



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 23.11.2020

Delivered on : 18.12.2020

CORAM

THE HONOURABLE MR.JUSTICE KRISHNAN RAMASAMY

W.P(MD).No.13776 of 2020

A.Maheshwaran

... Petitioner

Vs.

The District Manager,
Tamil Nadu State Marketing Corporation Limited
(TASMAC),
Sivagangai District

... Respondent

PRAYER: Writ Petition is filed under Article 226 of the Constitution of India, praying for issuance of a Writ of Certiorari calling for the records pertaining to the impugned order in Na.Ka.No.A1/434/2020, dated 14.09.2020 passed by the respondent and quash the same.

For Petitioner : Mr.R.V.Rajkumar

For Respondent : Mr.H.Arumugam

Standing counsel for TASMAC

O R D E R

This writ petition has been filed against the order passed by the respondent in Na.Ka.No.A1/434/2020, dated 14.09.2020, whereby the respondent has imposed penalty, interest and GST, for the remittance of the shortage amount as the same was found at the time of taking the inventory of stocks, subsequent to the transfer of the same from Shop to godown for the purpose of safe custody.

2. The petitioner is working as a Supervisor at TASMAC Shop No.7538, Sivagangai District. On 24.03.2020, the Government of India announced the lock down throughout the country with effect from 6.00 p.m., due to Novel Coronavirus spread. Due to the said lock down, the petitioner has received instructions from the Managing Director that he has to close the Shop at 6.00 p.m. In the normal course, the Shop is closed as per the closing time. The petitioner used to work for more than two hours to take the details of the stocks available and sale during the day and the sale amount for the day. The sale amount, in the normal course, shall be remitted on the next working day before 4.00 p.m.

3.The issue involved in the present case is that the respondent after issuing show cause notice and reply of the petitioner, without conducting the domestic enquiry, imposed the penalty, which is totally contrary to the investigation procedure laid down under Clause-6 of the Prevention and Detention of Fraudulent Acts in Tamil Nadu State Marketing Corporation Limited, 2014. Therefore, the impugned order is liable to be set aside.



4. Heard Mr.R.V.Rajkumar, learned counsel appearing for the petitioner; Mr.H.Arumugam, learned standing counsel appearing for the respondent and perused the materials available on record.

5.A similar issue was dealt with by this Court in W.P.(MD) No.10355 of 2020, dated 23.11.2020. Paragraph Nos.23 to 39 of the order passed thereon is extracted hereunder:

"23.The Government of India in an unprecedented move had issued the direction to lock down with effect from 6.00 p.m. on 24.03.2020 thereby to close all the establishments with the intention to restrict the free movements of the people, thereby to control the COVID-19 Virus spread. Subsequently, an intimation was sent by the District Managers to all the Supervisors and Salesmen of the respective TASMACH Shops through S.M.S., to shut down the shop by 6.00 p.m. Due to this announcement, there was a huge uncontrollable crowd from 4.00 p.m. on 24.03.2020, to buy the liquors from the Shop. Therefore, the petitioner has decided to close the day account up to 4.00 p.m. and the amount of sales occurred up to 4.00 p.m., was reported to District Managers by SMS and the same was deposited on 26.03.2020. However, due to lock down, the liquor sold between 4.00 p.m. and 6.00 p.m. on 26.03.2020 was not able to inform the District Managers as the petitioner was not able to close the stock registers of the day after 4.00 p.m., since there was uncontrollable huge rush to buy liquor upto 6.00 p.m. In the normal course, if the Shop is closed at 10.00 p.m. the day account will be closed thereafter on the same day. But in the present case, the petitioner was not allowed to sit and close the accounts inside the Shop after 6.00 p.m. Therefore, without any other option to close the day stock register, the petitioner was compelled to keep entire sale proceeds in the locker which is available in the shop and closed the Shop at 6.00 p.m. and due to the same, the petitioner was not able to inform the total sales made between 4.00 p.m. and 6.00 p.m. to the District Managers.

24.To avoid the theft and further damage to the stocks available in the shop, as per the instructions of the respondents, the entire stock was transferred to a godown/Marriage Hall. When the shop was allowed to open and transfer the stocks to the respective godowns/marriage hall, where the stock audit was conducted by the respondents and found that there was a shortage in the stocks. When the same was informed to the petitioner, he immediately made reply stating that the said amount is not a shortage but it was after sales amount made between 4.00 p.m. and 6.00 p.m. on 24.03.2020.

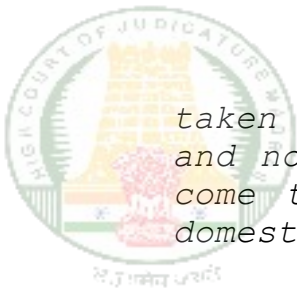


25. When the respondents opened the shop for the purpose of shifting the stocks and stock verification, the petitioner had an opportunity to enter into the shop and to verify the collections that have been made, out of the sales occurred in between 4.00 p.m. and 6.00 p.m. on 24.03.202 and to finalise the day accounts for the sales occurred between 4.00 p.m. to 6.00 p.m. on the day of lock down announcement. Subsequent to the finalisation of the day account, he immediately contacted the District Manager but he has not given any permission to deposit the after sales amount in the bank, therefore, it appears that there was a delay of one or two days to deposit the sale proceeds in to the bank account.

26. The respondents contention was that it was not after sale, but it was a shortage amount, that is the reason why the respondents have issued the demand notice, as per the demand notice, the petitioner had remitted the shortage amount with interest and GST. It was only the contention of the respondent, but the petitioner categorically denied the said contention of the respondent and the petitioner was very firm on the stand of after sales.

27. When the respondent issued a show cause notice to the petitioner, with regard to the imposition of penalty under Section 7(b) (xiv) of the Code, the petitioner sent a reply stating that only the respondents have construed it as shortage amount but it was only the after sales amount.

28. When such being the case, without conducting any domestic enquiry to find out the fact that whether the said amount was after sales amount or it was a shortage amount; whether the petitioner was really sent any intimation about the after sales amount to the respective District managers and whether there was any obstacles to the petitioner to deposit, the after sales amount. All these facts can be proved only by conducting a domestic enquiry and enquiring the concerned District Managers, Supervisors, Salesmen and those who did stock verification. Without conducting any such enquiry and giving the opportunity to the petitioner to explain his case, in a personal hearing, it is not proper for the respondents to arrive at a preconceived manner as if that the amount deposited subsequent to the stock taken by the respondents as shortage amount particularly when the petitioner took a stand that the amount already deposited subsequent to the stock verification is only an after sales occurred between 4.00 p.m. to 6.00 p.m. On 24.03.2020. When the petitioner has



taken definite stand that it was only an after sale amount and not a shortage amount, the respondents should not have come to the conclusion arbitrarily without conducting the domestic enquiry as shortage amount.

29. At this juncture, it is relevant to refer the investigation procedure laid down in Clause 6 of the Prevention and Detention of Fraudulent Acts in Tamil Nadu State Marketing Corporation Limited, 2014 (hereinafter called as Code), which reads as under:-

"6(a).....

(b).....

(c)

(d). If the charges are grave and if it is found that the continuance of the employee in service is injurious to the interest of fair investigation / disciplinary proceedings, he may be suspended pending enquiry. In such event, he shall be paid subsistence allowance as per rules.

(e). When the person does not admit the charges or the Management is not satisfied with the explanation offered by the person and the charges are sufficiently grave and serious to warrant a punishment other than censure, reprimand or warning, the Management shall conduct a domestic enquiry by any person of its choice.

(f).....

(g). At the enquiry, the charge sheeted person will be given the fullest opportunity to cross examine the witnesses, examined on behalf of the Management and also examine witnesses, if any, on his behalf. It shall be responsibility of the charged person to bring the witnesses he chooses to examine on his behalf to the enquiry.

(h).....

(i).....

(j).....

(k).....

(l). Upon the conclusion of the enquiry, the Enquiry Officer will submit to the Management a report containing his findings after a careful examination of the proceedings of the enquiry. The report should be a self-contained speaking report.

(m). The charge sheeted person will be furnished with a copy of the findings of the Enquiry Officer after giving him an opportunity to make his representation, if any.

(n). Before imposing any punishment, consequent upon the charges proved at the enquiry, the person



shall be given an opportunity to make his representation against the punishment proposed to be imposed to him.

(o).While imposing any punishment, the Management shall take into consideration the gravity of the misconduct proved, the previous record of service of the employee and any aggravating circumstance that may exist."

30.A mere perusal of the investigation procedure would show that when a person does not admit the charges or the Management is not satisfied with the explanation offered by the person and the charges are sufficiently grave and serious to warrant a punishment other than censure, reprimand or warning, the Management shall conduct a domestic enquiry by any person of its choice. In the present case, it is not the case of censure, reprimand or warning but it is a case of imposition of penalty. Hence, it is clear that the respondents have not followed the investigation procedure as contemplated under Code.

31.Therefore, this Court is of the opinion that the impugned order was passed in an arbitrary manner and in violation of the principles of natural justice, without conducting any domestic enquiry as contemplated in the Code and the procedure adopted in the course of decision making process is not as contemplated in the Code, thus, this Court find fault on such decision making process and the same is totally illegal and liable to be quashed.

32.The next question that arises for consideration is whether the penalty imposed in a disciplinary proceedings in a service matter is liable for GST, in terms of Section 7(1) (d) or 7(1-A) of the GST Act, 2017. Admittedly the said Section 7(1) (d) was not in force as on the date of passing the impugned order in the month of September 2020. The said Section was omitted with effect from 01.02.2019. The respondent, in his counter clearly stated that the notice of collection of GST was issued under Section 7(1) (d) alone. Therefore, without any provision/authority, the third respondent has issued the show cause notice to collect the GST, which is totally illegal.

33.Secondly, even assuming that Section 7(1A) of the Act r/w Rule 5(e) of the Rules will be applicable and the show cause notice was issued in accordance with the said provision, as contended by the learned counsel for the respondents, nowhere either in the show cause notice or in the impugned order or in the counter affidavit, the



respondents never ever stated about the applicability of Section 7(1A) r/w Rule 5(e). It would be apposite to mention Section 7(1A), which reads as follows:-

'Agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act.'

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34. By referring the above said Section, the respondents submitted that the petitioner refrained from performing to prevent the shortage of supply, so that they have imposed the penalty and as such it would attract the GST. This Court is not in a position to accept the present approach of the respondents due to the reason that the imposition of any GST will arise only when the penalty imposed in the course of trade or commerce. During the course of business, if any agreement was entered, where there is a delay in supply or in payment, if any, penalty imposed as per the agreement, such penalty comes under the purview of Section 7 (1A) for the imposition of GST. However, in the present case, the penalty imposed was in a disciplinary proceedings to an employee which would not attract GST.

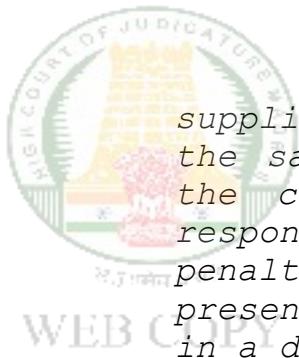
35. In any angle, the imposition of the GST by the respondents, to the penalty imposed, under Rule 7(b) (xiv) of the Code, in a disciplinary proceedings initiated against the employees would not attract the GST and the penalty referred therein would only refer the penalty imposed in the course of trade or commerce.

36. As such in the present case the penalty was imposed in a disciplinary proceedings which cannot be construed that the penalty imposed in the course of trade or commerce for the imposition of GST.

37. This Court finds substance in the arguments made by Mr. R.V. Rajkumar, learned counsel appearing for the petitioners in some of the writ petitions in the batch and this Court recorded its appreciation for his assistance in the present writ petition.

38. Therefore, I am of the opinion that the GST imposed by the respondents is illegal on the face of it and the same is liable to be set aside.

39. The learned counsel for the petitioner as well as the learned Standing counsel appearing for the respondents referred the case laws, which does not require any consideration in the present case as such this Court arrived at a well considered decision on the available facts. However, when this Court perused the case laws



supplied by the respondents, this Court is of the view that the same will not be applicable for the present facts of the case, as such all the case Laws referred by the respondents are related to the facts of imposition of penalty in the course of trade or commerce, whereas in the present case, it is relating to the imposition of penalty in a disciplinary proceedings."

6.Since the issue involved in this matter is already decided by this Court as extracted above and following the consistent view taken by this Court in the above writ petition, the impugned order is liable to be set aside.

7.In the light of the above, the impugned order is set aside and this Writ Petition is allowed. Since the impugned order has been set aside by this Court as the respondent(s) has/have already issued the show cause notice, for which, the petitioner has also filed his reply, now it is for the respondents, if so advised, to conduct a domestic enquiry in accordance with the procedure laid down in the Code.

Sd/-

Assistant Registrar (AE)

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/ /2021

Sub Assistant Registrar(CS)

To

The District Manager,
Tamil Nadu State Marketing Corporation Limited
(TASMAC),
Sivagangai District.

Pre-delivery Order made in
W.P. (MD) .No.13776 of 2020
18.12.2020

DKS (CO)
KB(20.01.2021) 7P 2C