HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

W.P.No.36536 of 2016

ORDER:

Heard the learned counsel for the petitioner and the learned Government Pleader for Commercial Taxes appearing for the respondents.

2. This Writ Petition is filed by the petitioner to set aside the charge memo issued to him by the 2nd respondent vide proceedings in CCT Ref. No.V2/139/2016 dt.11-07-2016.

3. The petitioner is employed as Deputy Commercial Officer, Karimnagar Circle-II under the control of the respondents.

4. While working as Deputy Commercial Tax Officer-III at Karimnagar, he passed order on 27-11-2015 and concluded assessments for profession tax and penalty from M/s.Manikanta Traders, Karimnagar (for short 'the assessee') for ten consecutive years from 2005-06 to 2015-16

5. Contending that this assessment order was passed by the petitioner without considering the objections filed by it, the assessee filed W.P.No.5475 of 2016 before this Court. It also contended that the action of the petitioner was contrary to the provisions of the AP Tax and Professions, Trades, Callings and Employments Act, 1987 (for brevity 'the Profession Tax Act'). The assessee had preferred appeal before the Appellate Deputy Commissioner and the assessee

contended in the High Court, that pending disposal of the appeal, stay of collection of the disputed tax and penalty be granted.

6. This Court by order dt.02-03-2016 held that under Section 8 (2) of the Profession Tax Act, there is limitation of four years, from the expiry of the year to which the assessment relates, to make assessment and *prima facie* the profession tax levied for the first six years of the ten year period of 2005-06 to 2015-16, appeared to be barred by limitation. It is also held that the power to impose penalty under Section 12 of the Act, 1987 can be exercised only after assessing authority gives the assessee a reasonable opportunity to make representation, and no such opportunity had been afforded to the assessee before the petitioner passed the impugned order dt.27-11-2015 levying both profession tax and penalty. It held that the profession tax which the petitioner could have collected from the assessee for the four year period within limitation is only Rs.10,000/- and the interest component also for this period would be approximately only Rs.5000/-. It therefore granted stay of collection of disputed tax by the petitioner on condition that the assessee deposits Rs.15000/- within four weeks from the date of its order after giving credit to any amount already paid to the assessee. It directed Appellate Deputy Commissioner to examine the assessee's appeal on its own merit and in accordance with law.

7. After the Writ Petition was decided, the Deputy Commissioner issued memo A1/39/201523-02-2016 dt.23.2.2016

directing to submit his explanation why he did not follow the provisions of the Act while passing the assessment order dt.27-11-2015 against the assessee for the period in question.

8. The petitioner gave an explanation dt.29-02-2016 denying the contents of the memo and stating that as per sub Section (2) of Sections 8 and 9 of the Act, 1987, he has passed the assessment order in respect of the assessee for the four years treating it as current year and for remaining six years treating them as arrears.

9. After the said explanation was received, it was considered by 2nd respondent and the impugned show cause notice was issued making the following two allegations:

> *"Article of Charge I:*
>
> *That Sri A.Venkata Swamy DCTO-III, Karimnagar, while working as Dy. Commercial Tax Officer, Karimnagar, passed assessment orders under Profession Tax Act for 10 consecutive years from 2005-06 to 2015-16 without following due process of law as specified in the Act and without considering the objections raised by the dealer in his two reply notices dt.16-07-2015 and 01-09-2015, Sri A.Venkata Swamy, DCTO has shown gross negligence to his duties.*
>
> *Article of Charge II:*
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> *That while passing the assessment, the assessing authority i.e. Sri A.Venkata Swamy, DCTO has not followed the provisions of the Act & Rules and passed the assessment orders under Professional Tax Act for the past 10 years contrary to the provision of Professional Tax Act.*

> *Thus, Sri A.Venkata Swamy DCTO-III, Karimnagar, by his above mentioned acts, exhibited lack of integrity, devotion to duty, conduct unbecoming of a Government Servant and thereby contravened Rule (3) (1) & (2) of APCS (Conduct) Rules 1964."*

10. The petitioner contended that the very issuance of the impugned charge memo by the 2nd respondent is arbitrary and amounts to malice in law; and even if the charges framed were to be accepted, they do not satisfy Section 3 of the A.P. (Conduct) Rules,1964. He contended that petitioner is protected under Section 70 of the AP VAT Act,2005 for all actions done by him in good faith. He further contended that the charge memo was issued only with an intention to deprive him from further promotions and that the respondents had promoted certain employees who are juniors to the petitioner to a higher post ignoring him. Counsel for petitioner reiterated the said contentions and placed reliance on the decision of the Supreme Court in **Zunjarrao Bhikaji Nagarkar Vs. Unioin of India and others[1].**

11. The learned Government Pleader for Services appearing for the respondents refuted the above contentions and pointed out that having regard to the order dt.02-03-2016 passed in W.P.No.5475 of 2016 filed by the assessee against the Commercial Tax Department, *prima facie* the petitioner was reckless and negligent, and the petitioner cannot contend that this conduct in passing the assessment

[1] AIR 1999 S.C. 2881=(1999) 7 S.C.C. 409

order is *bona fide* for which disciplinary proceedings cannot be initiated against him.

12. I have noted the contentions of both sides.

13. A reading of the charges framed against the petitioner shows that the basis of the said charges is the assessment order dt.27-11-2015 passed by him against the assessee for a period of ten years 2005-06 to 2015-16 under the Profession Tax Act imposing Tax and penalty for a 10 year period from 2005-06 to 2015-16.

14. As stated above, this order was challenged in W.P.No.5475 of 2016 and a Division Bench of this Court granted stay of collection of disputed tax and penalty assessed by the petitioner on the assessee on condition that the assessee deposits Rs.15,000/- within four weeks after giving credit to the amount paid by the assessee pending disposal of the appeal filed by the assessee before the Appellate Deputy Commissioner questioning the said assessment order. The Division Bench found that the assessment order passed by the petitioner against the assessee was *prima facie* barred by limitation for six of those ten years and that before levying penalty on the assessee, the petitioner was bound to give a reasonable opportunity to the assessee for making his representation as mandated under Section 12 of the Act, but the petitioner did not give any such opportunity and levied both professional tax and penalty on the assessee.

15. Therefore the charges were framed against the petitioner by 2nd respondent that the assessment order was passed by the petitioner against the assessee without following due process of law, without considering the objections raised by the dealer in his two reply notices dt.16-07-2015 and 01-09-2015 and with gross negligence; and that while passing the assessment order for the 10 year period, the petitioner had not followed the provisions of the Act and this indicates lack of integrity, devotion to duty and is conduct unbecoming of a Government servant contravening Rule 3 (1) and 2 of the AP Civil Services (Conduct) Rules, 1964.

16. Learned counsel for the petitioner contended that on the basis of the charges, no enquiry can be conducted against the petitioner since the petitioner was discharging quasi judicial functions and unless there is culpable negligence on his part as held in the decision of the Supreme Court in **Zunjarrao Bhikaji Nagarkar** (1 supra) (which according to him is not there in the present case), the disciplinary proceedings cannot be initiated against the petitioner.

17. In **Zunjarrao Bhikaji Nagarkar** (1 supra), the charge sheeted officer therein had not levied penalty on an assessee under the Central Excise Act, 1944 even though he had given a finding that the assessee has clandestinely removed and cleared the excisable goods willfully and evaded excise duty and confiscation of the goods was also ordered. A charge memo was issued to the appellant before the Supreme Court alleging that he favoured the assessee by not imposing

penalty on it under Rule 173 of the Central Excise Rules 1944 when he passed the assessment order.

In that context, the Supreme Court held that when penalty is not levied, the assessee benefits, but it cannot be said that by not levying the penalty, the officer favoured the assessee or showed undue favour to him. It considered certain earlier decisions rendered by it including the decision in **Union of India Vs. K.K.Dhawan**[2] and held that mere negligence is the performance in the *quasi* judicial adjudication is not a ground to initiate disciplinary proceedings unless it is culpable negligence; and that carelessness, inadvertence, or omission cannot be held to be misconduct since they would come within the purview of mere error of judgment. It held that there should be some basis for the disciplinary authority to reach such a conclusion even *prima facie* and the record in that case did not show such basis. It held that mere wrong exercise of jurisdiction can be corrected in appeal, but it cannot always form basis for initiating disciplinary proceedings for an officer while he is acting as quasi judicial authority. It observed that initiation of disciplinary proceedings against an officer cannot take place on information which is vague or indefinite, that suspicion has no role to play in such a matter, and there must exist reasonable basis for the disciplinary authority to proceed against delinquent officer.

18. The learned counsel for the petitioner invited the Court to go into the provisions of the Profession Tax Act and contended that

[2] (1993) 2 S.C.C. 56

there is no basis for initiating disciplinary proceedings against the petitioner.

19. It is pertinent to note that the judgment cited by the learned counsel for the petitioner in **Zunjarrao Bhikaji Nagarkar** (1 supra) was rendered by a Two Judge Bench of the Supreme Court and the same was reconsidered by the Three Judge Bench of the Supreme Court in **Union of India and others Vs. Duli chand[3].**

20. In **Duli chand** (3 Supra) also, the question considered was whether disciplinary action could be taken against the respondent employee on the ground that the employee had been found to be grossly negligent while discharging quasi judicial functions. The respondent was punished in that case by the disciplinary authority on the ground that he had negligently allowed claims of refund to the assessee on 31 occasions by imposing punishment of stoppage of two annual increments with cumulative effect. This was challenged before the Central Administrative Tribunal on the ground that no disciplinary proceedings would lie against an officer discharging judicial or quasi judicial functions unless there was a moral turpitude. The Central Administrative Tribunal upheld the finding of gross negligence on the part of the respondent, but relying upon the judgment in **Zunjarrao Bhikaji Nagarkar** (1 supra), it opined that the disciplinary proceedings would not lie on the officer discharging quasi judicial

[3] (2006) 5 S.C.C. 680

functions unless it was established that the officer concerned had obtained an undue advantage thereby or in connection therewith.

This was questioned before the High Court and the High Court also held that since no ulterior motive was alleged against respondents, the Tribunal was correct in quashing the proceedings against the respondent.

The Union of India then appealed to the Supreme Court. The Supreme Court then referred to its Three Judge Bench decision in **K.K.Dhawan** (2 supra), wherein the Supreme Court had declared that the view that no disciplinary action could be initiated against an officer in respect of judicial or quasi judicial functions was wrong, and that an officer who exercises judicial or quasi judicial powers acting negligently or recklessly could be proceeded by way of disciplinary action. The Court in **K.K.Dhawan** (2 supra) listed out following six instances when such action could be taken:

> *"28. (i) where the officer had acted in a manner as would reflect on his reputation for integrity or good faith or devotion to duty;*
>
> *(ii) if there is prima facie material to show recklessness or misconduct in the discharge of his duty;*
>
> *(iii) if he has acted in a manner which is unbecoming of a government servant;*
>
> *(iv) if he had acted negligently or that he omitted the prescribed conditions which are essential for the exercise of the statutory powers;*

(v) if he had acted in order to unduly favour a party;

(vi) if he had been actuated by corrupt motive, however small the bribe may be because Lord Coke said long ago 'though the bribe may be small, yet the fault is great'."

21. In **Duli Chand** (3 supra), the Supreme Court considered **Zunjarrao Bhikaji Nagarkar** (1 supra) and declared that the view taken by the Two Judge Bench in **Zunjarrao Bhikaji Nagarkar** (1 supra) was contrary to the Three Judge Bench decision in **K.K.Dhawan** (2 supra) and that the decision in **Zunjarrao Bhikaji Nagarkar** (1 supra) does not correctly represent the law.

22. From the above decision of the Supreme Court **in Duli Chand** (3 supra), it is clear that even in circumstances where there is a recklessness *prima facie* in the discharge of a quasi judicial function, disciplinary action can be initiated against the officer exercising such quasi judicial power. It is not necessary that there should be an element of moral turpitude or culpability for initiating disciplinary action and it is sufficient if the officer had acted negligently or omitted the prescribed conditions which are essential for the exercise of statutory powers.

23. In this view of the matter, and in view of the *prima facie* observations made by this Court in W.P.No.5475 of 2016 wherein the order passed by the petitioner was under challenge, I do not see any

illegality or procedural impropriety in the action of the respondents initiating disciplinary proceedings against the petitioner.

24. I therefore do not find any merit in the Writ Petition and it is accordingly dismissed.

25. However, the respondents shall not be influenced by any observations made in this order in proceeding against the petitioner and it is made clear that these observations are only *prima facie* and for the purpose of deciding whether the issuance of charge memo to the petitioner is valid or not. No costs.

26. As a sequel, the miscellaneous petitions pending, if any, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 16-11-2016
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