HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

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WRIT PETITION No.20743 OF 2015

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ORDER: (*Per* Hon'ble Sri Justice M. Satyanarayana Murthy)

This writ petition, under Article 226 of the Constitution of India, is filed by the petitioner-assessee to issue a direction declaring that the dismissal of order dated 04.04.2015, passed by the 3rd respondent *vide* proceedings in CCT's Ref.No.LIII(2)/30/2015 in JC Order No.75 of 2015 as arbitrary, illegal, unjust and in violation of the procedure laid down under the Andhra Pradesh General Sales Tax Act, 1957 (for short, 'the APGST Act').

The petitioner is a partnership firm carrying on the business of manufacturing cement having its unit at Bibinagar mandal in Nalgonda district. In pursuance of introduction of a New Comprehensive Scheme of State Incentives Scheme, 1992 (NCSSI, 1992) *vide* G.O.Ms. No.117, Inds. & Com. (IFR) Department dated 17.03.1993, the petitioner applied for tax exemption and, accordingly, the Commissioner of Industries, Hyderabad *vide* his proceedings in File No.10/3/5/2692 dated 22.12.1995 fixed up the eligibility for Sales Tax exemption for a period of 5 years *i.e.,* from 10.08.1995 to 09.08.2000 for Rs.30,03,920/- and the petitioner duly complied the conditions to avail the tax incentives, as per the certificate issued by the Commissioner of Industries.

While the matter stood thus, the 4th respondent passed an assessment order dated 24.02.2000 in Assessment No.2154/96-97(APGST) fixing tax liability at Rs.10,30,948/- for the year 1996-97 without serving the original assessment order on the petitioner; while passing the said assessment order, the 4th respondent did not follow the procedure laid down under the APGST Act; therefore, the impugned order is illegal and arbitrary. As the 4th respondent did not consider the exemption certificate issued by the Commissioner of Industries and the order was not served on petitioner by the 4th respondent, the petitioner only came to know about passing of the order on receipt of demand notice dated 20.02.2001 on 15.03.2001, the petitioner preferred an Appeal before the Appellate Authority *i.e.,* Appellate Deputy Commissioner (CT), Rural Division, Hyderabad (for short, 'ADC, Hyderabad') but without serving any notice, the ADC, Hyderabad rejected the Appeal and the order in Appeal was also not served on the petitioner.

As the matter stood thus, the petitioner was served with a Statutory Notice dated 13.01.2015, in DMU.Regd.No.1120106008, demanding an amount of Rs.11,72,717/- towards arrears of Sales Tax due from him for the assessment years 1996-97 and 1999-00. As the said notice was issued after a lapse of more than 2 decades, the demand is hopelessly barred by limitation; there was no reference in the said notice about rejection of the Appeal but keeping the petitioner totally in dark and ignoring the exemption granted by Commissioner of Industries, passed the impugned order arbitrarily.

The petitioner came to know about rejection of the Appeal *vide* order dated 06.01.2004 only on receipt of statutory notice. Thus, the procedure followed by 3rd respondent and ADC, Hyderabad is totally contrary to the provisions of APGST Act and Rules framed thereunder.

Immediately, the petitioner filed an Appeal before the Telangana Value Added Tax Appellate Tribunal, Hyderabad (for short, 'the Tribunal') and during pendency of said Appeal before the Tribunal, against rejection of stay by the ADC, Hyderabad filed Revision before the 3rd respondent, who declined to pass an order for stay of recovery of tax assigning different grounds. Thus, the 3rd respondent passed an order dismissing the Revision declining to grant stay of recovery of tax, demanded in statutory notice.

It is specifically contended that the 3rd respondent did not follow the procedure prescribed under Rule 58 of Rules framed under the APGST Rules for serving notice and orders passed by them and, therefore, failure to file a Revision within time before the ADC, Hyderabad and Revision against the order passed by the ADC, Hyderabad before the 3rd respondent and Appeal before the Tribunal is not wilful as the order was passed by the authorities under the Act keeping the petitioner totally in dark and without complying Rule 58 of the APGST Rules framed under the Act, the 3rd respondent would not have dismissed the Revision but the 3rd respondent without appreciating various contentions raised before him, dismissed the Revision erroneously and therefore prayed to declare the proceedings as illegal and arbitrary.

Learned counsel for the writ petitioner mainly contended that since the 3rd respondent and ADC, Hyderabad passed orders without following necessary procedure prescribed under Rule 58 of the APGST Rules, the said orders are illegal and arbitrary; apart from that, the 3rd respondent also did not consider the background of the case and erroneously dismissed the same, drawn the attention of this Court to a decisions of this Court in ***Sri Balaji Food, Kakinada Vs. The State Level Committee, Government of Andhra Pradesh and others***, ***Madras Cements Limited Vs. Commercial Tax Officer and another*** and ***Srikanth Trading Company Vs. State of Andhra Pradesh*** to contend that the order passed by the authorities *i.e.,* 3rd respondent and ADC, Hyderabad without issuing notice is arbitrary and illegal and prayed to grant the aforesaid reliefs.

The petitioner is an assessee on the rolls of 4th respondent; though he obtained exemption from payment of tax in view of the eligibility certificate allegedly issued by the Commissioner of Industries, Hyderabad dated 22.12.1995, he is under obligation to file sales tax returns for every assessment year but as per the orders passed by the 4th respondent dated 24.02.2000, the petitioner did not file returns but submitted only monthly turnover returns in Form-A2 (from 4/96 to 11/96 and 12/96 to 3/97); A2s not filed disclosing the gross turnovers, exempted turnover and net turnover.

A notice in Form-IX was issued to the petitioner on 23.05.1998 and 02.09.1998 asking to submit the books of accounts to finalize the assessment for the year 1996-97 under the APGST Act but the petitioner did not submit books of accounts; thereupon, having no other alternative, the 4th respondent passed the best judgment assessment based on the available information assessing the petitioner to tax of Rs.10,30,948/- for the said period; copy was marked to M/s. Anand Cements, Kondamadugu and to the Deputy Commissioner (CT), Nalgonda Division.

As seen from the assessment order passed by the 4th respondent, the petitioner did not respond to the demand made by the 4th respondent and did not submit the books of accounts; though copy of the assessment order was marked to the petitioner, the petitioner neither complied the demand notice nor filed any Appeal within the time stipulated; however, filed Appeal in Form-I under Section 19 of the APGST Act before the ADC, Hyderabad on 29.05.2001 raising several contentions, the said Appeal was rejected as the petitioner did not comply the objections even after issuing check memos dated 02.06.2001, 04.04.2003 and final notice dated 27.10.2003.

The petitioner's contention from the beginning is that the notices, as required under Rule 58 of the APGST Rules, were not issued either by 4th respondent or by the ADC, Hyderabad; therefore, rejection of the Appeal and passing of best judgment assessment by the authorities concerned is illegal; the orders passed by the 4th respondent and ADC, Hyderabad are the subject matters in the Appeal pending before the Tribunal. Therefore, the legality and validity of the orders passed by the 4th respondent and ADC, Hyderabad need not be gone into by this Court while deciding the present writ petition.

Rule 58 of the APGST Rules deals with service on a dealer of any notice, summons, order or proceedings under the Act or under these rules and a specific procedure for service of notices *etc.,* is contemplated under Rule 58, which reads as follows:

> "(a) by giving or tendering it to such dealer or his manager or agent; or
>
> (b) if such dealer or his manager or agent is not found, by leaving it at his last known place of business or residence or by giving or tendering it to some adult member of his family; or
>
> (c) if the address of such dealer is known to the assessing or licensing authority, by sending it to him by registered post; or
>
> (d) if any or all of the modes aforesaid is not practicable, by affixing it in some conspicuous place at his known place of business or residence."

Taking advantage of various modes of service of notices, summons, order of proceedings, Sri K. Lakshman, learned counsel for the petitioner, contended that due to non-service of notices, check memos and orders passed by the 4th respondent and ADC, Hyderabad the petitioner could not pursue the proceedings.

No doubt, a specific procedure is contemplated under Rule 58 of the APGST Rules for serving of notices, summons, orders *etc.,* on dealer but Rule 33(1) of APGST Rules prescribed the procedure for filing Appeals; according to it, if for any reason, subject to provisions of Section 19 of the APGST Act, any person aggrieved by an order passed or proceeding recorded under the provisions of the Act by any officer not above the rank of an Assistant Commissioner may appeal to the Appellate Deputy Commissioner of the area concerned and such Appeal shall be in Form-I and verified in the manner specified in the rules; it shall be in duplicate and shall accompany a treasury receipt in support of having paid; every such appeal shall accompany a declaration in Form-I(A) stating that the tax admitted to be due, or of such instalments as have been granted, have been paid for the relevant assessment year, in respect of which the Appeal is preferred along with the proof of such payments.

In case where the levy of tax, surcharge or penalty is disputed, a fee calculated at the rate of two percent of the disputed tax or penalty subject to a minimum of Rs.50/- and a maximum of Rs.1,000/- and in all other cases a fee of Rs.50/-. It further says that the Appeal may be sent to the appellate authority by registered post or be presented to that authority or to such officer as the appellate authority may appoint in this behalf by the appellant or by his authorized agent or a legal practitioner. The appellate authority shall, after giving the appellant a reasonable opportunity of being heard, pass orders as laid down in sub-section (3) of Section 19.

Here, the only grievance of the petitioner in rejection of Appeal by the ADC, Hyderabad on the ground that the original order served on the petitioner was not annexed to the grounds of Appeal is illegal; legality of the rejection of the Appeal by the ADC, Hyderabad cannot be gone into in the present writ petition as it is only questioning the order passed by the 3rd respondent rejecting stay during pendency of the Appeal.

The 3rd respondent passed the impugned order on 04.04.2015 on the ground that the petitioner did not seek stay of collection of tax before the ADC, Hyderabad, he did not reject the stay and that too the order was challenged after a long lapse of time and declined to grant stay of collection of tax during pendency of the Appeal before the Tribunal.

The relevant provision dealing with stay of collection and Revision is Section 19 (2-A) and (2-B) of the APGST Act. Section 19 deals with Appeals; Section 19(2-A) deals with grant of stay of collection of tax under dispute, pending disposal of the Appeal; according to it, the appellate authority may, on an application filed by the appellant order stay of collection of the tax subject to furnishing of such security or on payment of such part of the disputed tax within such time as may be specified. Thus, power to grant stay of collection was conferred on the Appellate Deputy Commissioner only on an application filed by the appellant. In the present dispute, the petitioner filed an Appeal in Form-I on 29th May, 2001 before the Appellate Deputy Commissioner (CT), Rural Division, Hyderabad.

In the grounds of Appeal filed along with petition, the petitioner prayed the Appellate Deputy Commissioner to pass an order relieving the manufacturing firm from the liability of sales tax as demanded by the Commercial Tax Officer, Bhongir in his notice dated 28.02.2001 and pass such other order or orders.

No interim relief was claimed for stay of collection of disputed tax before the ADC, Hyderabad or no separate application was filed for stay of collection of disputed tax but the ADC, Hyderabad rejected the Appeal itself for non-compliance of the objections. When no stay was claimed before the ADC, Hyderabad by the petitioner under Section 19(2-A) of the APGST Act either in the Appeal itself or by filing a separate application, the question of challenging the order passed by the Appellate Deputy Commissioner before the 3rd respondent does not arise.

Section 19(2-B) of the APGST Act provides a Revision against an order passed by the appellate authority refusing to order stay under sub-section 2-A and on such Revision, the 3rd respondent may pass an order of stay of collection of disputed tax but in the present case, no order was passed under Rule 19(2-A) and in fact, no stay application, as contemplated under 19(2-A), was filed for grant of stay of collection of tax. Therefore, question of challenging the same under Section 19(2-B) before the 3rd respondent does not arise. Since no order was passed by the Appellate Deputy Commissioner under Section 19(2-A) of the APGST Act, no Revision lies; consequently, the 3rd respondent declined to grant stay of collection of disputed tax by exercising power under 19(2-B) of the APGST Act, such order cannot be found fault.

Even a perusal of entire record, it discloses that the petitioner though filed an Appeal before the ADC, Hyderabad did not seek stay of collection of tax either in the Appeal or by filing a separate application as required under Section 19(2-A) of the APGST Act and, in such case, question of passing an order by the ADC for stay of collection of tax does not arise and, when no such order was passed under Section 19(2-A), no Revision lies under 19(2-B); therefore, the order passed by the 3rd respondent rejecting stay of collection of tax during pendency of the Appeal before the Tribunal is in accordance with law and we find no reason warranting interference with the order passed by the 3rd respondent under challenge.

As seen from the conduct of the petitioner, from the beginning, the petitioner though submitted monthly turnover returns to the 4th respondent, he did not file sales-tax returns and not responded to the notices issued by the 4th respondent calling upon the petitioner to produce books of accounts for audit to fix the tax liability; thereupon, the 4th respondent having no other alternative, passed a best judgment assessment, marked a copy of the order to the petitioner. The petitioner slept for a considerable period but only on receiving demand notice from the 4th respondent, obtained a certified copy of the assessment order, filed Appeal before the Appellate Deputy Commissioner, Hyderabad with substantial delay without complying the procedure prescribed under Rule 33 of the Rules framed under the APGST Rules; thereupon, the Appellate Deputy Commissioner issued two check memos and a final notice calling upon the petitioner to comply the objections but the petitioner wantonly did not comply the objections taken by the office of the Appellate Deputy Commissioner to register the same as Appeal filed Form I-A. The said rejection order was marked to the petitioner but the petitioner slept over for a decade only on receipt of statutory notice dated 13.01.2015, filed an Appeal before the Tribunal and Revision before the 3rd respondent for stay of collection of tax during pendency of the Appeal. The conduct of the petitioner from the beginning is blameworthy since he did not respond to any of the notices from 1999 onwards.

Learned counsel for the petitioner while contending that on account of non-compliances of Rule 58, the petitioner within time could not prefer Appeal before the Appellate Deputy Commissioner and Revision before the 3rd respondent drawn attention of this Court to ***Sri Balaji Food***[1], wherein this Court held that an order affecting the rights of a citizen shall not be given effect to unless there is proof of its service. The rights of a citizen cannot be permitted to be taken away under a decision which remained un-communicated.

Similarly, in ***Srikanth Trading Company***[3], scope of Rule 58 of APGST Rules came up for consideration and this Court in Para 9 therein held that service of notice on persons as contemplated under Rule 58 is entirely different from appearance of the persons under Section 35 of the APGST Act. Merely because the chartered accountant is entitled to appear in the proceedings before the authorities under Section 35 of the APGST Act, it cannot be held that the chartered account is an agent for the purpose of receiving pre-assessment notice. Receiving of notice during the pendency of any proceedings where chartered account is appearing cannot be equated with receiving of pre-assessment notice for and on behalf of a dealer. In the facts of above decision, notice was issued on the auditor who appeared on behalf of assessee and this Court held that it is not sufficient service.

Similarly, in ***Madras Cements***[2], this Court held that Rule 58 prescribes that any service of notice, summons, order or proceedings under the Act or under the Rules may be effected by giving or tendering it to such dealer or his manager or agent; or when such dealer or his manager or agent is not found by leaving it at his last known place of business or residence or by giving or tendering it to adult member of his family; or if the address of such dealer is known to the assessing authority, by sending it to him by registered post and if it is returned un-served, it shall be put on notice board of the office of the assessing authority or the notice board in the office of the local Chamber of Commerce or Traders Association, and it shall be deemed that the said notice or summons or proceedings are served on the dealer and action shall be taken in pursuance thereof accordingly. Finally, it is concluded therein that notice sent by ordinary post is not contemplated under Rule 58 and it is not appropriate service.

No doubt service of notice under Rule 58 is mandatory but when the Appeal is pending against the order passed by the Appellate Deputy Commissioner before the Tribunal, the validity of the orders passed by the 4^{th} respondent and Appellate Deputy Commissioner cannot be gone into at this stage and, at best, the law laid down by the Courts in the above decisions are helpful to the petitioner in the pending Appeal before Tribunal but not in the present case.

However, the power of review under Article 226 is purely discretionary and the court may exercise such power when the order passed by the statutory authority is in violation of any of the Rules or in violation of principles of natural justice. To claim such discretionary relief, the petitioner must approach the Court with clean hands; in the present case, the petitioner though allegedly obtained tax exemption subject to compliance of certain conditions in the certificate issued by the Commissioner of Industries slept over for more than 15 years and approached this Court leisurely; in which case the court cannot exercise its power of review.

In matters of taxation, it is inappropriate for this Court to interfere, in exercise of jurisdiction under Article 226 of the Constitution either at the stage of show-cause notice or at the stage of assessment where alternative remedy by way of filing a reply or appeal, as the case may be, is available. But these are the limitations imposed by the courts themselves in exercise of their jurisdiction and they are not matters of jurisdictional factors. If this Court preferred to entertain the writ petition where the authority lacked jurisdiction to issue the notice and decided the issue on merits, the Apex Court declined to interfere with such impugned order on the technical ground of non-interference at the stage of show-cause notice as held in ***Union of India Vs. Hindalco Industries*** and ***Trade Tax Officer, Saharanpur Vs. Royal Trading Company***. In the present case, no statutory violation is pointed by the petitioner except alleged non-compliance of Rule 58, which is the subject matter for decision by the Appellate Tribunal. Therefore, we find that no discretion can be exercised under Article 226 to declare that the orders passed by the 3rd respondent are illegal and arbitrary. The observations, if any, made hereinabove will have no bearing on the Appeal pending before the Tribunal and those observations are limited for deciding the present petition.

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In view of our foregoing discussion, the Writ Petition fails and is, accordingly, dismissed.

In consequence, miscellaneous petitions, if any, pending in this writ petition, shall stand dismissed. There shall be no order as to costs.

RAMESH RANGANATHAN, J

M. SATYANARAYANA MURTHY, J

Date: 26-11-2015.

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HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

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WRIT PETITION No.20743 OF 2015

(Order of the Division Bench delivered by

Hon'ble Sri Justice M. Satyanarayana Murthy)

Date. 26-11-2015

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