SUPREME COURT OF INDIA

Bharjatiya Steel Industries

Vs

Commissioner, Sales Tax, U.P.

C.A.No.1768 of 2008

(S.B. Sinha and V.S. Sirpurkar JJ.)

05.03.2008

JUDGMENT

S.B. Sinha, J.

1. Leave granted.

2. Appellant manufactures Steel Ingots. It purchased iron scrap from the Railways in public auction. Iron scrap is melted and converted into the finished products. Appellant had been accorded recognition under Section 4-B (2) of the U.P. Trade Tax Act (for short "the Act") in terms whereof it became entitled to purchase raw-materials for manufacturing purpose at a concessional rate of tax. In the year 1985-86, it purchased 2532.989 M.T. of iron scrap. Allegedly, the lots contained various categories of iron scraps as it was purchased on "as is where basis is". Appellant allegedly was not allowed to sort out the scrap at the time of purchase as the conditions specified therein were:

> "(1.) the material will be sold of "AS IS WHERE IS" basis.
>
> (2). No sorting, picking whatsoever under any circumstances will be allowed.
>
> (3.) The purchaser will be required to take delivery of the material from the lots.
>
> (4.) The purchaser should inspect the lots prior to the auction"

3. Appellants stated that about 9.47% of the total amount of scrap purchased, i.e., 239.966 M.T., could not be utilized by it. It sold the said goods to other dealers at a concessional rate of tax. Inter alia, on the plea that the appellant for the purpose of obtaining the tax concession in terms of Section 4-B(2) of the Act had furnished an undertaking whereby and where under it undertook to utilize the entire material for manufacturing purposes, which was breached by reason of the said transfer, a proceeding for levy of penalty was initiated against it whereupon a show-cause notice was issued. Cause was shown by the appellant on 5.03.1990 contending that the said quantity of scrap being not usable; it had no other option but to dispose of the same.

4. By reason of an order dated 26.03.1990; the assessing officer rejected the said contention. It levied penalty of Rs.85, 619/- on the appellant. An appeal preferred there against before the Deputy Commissioner (Appeals) was dismissed by an order dated 8.02.1991.

5. An appeal to the Tribunal preferred by the appellant was, however, allowed by an order dated 29.04.1993, stating:

> "6. Having given our deep consideration and anxious thoughts to the rival submissions and perused the relevant record, we feel that the ld. Authorities below have not appreciated the facts of the case in right perspective. It is not disputed that the scrap has been purchased by the Appellant in lots from the railway, in which there remains existence of several types of scrap. During the course of arguments, the ld. Counsel produced copy of tender invited by Railway Department. We have gone though this document and we find that in general conditions of the said document,

there is specific mention in condition No. 1 that the material will be sold on "AS IS WHERE IS" basis and in condition No. 2, no sorting, and picking whatsoever under any circumstance will be allowed. It is worth consideration that no purchaser can violate the conditions of purchaser. The purchases have been made in lots, in which different types of scrap exists, out of which maximum usable strap has been consumed by the Appellant in the manufacture and only that type of scrap was sold against the Form 3-B which was not usable in the unit of Appellant in any condition. In these circumstances, to our mind, there appears no malaise on the part of the Appellant, hence no penalty could be initiated against the assesses U/s 4-B(6) of the Act"

6. Respondent preferred a revision petition there against before the High Court which has been allowed by the impugned judgment dated 1.04.2004.

7. Mr. Puneet Jain, learned counsel appearing on behalf of the appellant, in support of the appeal, inter alia would submit:

"(1) On a plain reading of the provisions of Section 4-B of the Act, it is evident that in terms of Sub-section (a-1) thereof, a dealer is entitled to sell the goods to another;

(2) From a perusal of Sub-section (5) of Section 4-B of the Act, it would appear that a discretion has been conferred upon the authority to levy or not to levy penalty and in that view of the matter the High Court committed a serious error in opining that the principle of menses has no application in the instant case as for technical or venial breaches no penalty should be levied particularly when the action of the assesses does not defeat the very object for which the provision has been inserted.

(3) In view of the fact that 90% of the scrap purchased by the appellant has been utilized for the purpose of manufacture of steel ingots, only because due to certain unavoidable reasons the rest 10% of it could not be utilized, the appellant could not be said to have any menses in relation thereto.

8. Mr. Gaurav Banerjee, learned senior counsel appearing on behalf of the respondent, on the other hand, would contend:

"(1) In a case of this nature as no duty can be imposed, the minimum penalty which has been prescribed would amount to the duty payable to the State.

(2) The High Court, in a case of this nature, had ordinarily been ordering levy of penalty only twice the amount of the duty keeping in view the fact that the dealer admittedly has not utilized the goods for manufacturing purposes where for it had furnished an undertaking.

(3) In any event, as the assessing authority and the appellate authority had assigned sufficient and cogent reasons for imposition of the penalty having found that:

(i) It has not been proved that the goods were not suitable for manufacturing purposes;

(ii) The goods which were sold to another dealer had been used by the vendee for manufacturing purposes;

(iii) The appellant could have given advance intimation to the authorities pointing out its genuine difficulty;

(iv) 10% of the total stock cannot be said to be a miniscule portion which can be ignored by the authorities and, thus, there must be something more than which meets the eye; and

(v) In any event such a process of getting away in regard to payment of duty should not be encouraged. The impugned judgment should not be interfered with."

9. Before embarking upon the rival contentions, as noticed hereinbefore, we may notice the relevant part of Section 4-B of the Act, which reads as under:

"4-B - Specific relief to certain manufacturers –

(1) Notwithstanding anything contained in Sections 3, 3-A, 3-AAAA and 3-D--(a) Where any goods liable to tax under sub-section (1) of Section 3-D are purchased by a dealer who is liable to tax on the turnover of first purchases under that sub-section or where any goods are purchased by any dealer in circumstances in which such dealer is liable to trade tax on purchase of such goods under Section 3-AAAA, and the dealer holds a recognition certificate issued under sub-section (2) in respect thereof, he shall be liable in respect of those goods to tax at such concessional rate, or be wholly or partly exempt from tax, whether unconditionally or subject to the conditions and restrictions specified in that behalf, as may be notified in the Gazette by the State Government in that behalf ;(a-1) Where any declared goods liable to tax under sub-section (1) of Section 3-D are sold or supplied by a dealer, who is the first purchaser thereof, to another dealer, holding a valid recognition certificate under sub-section (2), in respect thereof, the State Government may, subject to such conditions and restrictions as may be specified by a notification in that behalf, grant the same relief as mentioned in clause (a) to such first purchaser:

(2) Where a dealer requires any goods, referred to in sub-section (1) for use in the manufacture by him in the State, of any notified goods, or in the packing of such notified goods manufactured or processed by him, and such notified goods are intended to be sold by him in the State or in the course of inter-State trade or commerce or in the course of export out of India, he may apply to the assessing authority in such form and manner and within such period as may be prescribed, for the grant of a recognition certificate in respect thereof, and if the applicant satisfies such requirements including requirement of depositing late fee, and conditions as may be prescribed, the assessing authority shall grant to him in respect of such goods a recognition certificate in such form and subject to such conditions, as may be prescribed.

(3) Where a dealer in whose favor a recognition certificate has been granted under sub-section (2) has purchased the goods after payment of tax at concessional rate under this section or, as the case may be, without payment of tax and has used such goods for a purpose other than that for which the recognition certificate was granted or has otherwise disposed of the said goods, such dealer shall be liable to pay as penalty such amount as the assessing authority may fix, which shall not be less than the difference between the amount of tax on the sale or purchase of such goods payable under this section and the amount of tax payable under any other provisions of this Act but not exceeding three times the amount of such difference"

10. It is not in dispute that the appellant was exempted from payment of the entire amount of tax, subject to the conditions and restrictions specified in the notification. For the said purpose, it holds a recognition certificate. The assessing authority while opining that the appellant should have taken all precautions to see that the goods it had purchased were

capable of being utilized or consumed for manufacture of ingots, arrived inter alia at the following finding of fact:

> "(i)The trader could have very well properly looked into the fact at the time of purchase of the goods as to which of the purchased goods by them would be fit/ proper for their manufacture, and purchase of the same should have been carried out through the assistance of the Form 3-B..."
>
> (ii) "Now the conclusion arrives is that the trader has knowingly carried out purchases of such goods, without utilizing the same in their manufacture, they have sold away the same with the assistance of the Form 3-B, because there is no such evidence available on the records, by which it may be proved that the goods sold away was not worth to be utilized in the manufacture. Because the purchases of old iron scrap have been made against the Form 3-B, and the goods sold away was also old iron scrap and the iron scrap traders are utilizing the same in their manufacture, the sold away iron was not fit for being utilized in their manufacture"
>
> (iii) "Therefore, the conclusion is arrived at that these goods were worth being utilized in the manufacture, but the same had been sold away knowingly with the intention of escaping the tax against the Form 3-B. Therefore, the trader was under the impression that even if each goods is not in consonance with the conditions of the provisions of Section 4-B, even then at the time of purchases, they could have paid the tax against the same, but the trader had desired to escape from the payment of the tax to such kind of sale-purchase till the decision about the final assessment of the tax, and from the same, the conclusion is arrived at that the trader has committed violation of the provisions of Section 4-B of the Act, knowingly and in planned manner"

11. On the said findings, the minimum penalty of Rs. 85,619.00 was imposed. The appellate authority agreed with the said finding of the assessing authority stating:

> "Clearly, the appellants while violating the provisions of Section 4(B) (2) of the Act had carried out the sale of the raw material purchased against Form 3-B. Therefore, this offence of the appellant was naturally punishable under the provisions of Section 4(B)(5) of the Act. The appellants have committed this sale knowingly with a view to escape from the liability of the tax. Had this sale would not have been carried out knowingly to escape from the liability of the tax, then the appellants, while extending his cooperation/ bone fides and informed the learned Tax Assessing Authority and got inspected the goods which they intended to sale and that that material could not be utilized in the manufacturing of the notified articles produced by them. But the appellants have not done so. The appellants have also not paid any tax against such sales and have knowingly sold away the aforesaid goods to other manufacturers and have also obtained the Form 3-B from them. In this way, the appellants have also not paid any tax against such sales"(Emphasis supplied)

12. The Tribunal, however, as noticed hereinbefore, allowed the appeal on the ground that the appellant did not have any menses.

13. The High Court by reason of its impugned judgment, following some of its earlier decisions, opined:

> "This Court in the case of Sai Electrical (P) Ltd. (supra) has placed reliance upon three judgments of the Supreme Court given in the case of *Hindustan Steels Limited*

Vs. State of Orissa[1] *Gujarat S.T.O. Vs. Ajeet Mills Ltd.*[2] and *Director of Enforcement Vs. M.C.T. Municipal Corporation J.T*[3] to hold that classic view that "no menses no crime" is not applicable to the economic crimes and departmental penalties. Plain language of sub-section (5) of Section 4-B also does not show that menses is an essential ingredient for imposition of penalty. The reasoning given by the tribunal in Para 6 of its order that since the goods were purchased in lots and there appears no mala fide on the part of the appellant, for deleting penalty under Section 4-B(5) of the Act cannot be sustained. It appears that sub-section (5) to Section 4-B was not brought to the notice of the tribunal. The tribunal has failed to decide the case within the four corners of Section 4-B(5) of the Act. The other reasoning given by the tribunal for deleting the penalty is that the tax has been paid by the purchasers to whom the sale of unusable iron scrap has been made by the appellant. Substantial proofs have been produced before it about the payment of tax. These factors are hardly germane for deleting penalty under Section 4-B (5) of the Act."

14. It is difficult to accede to the contention of the learned counsel that Sub-section (a-1) of Section 4-B of the Act would be attracted. Apart from the fact that no such contention has been raised before the authorities concerned, the notification purported to have been issued by the Stage Government has also not been placed on record. It is furthermore difficult to accept that in a case of this nature where a tax benefit had already been granted to a dealer, a further tax benefit would be granted even if he violates the condition of certificate.

15. Sub-section (5) of Section 4-B of the Act is in two parts. Penalty is levied if the goods have been utilized for the purpose other than that for which the recognition certificate was granted or the dealer otherwise had disposed of the said goods. The statutory provision speaks of penalty and not duty. It is, therefore, difficult to accept the contention of Mr. Banerjee that the said provision merely purports to recover the duty which was otherwise payable by the dealer. Mr. Banerjee himself submitted that the stage of realization of the duty was over. If that be so, only penalty could be levied. Levy of penalty, ordinarily, unless there exists any statutory interdict, requires proof of menses.

16. It was so held in *Hindustan Steel Ltd. v. State of Orissa*[4] stating:

> "8An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute"

17. Mr. Banerjee, however, urged that Hindustan Steel Ltd. (supra) is not applicable to the facts of the present case. We do not agree.

18. Reliance placed by *Mr. Banerjee on R.S. Joshi, S.T.O., Gujarat v. Ajit Mills Ltd. and another*[5] has no application in the instant case. The question which arose for consideration

therein was as to whether the word 'penalty' would include forfeiture. The core question therein was as to whether the enactment by the State legislature providing that sums collected by dealers by way of sales tax but are not eligible under the State law and, indeed, prohibited by it shall be forfeited to the public exchequer punitively. It was held that it is permissible, stating:

> "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."

19. P.S. Kailasam, J, in his concurrent but separate judgment, stated:

> "63. Mr Kaji as well as Mr B. Sen, learned Counsel for some of the assesses, further brought to our notice cases in which by the application of the provisions of the sales tax enactment considerable hardship and injustice has been caused to the dealers. It was submitted that where the assesses innocently collected amounts on the impression that tax was livable; the amounts so collected were forfeited while his obligation to the purchasers to refund the amounts continued. If the assesses by a mistake failed to collect tax, from the purchasers, tax was levied and collected from the assesses making him suffer in any event. When after a costly litigation, the assesses succeeded in establishing that sales tax cannot be collected on the railway freight on cement bags or inter-State sales, the Government promptly forfeited such amounts. We agree these are instances of hardship to the assesses and deserve Government attention. But for that reason the Courts cannot say that the act is beyond the legislative competence. The fact that in some cases the dealers are prejudiced would not affect the validity of the legislation which is the question we are called upon to decide. On a careful consideration of the points raised, I am satisfied that the provisions of Section 37(1) are within the competence of the State Legislature."

20. We are not concerned with such a question here.

> "Reliance has also been placed on *Director of Enforcement v. M.C.T. M. Corporation Pvt. Ltd. & Others*[6] This Court was dealing therein with Foreign Exchange Regulation Act, 1947. It was opined that Section 23(1(a) of the Act confers adjudicatory function on the conduct of the delinquent, stating :
>
> "8. It is thus the breach of a "civil obligation" which attracts 'penalty' under Section 23(1) (a), FERA, 1947 and a finding that the delinquent has contravened the provisions of Section 10, FERA, 1947 that would immediately attract the levy of' penalty' under Section 23, irrespective of the fact whether the contravention was made by the defaulter with any "guilty intention" or not. Therefore, unlike in a criminal case, where it is essential for the 'prosecution' to establish that the 'accused' had the necessary guilty intention or in other words the requisite "menses" to commit the alleged offence with which he is charged before recording his conviction, the obligation on the part of the Directorate of Enforcement, in cases of contravention of the provisions of Section 10 of FERA, would be discharged where it is shown that the

"blameworthy conduct" of the delinquent had been established by willful contravention by him of the provisions of Section 10, FERA, 1947. It is the delinquency of the defaulter itself which establishes his 'blameworthy' conduct, attracting the provisions of Section 23(1) (a) of FERA, 1947 without any further proof of the existence of "menses". Even after an adjudication by the authorities and levy of penalty under Section 23(1) (a) of FERA, 1947, the defaulter can still be tried and punished for the commission of an offence under the penal law, where the act of the defaulter also amounts to an offence under the penal law and the bar under Article 20(2) of the Constitution of India in such a case would not be attracted. The failure to pay the penalty by itself attracts 'prosecution' under Section 23-F and on conviction by the 'court' for the said offence imprisonment may follow."

21. The attention of the Court, therein, however, was not drawn to the earlier binding precedent in Hindustan Steel (supra). Furthermore, the question as to whether mens rea is an essential ingredient or not will depend upon the nature of the right of the parties and the purpose for which penalty is sought to be imposed.

22. A distinction must also be borne in mind between a statute where no discretion is conferred upon the adjudicatory authority and where such a discretion is conferred. Whereas in the former case the principle of mens rea will be held to be imperative, in the latter, having regard to the purport and object thereof, it may not be held to be so. In *Dilip N Shroff v. Joint Commissioner of Income Tax, Mumbai & Anr*[7]it was opined:

"86. It is of some significance that in the standard pro forma used by the assessing officer in issuing a notice despite the fact that the same postulates that inappropriate words and paragraphs were to be deleted, but the same had not been done. Thus, the assessing officer himself was not sure as to whether he had proceeded on the basis that the assesses had concealed his income or he had furnished inaccurate particulars. Even before us, the learned Additional Solicitor General while placing the order of assessment laid emphasis that he had dealt with both the situations. The impugned order, therefore, suffers from non-application of mind. It was also bound to comply with the principles of natural justice. (See Malabar Industrial Co. Ltd. v. CIT).We have, however, noticed hereinbefore that the Income Tax Officer had merely held that the assesses is guilty of furnishing of inaccurate particulars and not of concealment of income; which finding was arrived at also by the Commissioner of Income Tax and the Income Tax Appellate Tribunal."

23. In *Chairman, SEBI v. Shriram Mutual Fund*[8] this Court held:

"35. In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulations is established and hence the intention of the parties committing such violation becomes wholly irrelevant. A breach of civil obligation which attracts penalty in the nature of fine under the provisions of the Act and the Regulations would immediately attract the levy of penalty irrespective of the fact whether contravention must be made by the defaulter with guilty intention or not. We also further held that unless the language of the statute indicates the need to establish the presence of menses, it is wholly unnecessary to ascertain whether such a violation was intentional or not. On a careful

perusal of Section 15-D (b) and Section 15-E of the Act, there is nothing which requires that menses must be proved before penalty can be imposed under these provisions. Hence once the contravention is established then the penalty is to follow."

24. It is, therefore, difficult to accede to the contention of Mr. Banerjee that under no circumstances absence of menses would not be a plea for levy of penalty. An assessing authority has been conferred with a discretionary jurisdiction to levy penalty. By necessary implication, the authority may not levy penalty. If it has the discretion not to levy penalty, existence of menses becomes a relevant factor. We may notice that in the show cause notice itself, the authorities stated:

"You have sold away 239.966 tons of iron and steel without payment of any sales tax with the assistance of the Form No. 3(B), amounting to Rs. 10, 73,850.89, whereas the receipt thereof was also issued under the provisions of Section 4-B on the basis of full exemption from the tax, with the assistance of the Form No. 3(B). In this way, the material purchased for the purposes of production under the provisions of Section 4-B, while utilizing the same for the same purposes, was sold away in the same condition, which is a violation of the provisions of Section 4-B, and is punishable under the aforesaid sub-section of the Act."

25. The assessing authority, therefore, understood the said provision to mean that the appellant was liable to be imposed with a punishment. The authority did not say that the duty which was otherwise due from the appellant would be realized.

26. We, however, are of the opinion that in the facts and circumstances of this case, existence of menses on the part of the appellant is evident.

27. Ordinarily a dealer must abide by the undertaking given by it. If it is not in a position to comply with the requirements contained in the statute, it is expected that it would inform thereabout to the assessing authority. It purchased the goods in the assessment year 1985-86. It did not disclose as to when it sold out the goods. What was its consumption during said assessment year or the next assessment year had not been disclosed. As a finding of fact has been arrived at that the dealer had not furnished any proof in regard to its inability to use it for manufacturing purposes. It was obligatory on the part of the appellant as it has special knowledge in regard thereto to show as to why the entire quantity of goods could not be utilized. A finding of fact has also been arrived at by the assessing authority that the vendee had utilized the self-same goods for manufacturing. 10% of the purchased goods, namely, 2532.989 M.T. is not such which could be ignored by the assessing authority. Although duty was payable thereon, it may be that the auction of lots was on "as is where is basis", the same would not mean that a part of it could not be melted for manufacturing the ingots. If that was the position, it could have informed the authorities in that behalf even prior to affecting the sale to a third party.

28. Moreover, the assessing authority as also the appellate authority had held that the appellant sold the goods knowingly and, it must, therefore, be inferred that the finding in regard to menses had also been arrived at.

29. In the facts and circumstances of this case, we are of the opinion that no case has been made out for interfering with the impugned judgment. The appeal is dismissed accordingly. No costs.

[1]IR 1970 S.C. 253, R.S.

[2]*1979 U.P.T.C.0171*
[3]*1996 1 S.C. 0079*
[4]*(1969) 2 SCC 0627*
[5]*(1977) 4 SCC 0098*
[6]*(1996) 2 SCC 0471*
[7]*(2007) 6 SCC 0329*
[8]*(2006) 5 SCC 0361*