

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. 1894 of 2012 () IN RP.864/2012

AGAINST THE JUDGMENT IN WP(C) NO.10938/2012 of HIGH COURT
OF KERALA DATED 22/8/2012.

AGAINST THE ORDER IN RP NO.864/2012 IN WP(C)
NO.10938/2012 DATED 22/8/2012 of HIGH COURT OF KERALA.

APPELLANTS/PETITIONERS:

1. M/S.INTERNATIONAL MERCHANDIUCE TRADE &
EXPORTS PVT(LTD) . ,
G-211, MAIN AVENUE, PANAMPILLY NAGAR,
KOCHI-36, REPRESENTED BY ITS MANAGING DIRECTOR
SRI.M.A.K. AZAD, AGED 49 YEARS,
S/O LATE T. MUHAMMED GHANI, HIG-19,
PANAMPILLY NAGAR, KOCHI-36.

2. M.A.K.AZAD, MANAGING DIRECTOR,
M/S. INTERNATIONAL MERCHANDISE TRADE &
EXPORTS PVT (LT) . , G-211,
MAIN AVENUE, PANAMPILLY NAGAR, KOCHI-36.

3. SMT. FARIDAH HAJI VAHEED,
DIRECTOR,
M/S. INTERNATIONAL MERCHANDISE TRADE &
EXPORTS PVT (LTD) . , G-211,
MAIN AVENUE, PANAMPILLY NAGAR, KOCHI-36

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

RESPONDENTS/RESPONDENTS:

1. INTELLIGENCE OFFICER (IB) ,
OFFICE OF INSPECTING ASSISTANT COMMISSIONER
(INTELLIGENCE) ,
COMMERCIAL TAXES, KOTTAYAM-686 001.

2. THE COMMERCIAL TAX OFFICER,
IIND CIRCLE, TRIPUNITHURA, ERNAKULAM-682 301.

3. DEPUTY TAHSILDAR (RR) ,
KANAYANNUR TALUK, ERNAKULAM, COCHIN-682 011.

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. No.1894 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.10938 of 2012. The 1st appellant is a Company registered under the Companies Act and the 2nd and 3rd appellants are the Managing Director and the Director respectively. The company was doing the business of trading food grains; but it was defunct from the year 2002 onwards. Pursuant to the inspection and seizure conducted on 2/2/2001 at the premises of the 1st appellant company, sister company and concerns, which were functioning under the same roof, the penalty proceeding under Section 45A of the KGST Act initiated against the 1st appellant company

and a penalty of Rs.33,55,472/- and Rs.21,46,324/- respectively imposed for the year 1999-2000 and 2000-2001 respectively. Eventually, after a chequered career, in R.P.No.90 of 2005, the penalty proceedings for the year 1999-2000 was set aside and in R.P.No.91 of 2005, the penalty proceedings for the year 2000-2001 was remanded for fresh consideration, by the orders dated 7/4/2009.

2. Pursuantly, on 1/12/2009, a notice was served on the appellants calling upon them before the 1st respondent on 14/12/2009 to produce evidence, if any, to substantiate their contention against penalty proceedings for the year 2000-2001. But the appellants sought for time till 30/1/2010, in order to collect F-Form evidencing Branch transfer to Coimbatore and the time was extended up to 15/1/2010. But, the sales tax authorities at Coimbatore had taken a definite stand that F-Form could be issued only after completing the assessment proceedings in regard to the transaction made by the Coimbatore Branch. The appellants again requested for time pointing out the said difficulty. However, no further proceedings were initiated for sometime. While so, on 19/3/2010 they have received

Exts.P1 to P3 notices which were issued under the Revenue Recovery Act, demanding amounts due under Exts.P4 to P6. On enquiry, appellants came to know about Ext.P4 penalty order passed under Section 45A of the KGST Act and Exts.P5 and P6 assessment orders passed under Section 17(3) of the KGST Act for the year 1999-2000 and 2000-2001.

3. According to the appellants, appellants 1 and 2 were not in Kerala, during the period, in which Exts.P4 to P6 were passed. They were away at Chennai in connection with the heart surgery of the brother of the 2nd appellant and that fact was accepted by the learned single Judge of this Court in W.P.(c) No.12299 of 2012, which was heard along with the writ petition in which the impugned judgment had been passed. Moreover, the impugned orders were passed during the time, when an application for extension of time upto 30/3/2010, for production of documents, was pending before the respondents. Since the appellants 2 and 3 were away at Chennai, during the period from 21/12/2010 to 11/1/2011 and 25/1/2011 to 15/2/2011, they could not receive notices allegedly sent by

the respondents, after rejecting the request for extension of time. The observation in all the impugned orders to the effect that the appellants willfully evaded the procedure to complete the proceedings is unfounded and biased. In fact, an opportunity of being heard was not provided to the appellants as provided under Sections 45A and 17(3) of the KGST Act. Thus, the writ petition was filed challenging Ext.P4 penalty order pertaining to the year 2000-2001 and Ext.P5 and P6 assessments orders pertaining to the years 1999-2000 and 2000-2001 respectively.

4. The respondents opposed the writ petition and contended that a reasonable opportunity of being heard was given to the appellants before passing Exts.P4 to P6, in compliance with Sections 45A and 17(3) of the KGST Act. It was also contended that service of notice was effected in compliance with Section 55B of the KGST Act also. After considering the rival contentions, the learned single Judge dismissed the writ petition on a finding that being a company incorporated under the relevant provisions of the Indian Companies Act, 1956, the appellants could have ensured proper representation before the concerned

authority through Company Secretary, Chartered Accountant, Lawyer, if any, or such other authorised representatives. The legality and propriety of the findings by which the learned single Judge dismissed the writ petition are under challenge in this writ appeal.

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

6. The sum and substance of the arguments advanced by the learned counsel for the appellants is that the finding that, the appellants were willfully evading from penalty proceedings and assessment proceedings, is unfounded and biased. The learned counsel drew our attention to the postal endorsement 'addressee left' and pointed out that nobody had been available in the residence, during the time when the notice was kept in the post office, for effecting delivery, in response to the postal intimation left at their habitual residence. Since they were at Chennai during this period, they couldn't get the intimation informing arrival of the notice and the said fact

was accepted by the learned single Judge in W.P.(c) No.12299 of 2012, which was heard and allowed, along with the present writ petition. So, there is no reason to take a different view that the appellants were willfully evading from the penalty proceedings and assessment proceedings in the present writ petition. Further contended that an opportunity of being heard as provided under Sections 45A of 17(3) of the KGST Act was not provided to the appellants before passing the impugned orders. Notice was also not served in compliance with Section 55B of the KGST Act, it is submitted.

7. Per contra, the learned Government Pleader advanced arguments to justify the completion of penalty proceedings and assessment proceedings without adjourning the proceedings, after rejecting the request for extension. According to the learned Government Pleader, before passing the impugned orders, an opportunity of being heard as provided under Sections 45A and 17(3) of the KGST Act was given to the appellants and notices were served in compliance with Section 55B of the KGST Act. Therefore, after considering the sequences of proceedings

from the very beginning, the learned single Judge rightly dismissed the writ petitions, it is submitted.

8. The questions to be considered are, (i) whether a reasonable opportunity of being heard was given to the appellants before passing the impugned orders and (ii) whether the appellants have willfully evaded from the procedure of completing the penalty proceedings and assessment proceedings.

9. According to Section 45A(2) of the KGST Act no order under sub-section (1) shall be passed, unless the person on whom the penalty is proposed to be imposed is given an opportunity of being heard in the matter. Coming to the instant case, in Ext.P4, it is stated that, by notice dated 14/12/2009, the appellants were asked to appear before the Intelligence Officer with whatever evidence in their hands. In reply, the 1st appellant had sought for extension of time till 30/1/2010 to produce F Form to prove their claim of stock transfer and considering that request, time extended upto 15/1/2010. In response to this notice granting time, the 1st appellant sent a reply dated 14/1/2010, seeking further extension of time to produce

evidence till 31/3/2010. Later, another notice was issued to the 1st respondent to produce their books of accounts and evidence and that notice was served on the 1st appellant on 10/1/2011. Here it is the case of the appellants that they were away at Chennai during the period from 21/12/2010 to 11/1/2011 and similarly from 25/1/2011 to 15/2/2011. When there is a specific contention in Ext.P4 order that the last notice was served on 10/1/2011, the said contention was not specifically disputed in the writ petition; nor did they produce any evidence to show that the said notice was not served to the appellants. In the absence of specific challenge against service of notice on 10/1/2011, we are unable to accept the contention that an opportunity of being heard was given to the appellants before passing Ext.P4 order. In this analysis, the learned single Judge is justified in not interfering with Ext.P4 order, invoking jurisdiction under Article 226 of the Constitution of India. There is no reason to take a different view as regards Ext.P4 in this writ appeal.

10. Coming to Exts.P5 and P6 assessment orders, it is the specific case of the appellants that they were at

Chennai during the period from 21/12/2010 to 11/1/2011 and similarly from 25/1/2011 to 15/2/2011 and that contention was accepted in W.P.(c) No.12299 of 2012 which was filed by the appellants challenging the penalty proceedings against their sister concern and heard along with the present writ petition. According to the appellants, since their residence was found closed, the postal authorities stuck the intimation after noting the endorsement 'addressee left' and thereafter returned the notice as unclaimed. The observation in Ext.P5 reads as follows:

"The notice under Section 17(3) of the Act containing the above proposal was sent by registered post to the Company address as well as directors residential address. The postal authorities returned the covers containing the proposal noting the 'unclaimed' also with endorsement "കത്തു വന്ന വിവരം അറിയിച്ചിട്ടും കത്ത് കൈപ്പറ്റാത്തതുകൊണ്ടു തിരിച്ചയക്കുന്നു" Therefore the notice is treated as served.

In the above state of affairs it is evidently clear that the dealer have no

book of accounts of his business transaction to produce before the assessing authority. Hence they are deliberately evade from the procedure of completing the assessment for 1999-2000. In the circumstances, I have no other go but to proceed with the assessment and hence the final assessment of the dealer for 1999-2000 under KGST Act 1963 is completed as under."

Similar observation in Ext.P6 order in respect of the assessment year 2000-2001 reads as follows:

"The notice U/S 17(3) of the KGST Act 1963 dt. 1.2.2011 containing the above proposal inviting objection if any, was sent to the dealer as well as to the residential address of the directors. 1. Sri. M.A.K. Azad (Managing Director) 2. Smt. Farida Haji Vaheed (Director) by registered speed post. According to the notice dealer was afforded a personal hearing also on 3.3.2011 in the matter. The cover containing the notice addressed to the Company address was returned by the postal authorities noting endorsement "Left".

But the cover containing the notice address of both the directors are also

returned by the postal authorities with endorsement.

"Intimation stuck on 23.2.2011, 24.2.2011 and 25.2.2011, unclaimed"

Though the postal authorities have served intimation the consecutive days the dealer had not turned up to accept the letter. From the above fact is evidently clear that the dealer is willfully evading from the procedure of completing the final assessment for the year 2000-01. Therefore the notice is treated as served. But the dealer had neither filed any reply nor availed the opportunity of hearing. In the circumstances, the final assessment in respect of the dealer for the year 2000-01 is completed as under as proposed in the notice dtd. 1.2.2011."

What is discernible from the above endorsement is that their residence was found closed, when the postal authorities had attempted to serve the notice. It is further evidenced by the intimations repeatedly stuck on 23/2/2011, 24/2/2011 and 25/2/2011. It could reasonably be presumed that nobody was found in their residence on all those days. Therefore, it cannot be held that, in spite of the receipt of the intimation, they willfully kept off from

receiving the notice from the post office. The notice could not be received, unless they get the intimation. In this context, it is pertinent to note that in response to the earlier notice, they responded and sought for time. It is also to be borne in mind that the company was defunct from 2002 onwards. In the above view of the matter, there is no reason to take a different view that they were willfully evading from service of notice or the completion of assessment proceedings thereunder.

11. In this context, the decision of this Court in *Sherene Eugene v. Additional Sales Tax Officer* [1996 (1) KLT SN Case No.11 at page 8] is applicable to the instant case which reads as follows:

“Bare reading of S.55B would show that such notice has to be served if sent by registered post at the last known place of residence or business. It is obvious that it is not received by the addressee as a result of the endorsement “left”. Even the provisions of rule 63 are more than clear, specifically referring to rule 63 (d) requiring that in the event of none

of the modes specified there is found to be practical. then it has to be affixed on some conspicuous part of the last known place of residence or business or by the publication in a newspaper. The position is elementary and not different from the normal procedure of service even contemplated under the Code of Civil Procedure.”

12. Being an assessee, who had responded to the earlier notice and sought for time, when the notice was returned unclaimed with an endorsement 'addressee left', the 2nd respondent should have made a further attempt to serve notice to make sure that a reasonable opportunity of being heard was given to the appellants before passing the impugned order.

13. The service of notice is neither an empty formality; nor a perfunctory act to make it appear that notice was attempted to be served. 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 used to evade 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 it 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.

14. At the same time, we are unable to close our eyes towards some sort of negligence from the part of the appellants 1 and 2 also, in causing the delay, in disposing the matter, despite the long lapse of one decade. Had they made arrangements by giving authorisation to any one else

to receive the letters addressed to them, when they went to Chennai, in connection with the surgery of the 1st respondent's brother, they would have got an opportunity to raise their objection in time 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 give an opportunity of being heard again to the appellants; but the appellants have to pay cost for the loss caused to the State exchequer.

15. To sum up, we are not satisfied with the service of notice to the appellants before passing Exts.P5 and P6 orders. We find that the pre-assessment notices which culminated in Exts.P5 and P6 orders have not been served, in compliance with Section 55B of the KGST Act. We further find that a reasonable opportunity of being heard was not given to the appellants before passing the above said orders. In the above view, the impugned judgment is set aside.

16. Consequently, Exts.P5 and P6 and P1 to P3(a) to the extent of the amount covered under Exts.P5 and P6

will stand quashed and the matter would stand remitted back to the 1st and 2nd respondents respectively for fresh consideration on payment of the 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 1 and 2 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 pay cost within the stipulated time, 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)

Nan/

//true copy//

P.S. to Judge