THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN
And
THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

WRIT PETITION No.41273 of 2015

ORDER: (per Hon'ble Sri Justice Ramesh Ranganathan)

The action of the third respondent, in issuing a provisional attachment notice dated 08.12.2015 to the petitioner, and to third parties who had withheld the amounts due to the petitioner, pending finalization of the assessment proceedings, is questioned in this Writ Petition as being arbitrary, illegal and without jurisdiction.

The petitioner, a proprietary concern carrying on business in the purchase and sale of food grains and rice, is a registered dealer, under the Andhra Pradesh Value Added Tax Act, 2005 (for brevity, 'the Act') and under the Central Sales Tax Act, 1956, on the rolls of the Commercial Tax Officer, Governorpet Circle, Vijayawada. The petitioner claims to have purchased rice and food grains from registered VAT dealers in the State of Andhra Pradesh.

After the books of accounts of the petitioner were audited by the third respondent on 19.11.2015, for the tax period 2012 to October, 2015, a show cause notice in Form-VAT 305A dated 01.12.2015 was issued proposing to disallow input tax credit of Rs.1,97,82,956/-. It is at that stage that the petitioner invoked the jurisdiction of this Court. A counter-affidavit, and an additional counter-affidavit, has been filed by the respondents wherein serious allegations of fraud are leveled against the petitioner of their having claimed input tax credit on fictitious tax invoices not supported by genuine transactions. It is wholly unnecessary for us to examine these aspects as, subsequent to the filing of the Writ Petition, the respondents have issued a revised show cause notice to which the petitioner has yet to submit a reply; and the assessment proceedings are still pending.

The only question which necessitates examination in this Writ Petition is whether exercise of power by the assessing authority, in passing an order of provisional attachment and in issuing a garnishee notice to the bank, is valid or not. The Commercial Tax Officer issued notice dated 08.12.2015 to M/s Chaitanya Group of Institutions informing them that the Commissioner of Commercial Taxes had permitted him to provisionally attach the bank/third party accounts of the petitioner in terms of Section 27 (2) (a) of the Act. A notice of demand, for payment of the amounts outstanding of VAT dealer from third party, in Form-VAT 206 was enclosed to the said notice. The Commercial Tax Officer requested M/s Chaitanya Group of Institutions to make payment of the amounts due to the petitioner and withheld by them, to the department. A similar letter was addressed to M/s Narayana Group of Institutions also. The Commercial Tax Officer also issued a provisional demand dated 08.12.2015, for payment of the outstanding amounts, to respondents 4 to 6 and 8-banks informing them that, in accordance with Section 29 of the Act and Section 27 (2) thereof, they should make payment of the outstanding amount to the department after deducting these amounts from the petitioner's account with these banks.

Section 29 of the Act relates to recovery of tax from third parties and, under sub-section (1) thereof, the Commissioner, or any other authority prescribed, may at any time or from time to time, by notice in writing, require any person from whom money is due, or may become due, to the defaulter or any person who holds, or may subsequently hold, money for or on account of the defaulter to pay to such authority, either forthwith if the money becomes due or is so held, within the time specified in the notice, but not before the money becomes due or is held, so much of the money as is sufficient to pay the amount due by the defaulter in respect of arrears of tax, interest, penalty or the whole of the money when it is equal to or less than that amount. Under the proviso thereto, in case of the banks, the amount due to the defaulting dealer includes the amounts payable to the dealers by virtue of the overdraft facility.

The power conferred under Section 29 of the Act is for recovery of arrears of tax, interest and penalty from a defaulter. As the assessment proceedings are yet to be completed, the petitioner cannot be said to be in arrears of tax, interest and penalty, as their tax liability is yet to be determined. Till an assessment order is passed, determining their tax liability, the petitioner cannot also be held to be a defaulter. Section 29 of the Act is, therefore, not attracted.

Section 27(2) stipulates that where, during the pendency of any proceeding for the assessment, or reassessment of any tax, or turnover tax which has escaped assessment, the authority prescribed is of the opinion that, for the purpose of protecting the interests of the revenue, it is necessary so to do, he may, with the previous approval of the Commissioner and by order in writing, attach provisionally, in the prescribed manner, any property belonging to the dealer. In terms of Section 27 (2) (a), power is conferred on the competent authority, even during the pendency of assessment proceedings, to attach provisionally any property belonging to the dealer subject to the following conditions (1) on arriving at the opinion that such provisional attachment is necessary for the purpose of protecting the interest of revenue; and (2) with the previous approval of the Commissioner.

While it cannot be said with certainty that the amount still lying with M/s Narayana Group of Institutions and M/s Chaitanya Group of Institutions would not fall within the ambit of Section 27 (2) (a) of the Act, it does appear that, on a cheque being issued by them in the petitioner's favour, it may fall within the ambit of the word "property" as used in Section 27 (2) (a) of the Act. While Sri M.V.J.K.Kumar, learned counsel for the petitioner, would submit that Section 27 (2) (a) of the Act relates only to immovable property, the fact that the legislature has used the words "any property" in Section 27 (2) (a), and not immovable property, is significant. It is, however, unnecessary for us to delve on this aspect any further as the petitioner has filed an affidavit of undertaking dated 17.02.2016 stating that the amount due from the ninth respondent, by way of an account payee cheque, would be deposited with the fifth respondent i.e. Axis Bank Limited, M.P.Das Street, Crombay Road, Vijayawada; and the petitioner undertakes not to withdraw the said amount, that would be paid by way of account payee cheque and deposited in the fifth respondent-bank, till a final assessment order is passed by the third respondent.

Sri S.Suri Babu, learned Senior Standing Counsel for Commercial Taxes, expresses apprehension that acceptance of such an undertaking may well result in the petitioner withdrawing the entire amount from the bank on the date on which an assessment order is passed leaving the department high and dry, and preventing them from recovering the tax, if any, due from the petitioner.

Sri M.V.J.K.Kumar, learned counsel for the petitioner, would submit that the petitioner is present in Court and he has been instructed, by the petitioner, to state that, for a period of one week after the assessment order is communicated to the petitioner, Axis Bank Limited may be directed not to release money to the petitioner; and, in the interregnum, it would be open to either party to take necessary action in accordance with law. Sri S.Suribabu, learned Special Standing Counsel for Commercial Taxes, concurs to such an order being passed.

Ends of justice would be met if the Writ Petition is disposed of permitting the ninth respondent to pay the amounts, if any due from them, to the petitioner only by way of an account payee cheque under communication to the Commercial Tax Officer. The petitioner shall deposit the account payee cheque, in terms of the affidavit of undertaking furnished by them to this Court, with the fifth respondent-bank. The fifth respondent-bank shall retain the said amount, and shall not pay it either to the petitioner or to the Commercial Tax Department till expiry of a period of one week from the date on which the assessment order is communicated to the petitioner. It is open both to the petitioner and to the Commercial Tax Officer to inform the fifth respondent-bank that an assessment order has been passed. As retention of the amounts in the petitioner's account, by the fifty respondent-bank, would not benefit either of the parties, it is just and proper that an assessment order be passed at the earliest, more so as a part of the assessment period is likely to be barred by limitation in the next few months. We consider it appropriate, therefore, to direct the Commercial Tax Officer to pass an assessment order, after giving the petitioner an opportunity of being heard and a personal hearing, at the earliest and, in any event, before 30.04.2016. The Commercial Tax Officer shall communicate the assessment order immediately after it is passed to the petitioner, and inform the fifth respondent-bank accordingly. The impugned garnishee notice is set aside.

The Writ Petition stands disposed of accordingly. Miscellaneous Petitions pending, if any, shall also stand disposed of. There shall be no order as to costs.

RAMESH RANGANATHAN, J

M.SATYANARAYANA MURTHY, J

18th February, 2016.
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