

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN
&
THE HONOURABLE MR.JUSTICE K.HARILAL

THURSDAY, THE 9TH DAY OF APRIL 2015/19TH CHAITHRA, 1937

WA.No. 1881 of 2012 () IN WP(C).10403/2012

AGAINST THE JUDGMENT IN WP(C)NO. 10403/2012 of HIGH COURT
OF KERALA DATED 22/8/2012.

APPELLANT(S)/APPELLANTS:

M.A.K.AGRO COMMODITIES TRADING CO.PVT.LTD.,
HAVING ITS OFFICE AT G-211, PANAMPILLY NAGAR,
COCHIN-36, REPRESENTED BY ITS
MANAGING DIRECTOR, M.A.K.AZAD

BY ADVS.SRI.RAJU JOSEPH (SR.)
SRI.C.N.MIDHUN

RESPONDENTS:

1. INTELLIGENCE OFFICE (IB)
COMMERCIAL TAXES, KOTTAYAM-686001.

2. THE SALES TAX OFFICER,
IIND CIRCLE, TRIPUNITHURA, ERNAKULAM-682301.

3. THE TAHSILDAR,
KANAYANNOOR TALUK, ERNAKULAM-682011.

BY SENIOR GOVERNMENT PLEADER SRI. LIJU V. STEPHEN

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON
2-3-2015, THE COURT ON 9-4-2015 DELIVERED THE FOLLOWING:

**THOTTATHIL B. RADHAKRISHNAN &
K. HARILAL, JJ.**

W.A.Nos.1881 of 2012

Dated this the 9th day of April, 2015

JUDGMENT

Harilal, J.

This writ appeal is directed against the judgment passed by the learned single Judge dismissing W.P.(C) No.10403 of 2012. The appellant is the petitioner in the above writ petition. It is a Company, registered under the Companies Act, doing the business in food grains. But, the company is defunct from the year 2002 onwards. On 2/2/2001, the Intelligence Squad (IB), Kottayam, conducted a detailed inspection at the business premises of the appellant company and other sister companies and concerns which were functioning under the same roof and recovered books of accounts, including sale bills. The records in connection with the business of the appellant

company were seized. The 1st and 2nd respondents alleged that they have unearthed huge sales suppression and other irregularities during the period 1999-2000 and 2000-2001. As a result of this, the Intelligence Officer (IB) imposed penalty of Rs.8,81,496/- for the year 1999-2000 and Rs.9,40,264/- for the year 2000-2001. Against these orders, the appellant company had preferred revisions before the Deputy Commissioner, Commercial Taxes, Kottayam, and the Deputy Commissioner dismissed the revision for the year 1999-2000 and remanded the revision for the year 2000-2001 for fresh consideration. Aggrieved by the said orders, the petitioner/company further filed a revision before the Commissioner, Commercial Taxes, Thiruvananthapuram; but the Commissioner also dismissed the revision and affirmed the order passed by the Deputy Commissioner by Ext.P2 order dated 8/10/2004.

2. Thereafter, the 1st respondent issued notice on 7/11/2009 calling upon the petitioner to produce books of accounts for verification. The notice was received by the petitioner on 20/11/2009. On 1/12/2009, the petitioner sought time till 15/12/2009, as the Managing Director of the appellant company was not keeping well. Thereafter, on

14/12/2009, the Managing Director of the appellant company appeared before the 1st respondent and produced all the relevant documents. The original sale bills were also produced before him. After hearing, Ext.P3 written submission was also filed before the Intelligence Officer on 16/12/2009 through registered post. Thereafter, nothing was heard from the 1st respondent and the appellant company bona fide thought that the 1st respondent might have dropped the penalty proceedings in the light of the submission and documents produced before him and also for the fact that the 1st respondent was seemingly convinced at the time of hearing. Similarly, the assessment proceedings in regard to the year 2000-2001 was pending during all these years.

3. The grievance with respect of Ext.P10 is that the 2nd respondent before whom a request for time was filed on sustainable ground, issued notice under Section 17(3) of the KGST Act on 31/1/2011 proposing to complete the assessment in respect of the year 2000-2001. Thereafter, the assessment was completed ex parte on the ground that notice was not received and no reply was filed. However, the order was not communicated to the petitioner. Thus,

the petitioner was totally unaware of the penalty order as well as the assessment order. While so, the appellant got Exts.P5 to P7 revenue recovery notices from the 3rd respondent demanding an amount of ₹8,24,165/- and Rs.4,53,533/-. Thereafter, on enquiry, the appellant came to know that Exts.P5 to P7 are issued for the recovery of the said amount allegedly due under Ext.P9 penalty order and Ext.P10 assessment order.

4. It is the case of the petitioner that, in Ext.P9, it is stated that notice dated 11/2/2011 containing the proposal for penalty inviting objections was tendered to Mrs. Farida Haji Vaheed, the wife of the Managing Director as well as the Director of the Company, on 14/2/2011 in person by the 1st respondent himself and she refused to accept the notice. This is absolutely incorrect. On 14/2/2011 both Farida Haji and her husband, the Managing Directors of the Company, were away in Chennai and moreover, it is quite unusual that an Intelligence Officer is going the party with penalty notice personally for the purpose of serving the same personally. So also, the statement in the order that notice by speed post was not accepted is also not correct.

5. The 1st and 2nd respondents filed a statement

denying all the allegations against them raised in the writ petition. They specifically denied the allegation that the 1st and 2nd respondents had mala fide intention to pass orders against the petitioner/company without affording an opportunity of being heard. According to them, they had strictly acted in accordance with the provisions related to granting personal hearing to the assesses. But the petitioner, instead of availing these opportunities, neglected the same and raised bald allegations in order to defy the duty bound officers. On a close verification of the records related to the petitioner, in the capacity of proprietor as well as company, it can be seen that avoidance of personal hearing, production of evidence etc., before the assessing authority is a usual habit of the petitioner. Since correspondences were returned unaccepted to the respective officers, the only remedy remaining before the respondents in such circumstances was to serve them by affixture in conspicuous places as provided in the Act and Rules. As an assessee, who is bound to obey the provisions under the KGST Act, he is expected to produce evidence and appear before the assessing authorities as and when required or to arrange

alternative measures to look into these serious issues. But the sequence of events show that the petitioner has miserably failed to act in accordance with the duty cast on an assessee under the KGST Act.

6. We have heard Sri. Raju Joseph, senior counsel appearing for the appellant and Sri. Liju V. Stephen, the learned senior Government Pleader appearing for the respondents.

7. The sum and substance of the arguments advanced by the learned counsel for the appellant is that Ext.P9 penalty order and Ext.P10 assessment order are passed in violation of the principles of natural justice and also in violation of Secs.45A(2) and 17(3) of the KGST Act. When the 2nd respondent was informed that the Directors of the Company would be away, they could not have completed the assessment on the ground that the petitioner did not respond to the notice. The penalty proceeding was initiated in respect of the year 2000-2001 and it was pending before the 1st respondent since 8/10/2004 i.e., after the same was remanded by the Commissioner, Commercial Taxes. But all on a sudden, in the year 2011, the 1st respondent woke up and passed

Ext.P9 order presumably having received information from the 2nd respondent that the petitioner and his family were away in Chennai. According to the learned counsel, the mala fide intention of the 1st and 2nd respondents is writ large from the fact that the 1st and 2nd respondents did not communicate the assessment order to the petitioner. Exts.P9 and P10 are, therefore, clearly illegal, unjust, non-est in law and liable to be quashed in limine for affording an opportunity of being heard to the petitioner. In view of the rival submissions, the question to be considered is, whether Exts.P9 and P10 orders were passed, after affording an opportunity of being heard.

8. In the writ petition the appellant had challenged Ext.P9 penalty order and Ext.P10 assessment order in respect of 2000-01. The original penalty order dated 26/3/2002 passed by the 1st respondent was set aside by the Deputy Commissioner in revision and remanded back for fresh consideration and subsequently, the said order was affirmed by the Commissioner in the suo motu revision by Ext.P2 order dated 8/10/2004. Thus, indisputably the matter had been pending before the 1st respondent from 8/10/2004 onwards. Thereafter, the 1st respondent has not

taken any steps to proceed with fresh consideration of the penalty order, in compliance with the direction in Ext.P2 order, till the issuance of notice dated 7/11/2009 to the appellant. Obviously, the delay is inordinate and not justifiable. Thus, as a matter of fact, as rightly submitted by the learned counsel for the appellant, all on a sudden, the 1st respondent woke up and started proceedings, after a long lapse of five years.

9. The point to be considered is, whether the penalty proposal and pre-assessment notice had been served in compliance with the mode of service provided under Section 55B of the KGST Act. It is the case of the appellant that pursuant to the notice dated 7/11/2009 all relevant records were produced and full fledged hearing was afforded and on an argument note was submitted on 10/12/2009. Even after that, the 1st respondent kept quite for a period of more than one year, until the issuance of pre-assessment notice dated 11/2/2011. The above allegation is not denied in the counter statement filed by the 1st respondent. But, in Ext.P9, on the other hand, it is stated that notice dated 11/2/2011 inviting dealers objection was tendered to the Director of the Company Mrs.

Fareeda Haji Wahid on 14/2/2011 in person, by the 1st respondent himself, but she refused to accept the notice and hence, the notice was served by affixture. Moreover, the notice sent by speed post with acknowledgment due was not accepted by the dealer, in spite of proper intimation to him. Though the said attempt to serve notice said to have been made by the 1st respondent himself was denied in the writ petition, nothing stated in the counter statement, either standing by the said attempt made by the 1st respondent himself or disputing the appellant's denial of such service of notice in the writ petition. So also, no material had been produced in the writ petition to show that the 1st respondent himself made an attempt to serve notice directly to Mrs. Fareeda Haji Wahid, the Director of the Company and she refused to accept the same. We are unable to believe such an attempt said to have been made by the 1st respondent to serve notice, in the absence of any kind of evidence, so as to give assurance to the bonafides the said contention. More over, either Section 55B of the KGST Act or Rule 63 of the KGST Rules made thereunder does not provide such a mode of service of notice directly to the assessee by the officer who signed

and issued the notice himself. So, the mode of service of pre-assessment notice claimed to have been adopted by 1st respondent is not one recognized under law. Even if it is true, it cannot be taken as a valid service, even though the 1st respondent has claimed so in Ext.P9 order, in the absence of statutory recognition. That apart, there is nothing in the statement filed by the 1st respondent explaining the said manner in which notice was served, which is known to the 1st respondent alone.

10. Even according to the 1st respondent, notice had been affixed, since Mrs. Fareeda Haji Wahid, to whom the notice was tendered refused to accept the notice. According to Section 55B of the KGST Act, affixture of notice can be effected, if the assessee cannot be found. The 1st respondent has no case that the assessee was not found, when the notice was attempted to be served. In Deputy Commissioner v. Gopi [1987 (1) KLT 923], the Division Bench of this Court held that in order to say that a person cannot be found, within the meaning of Section 55B of the KGST Act, it should be found that that person is dead or has disappeared. Here, the 1st respondent has no case in Ext.P9 that the assessee was dead or has disappeared.

In the above view, the affixture is also not justifiable in such circumstance.

11. The specific case of the appellant was that the company was defunct from 2002 onwards and at the relevant time from 21/12/2010 to 1/1/2011 and from 25/1/2011 to 15/2/2011 the Directors were at the Apollo Hospital, Chennai, in connection with the major heart surgery of the eldest brother of the Managing Director. The above reason given by the appellant, for the non-receipt of the notice allegedly sent by speed post, and the denial of the 1st respondent's case that he himself attempted to serve notice, in the writ petition, are not disputed in the counter statement filed by the respondents 1 and 2.

12. In order to prove the contention that they were at Chennai during the relevant time, the appellant had produced photocopies of the bills showing stay of Directors at Hotel from 21/12/2010 to 11/1/2011 as Ext.P4 and 25/1/2011 to 15/2/2011 as Ext.P6 in W.P.(C) No.12299 of 2012, which was heard and disposed of along with the present writ petition. The learned single Judge in that case held that Exts.P4 and P6 are not sought to be rebutted in the counter affidavit filed by the respondents. So also, the

appellant has no case that Exts.P4 and P6 are false or fabricated. More importantly, in W.P.(C) No.12299 of 2012 the learned single Judge accepted the above explanation given by the appellant for non-receipt of the pre-assessment notice which was attempted to be served on him. We do not find any ground to disbelieve the appellants' case, particularly, in view of the fact that the said reason was accepted by the learned Judge in W.P.(C) No.12299 of 2012 which was heard along with the present writ petition.

13. The bona fides and the genuineness of the case of the appellants that the Directors were in Apollo Hospital at Chennai, gets further assurance from Ext.P4 order passed by the 2nd respondent. In Ext.P4 order, relating to the penalty proceedings against the sister concern by name 'M/s International Trade Links', the 2nd respondent has extracted the objection filed by the appellant in that case. Paragraph-15 of Ext.P4 shows that when the Assessing Officer issued notice dated 6/1/2011, requiring the petitioner to appear before him on 21/1/2011, the appellant sought for time on the reason that his elder brother is in the hospital at Chennai in serious condition

and there is nobody other than the appellant in the hospital to help his brother and 20 to 25 days may take to shift him from the hospital to the native place. He further sought for 30 days time to appear before the 2nd respondent.

14. In the above view of the matter, in the absence of any evidence to show that Mrs. Farida Haji Vaheed, the Director of the Company, was present in the house on 14/2/2014, the 1st respondent made an attempt to serve notice directly to her and she willfully refused to accept the notice, we are not inclined to countenance the finding in Ext.P9 that Mrs. Fareeda Haji Wahid had willfully evaded from acceptance of the notice. In short, the said finding is not supported by any materials or evidence. So also, in the absence of any material to show the presence of any of the Directors in the house or in the habitual place of residence, we are unable to hold that they deliberately refused to accept notice sent by speed post, in spite of the intimation given by the postal authorities.

15. In the impugned order it is also stated that, "on a close verification of the records relating to the petitioner in the capacity of Proprietor as well as Company, it can be seen that, avoidance of personal hearing, production of

evidence etc., before the Assessing Authority is a habit of the petitioner. In all the cases, 1st as well as the 2nd respondent had taken earnest efforts in serving the notice, orders, demand notices, summons etc., to the petitioner; but such correspondence would be returned to the respective offices unaccepted”.

16. From the above statement, it is discernible that, in the matter of service of notices, the respondents have treated the appellant as an assessee who habitually evades notices, and before passing the impugned orders considering their alleged bad antecedents, the respondents had not made sure that, notice had been duly served, in accordance with Section 55B of the KGST Act, and thereby a reasonable opportunity of being heard had been given to the appellant. The pre-assessment notice has a great purpose to serve. It informs the assessee the basis or reason as to why he is going to be assessed in the manner proposed. The service of notice is neither an empty formality; nor a perfunctory act to make it appear that notice was attempted to be served. The maxim “Audi alteram partem” i.e., no one shall be condemned unheard, is principle behind proper service of pre-assessment of

notice under Taxation Law also. An assessment order cannot be served behind the back of an assessee. Even if the previous conduct shows that an assessee had evaded service of notice or failed to appear before the authority in spite of the receipt of the notice, no general or adverse inference can be drawn against him with a bias or prejudice that the assessee habitually evades notice, and he might have evaded this notice also. The procedure adopted for service of notice must be examined independently untrammelled by the previous conduct of the assessee and must be made sure that the notice has been served in compliance with Section 55B of the KGST Act and Rule 63 of the KGST Rules and thereby a reasonable opportunity of being heard was given to the assessee. A real, effective and meaningful opportunity to offer his objection or explanation should have been given to make sure that a reasonable opportunity had been given.

17. At the same time, we are unable to close our eyes towards some sort of negligence from the part of the appellant also in causing the delay in completing the proceedings, despite the long lapse of one decade. Had the Directors made arrangements to receive the letters

addressed to them, when he went to Chennai, in connection with the surgery of the 1st respondent's brother, they would have got an opportunity to appear before the respondents and raise his objection and produce documents before passing the impugned orders. More over, it is seen that the matter had been dragged on for more than one decade by filing applications one by one, seeking adjournments. We again give an opportunity of being heard; but the appellant has to pay cost for the loss caused to the public exchequer, by the negligence from the part of the appellant.

18. To sum up, we are not satisfied the service of notice to the appellant before passing Exts.P9 and P10 orders. We find that the notice containing penalty proposal and pre-assessment notice, which culminated in Exts.P9 and P10 had not been served, in compliance with Section 55B of the KGST Act. It follows that a reasonable opportunity of being heard was not given to the appellant. In the above view, the impugned judgment is set aside.

19. Consequently, on payment of cost, Exts.P9, P10 and P5 to P8 issued thereunder will stand quashed and the matter would stand remitted back to the 1st and 2nd

respondents respectively for fresh consideration on payment of a cost of Rs.10,000/- (Rupees Ten thousand only) to the Department of Commercial Taxes within a period of one month from today. The respondents are further directed to pass orders afresh after affording an opportunity of being heard to the appellant, at any rate, within a period of three months from the date of payment of cost. The parties shall appear before the 1st respondent on 11/5/2015 and the 2nd respondent on 15/5/2015. Needless to say, in the event of failure to comply the said direction, the impugned judgment, the orders and notices mentioned above, will stand in force and the respondents will be at liberty to recover the amounts due under the impugned orders.

This writ appeal is allowed to the aforesaid extent.

Sd/-

(THOTTATHIL B. RADHAKRISHNAN, JUDGE)

Sd/-

(K. HARILAL, JUDGE)

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P.S. to Judge