recovery notice at Annexure-3 is dated 28.03.2023 and the entire amounts have been recovered which resulted in the present challenge before this Court.

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."*
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> *[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 <u>such period less than a period of three months as may be specified by him.</u>"*
>
> *[<u>underlining by us for emphasis</u>]*

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.

16. Following the dictum laid down in ***UTI Mutual Fund v. Income-Tax Officer and Others; [2012] 345 ITR 71 (Bom)***, 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*** (supra) 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*).

17. We cannot but find a definite overreach by the tax authority, the officer who issued Annexure-3 order, to surreptitiously recover the amounts due as per the assessment order passed, from the bank accounts of the assessee, without proper intimation being given to the assessee or a time specified for the assessee to satisfy the demands; even if the action was motivated by expediency and in the interest of the Revenue, which we have found is not discernible from the reasons recorded in the instant case. The reasons stated by the officer were kept hidden within the folds of the files; at the risk of

repetition, were also not convincing. The close of the assessment year and one or two days of bank holidays, we are not convinced are sufficient reasons to forfeit the amounts kept in the account of a running business. The State and its revenues would not collapse if the said amounts were not recovered but there is every chance of a business folding up without liquid funds being available to it, especially a running concern with liabilities to its employees, its other creditors and so on and so forth.

18. The actions of the Tax Authorities, under the taxing statute should be tempered with good conscience and judicious reasoning, which in the instant case was in complete derogation of the established principles of rule of law; reigning supreme even when there is a compulsory extraction of money for the larger good and welfare, which a levy of tax always is. The tax authority should also act as a facilitator of business and economy and not merely as an extortionist, always looking to have the pound of flesh, to satisfy his hierarchical superiors to push his/her personal agendas. We have no doubt that the action complained of, was high handed and arbitrary.

19. As we observed, the Assessing Authority in the

scheme of the enactment could not have made recovery of the entire amount. Section 112 provides for twenty per cent of the tax amount due, in addition to the ten per cent amount paid at the first appellate stage, for maintaining a second appeal before the Appellate Tribunal. On such payment being made under Section 112(8), there is also a requirement that the further recovery proceedings would be stayed. Hence, when an Appellate Authority was not constituted even when the Assessing Officer acted under the proviso to Section 78 what could have been recovered is only twenty per cent of the tax amount due in addition to that paid up to institute a first appeal. We see from Annexure-3 order that under both the BGST and CGST Act, the tax amounts due are Rs. 18,91,609.00 and the demand made of Rs. 34,94,161.00 each under CGST and BGST Act is after including the interest and penalty. We also notice that Rs. 1,89,161.00 has been reduced from the total demand raised under Annexure-2 order, presumably, the ten per cent payment made by the assessee at the first appellate stage.

20. Hence, what was required to be paid by the assessee, for maintaining an appeal before the Appellate Tribunal, if constituted, was Rs. 7,56,644.00 being the twenty

per cent of the tax dues under the BGST and CGST Act. Hence, the balance amounts from the total sums forfeited of Rs. 69,88,322.00 recovered shall be paid over 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 banks as per Annexure-3 order 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 periods the assessee was deprived of the amounts recovered, she shall be entitled to claim interest from the department.

21. We are also of the opinion that the officer who issued Annexure-3 order, who acted in complete derogation of the statutory provisions and established principles of law, should pay an amount of Rs. 5,000/- (five thousand) as cost to the assessee; a receipt of which shall be filed within two weeks in the instant writ petition.

22. The writ petition is allowed with the above

directions and the guidelines as laid down by us hereinabove.

(K. Vinod Chandran, CJ)

(Partha Sarthy, J)

P.K.P./-

AFR/NAFR	AFR
CAV DATE	
Uploading Date	30.08.2023
Transmission Date	