IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.03.2021

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P. Nos. 6125, 6126, 6141 & 6142 of 2006
and
W.M.P. Nos. 6613, 6614, 6627 & 6628 of 2006

Suman Jadav ... Petitioner in W.P.Nos.6125 & 6126 of 2006

V.R.Gaitonde
(rep.by Mrs.S.R.Gaitonde
Power of Attorney Holder) ... Petitioner in W.P.Nos.6141 & 6142 of 2006

Vs

1. The Commercial Tax Officer,
Periamet Assessment Circle,
3 Ritherdon Avenue,
Vepery, Chennai - 600 007.

2. The Deputy Commissioner (CT),
Chennai (Central) Division,
Chennai - 600 006. ... Respondents in all W.Ps

Prayer in W.P.No.6125 of 2006: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, calling for the records on the files of the Second Respondent herein in his proceedings in L.Dis.B1/1237/2006 dated 07.02.2006 preferred against the proceeding of the First Respondent in Rc.3339/20003/A3 dated 26.12.2005, quashing the proceedings of the Second Respondent in L.Dis.B1/1237/2006 dated 07.02.2006 and direct the Second respondent to entertain and hear the revision petition filed by the Petitioner under Section 33 of the TNGST Act, 1959, against the proceedings of the First Respondent in Rc.3339/20003/A3 dated 26.12.2005.
Prayer in W.P.No.6126 of 2006: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, calling for the records on the files of the First Respondent herein in Rc.3339/20003/A3 dated 26.12.2005 and quash the proceedings of the First Respondent in Rc.3339/20003/A3 dated 26.12.2005.
Prayer in W.P.No.6141 of 2006: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, calling for the records on the files of the Second Respondent herein in his proceedings in L.Dis.B1/1236/2006 dated 07.02.2006 preferred against the proceeding of the First Respondent in Rc.3339/20003/A3 dated 26.12.2005, quashing the

proceedings of the Second Respondent in L.Dis.B1/1236/2006 dated 07.02.2006 and direct the Second respondent to entertain and hear the revision petition filed by the Petitioner under Section 33 of the TNGST Act, 1959, against the proceedings of the First Respondent in Rc.3339/20003/A3 dated 26.12.2005.
Prayer in W.P.No.6142 of 2006: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, calling for the records on the files of the First Respondent herein in Rc.3339/20003/A3 dated 26.12.2005 and quash the proceedings of the First Respondent in Rc.3339/20003/A3 dated 26.12.2005.

For Petitioner (in all W.Ps) : Mr.N.Inbarajan

For Respondents (in all W.Ps) : Mr.M.Hariharan
Additional Government Pleader

COMMON ORDER

By this common order all the four writ petitions are being disposed of.

2. In these writ petitions, the petitioners have challenged impugned notices dated 26.12.2005 and the communication dated 07.02.2006 rejecting the application filed for revision of the proceeding in impugned notice dated 26.12.2005 has not maintainable.

3. The brief facts of the case are both the petitioners are the Niece and Nephew of one Mr.K.Y.Gaitonde, who was carrying on the business under the Name and Style of M/s.Gomukhi Charma Kendra (referred to as the proprietor). The said proprietor was engaged in manufacture and sale of footwear, leather and leather products etc. M/s.Gomukhi Charma Kendra, the proprietary concern of the Proprietor Mr.K.Y.Gaitonde was in arrears of tax and therefore the tax arrears of the said proprietary concern of the proprietor Mr.K.Y.Gaitonde viz., M/s.Gomukhi Charma Kendra was sought to be fastened on the respective petitioners as these petitioners entered in to a partnership firm arrangement with the said Mr.K.Y.Gaitonde vide unregistered partnership deed dated 29.03.2002.

4. The relevant clause from the aforesaid unregistered partnership deed dated 29.03.2002 reads as under:-

> "(iv) The amounts standing to the credit of the said party 92) (in the name of Hosak Industries - a proprietary concern owned by said party (2)) and the said party (3) (in the name of Gaja Shoes - a proprietary concern owned by said party (3) in the books of the proprietary concern GOMUKHI CHARMA

KENDRA before conversion will be treated as the capital contribution of the said parties (2) and (3) in the above partnership firm and the amount standing to the credit of the said party (1) in the above partnership firm for the purpose of the partnership business at the commencement of the partnership business. The parties hereto shall from time to time contribute capital further as and when required for the purpose of the partnership business."

5. Admittedly, the respective petitioners were the creditors of the proprietary concern of the proprietor Mr.K.Y.Gaitonde and therefore with a view to take over the business of the said proprietary concern, the respective petitioners entered in to the partnership firm with the said proprietor. The profits and losses of the partnership business were to be shared in the following ratios:-

"(vi) Mr. K.Y.GAITONDE 8.33%
Mr. V.R.GAITONDE 50.00%
Mrs. SUMAN S.JADHAV 41.67%"

6. To recover tax arrears of the proprietary concern of the said proprietor Mr.K.Y.Gaitonde, the impugned notice dated 26.12.2005, have been issued to both the petitioners along with Mr.K.Y.Gaitonde. Apart from these three persons, notice has been issued to one Mrs.V.R.Gaitonde, the wife of the writ petitioner in W.P.Nos.6141 & 6142 of 2006.

7. The relevant portion of the impugned notice in the respective writ petitioner reads as under:-

"It is seen from the assessment records of Tvl.M/s.Gomuki Charma Kendra (Partnership Concern) that all the Assets and Liabilities including closing stock of the proprietary concern held by Thiru.V.R.Gaitonde, were taken over by the partnership concern on 29.03.2002.

Thus the present partners of the firm Tvl.Gomuki Charma Kendra, are liabe for clearing of arrears due by the proprietary concern as they have taken the Assets & Liabilities.

....

Therefore the partners of Tvl.Gomuki Charma Kendra are requested to pay the entire Arrears of Tax immediately along with interest under section 24

> (3) accrued till the date of payment at 2% per month, on receipt of this notice failing which the action will be taken under the provisions of the TNGST Act without further notice."

8. The proceedings were initiated against the partners for having taken over the business of M/s.Gomukhi Charma Kendra, proprietary concern of Mr.K.Y.Gaitonde. Under these circumstances, petitions under Section 33 of the Tamil Nadu General Sales Tax Act, 1959 (hereinafter referred to as the TNGST Act, 1959) were filed by the respective petitioners, which came to be rejected vide impugned communications dated 07.02.2006 bearing Ref.No.L.Dis.B1/1236/2006/dt.7.2.2006 and in reference on L.Dis.B1/1237/2006/dt.72.2006.

9. The operative portion of the said communication reads as under:-

> "The Revision Petition received in the reference cited is not entertainable under Sec.33 of the TNGST Act as no Revision Petition lies against the notice calling for payment of arrears. Hence the Revision Petition received in the reference cited is returned herewith."

10. These proceedings are challenged by the petitioners on the ground that before issuing the impugned notice dated 26.12.2005, no show cause notice was issued to them and no personal hearing was held. It is further submitted that both the petitioners were ready to co-operate with the Commercial Tax Department and it was still open for the Commercial Tax Department to initiate proceedings against the assets of the defaulter Mr.K.Y.Gaitonde, in his capacity as the proprietor of M/s.Gomukhi Charma Kendra who was an assessee in default.

11. The learned counsel for the petitioners submitted that the petitioners have compiled details of several assets of Mr.K.Y.Gaitonde, which were transferred and it was open for the Commercial Tax Department to proceed against the assets under Section 24(A) of the TNGST Act, 1959. It is further submitted that though the impugned notice dated 26.02.2005 is titled as notice, it is indeed an order inasmuch as, it has left no choice and calls upon the petitioners to pay the amount along with interest at 2% per month, failing which, action would be taken under the provisions of the TNGST Act, 1959. It is further submitted that rejection of application for revision under Section 33 of the TNGST Act, 1959 has been made in a summary manner without any discussion. It is submitted that the

impugned communication dated 26.12.2005 was not mere notice but an order and therefore was susceptible to revision under section 33 of the TNGST Act, 1959.

12. In any event, these recovery proceedings can be subject to a revision petition before the Deputy Commissioner under Section 33 of the TNGST Act, 1959 inasmuch as, the powers have vested with the Deputy Commissioner to not revise not only an order passed but also proceedings under the Act. It is further submitted that the petitioners, even if they had taken over the assets and liability of the erstwhile proprietary concern of the said Mr.K.Y.Gaitonde, the liability, if any, can be restricted only on the proportionate value of assets due to business transfer.

13. It is submitted that the impugned communications have not particularized the value of the assets to the extent of which, the liability can be fastened on the petitioners. The learned counsel for the petitioner further submits that as per the decision of the Hon'ble Supreme Court in State of Karnataka Vs Shreyas Paper Private Limited, 2006 (144) STC 331, while dealing with Section 15(1) of the Karnataka Sales Tax Act, 1957, which is *pari materia* with Section 27 of the TNGST Act, 1959 held as follows:-

> "11................
>
> Hence, the mere transfer of one or more spices of assets does not necessarily bring about the transfer of the "ownership of the business" for "ownership of a business" is much wider than mere ownership of discrete or individual assets. In fact, "ownership of business" is wider than the sum of the ownership of a business' constituent assets. Above all, transfer of "ownership of business" requires that the business be sold as a going concern*. In our view, therefore, section 15(1) is intended to operate only when there is complete transfer of "ownership of business" so as to render the transferee as a successor-in-interest of the transferor. Only in such an eventuality does section 15(1) make the transferee liable for the transferor's sales tax liabilities."

14. The learned counsel for the petitioners therefore submits that unless there was a transfer of ship of the business, there is no basis to fasten the liability can be fastened on the petitioners and therefore prayed for allowing these writ petitions.

15. The learned counsel for the petitioners further placed reliance on the following decisions:-

(i) The State of Andhra Vs Bellamkonda Venkata Subbaiah and another, 8 STC 309 (A.P)

(ii) Shrin Bi Mohamadali Vs The Deputy Commercial Tax Officer, Madras and another, 14 STC 974 (Mad)

(iii) Commissioner of Income-Tax, Madras Vs K.H.Chambers, (1965) Vol.55 ITR 674 (S.C)

(iv) K.J.Lingan and others Vs Joint Commercial Tax Officer, Madras and others, 19 STC 349 (Mad)

16. Defending the impugned order, the learned counsel for the Commercial Tax Department/respondents submits that the writ petition is devoid of merits and it is liable to be dismissed in limine. He submits that the impugned communication dated 26.12.2005 clearly gives a categorical finding that all the assets of the proprietary concern were taken over by the partnership firm including closing stock as on 29.03.2002 and therefore the impugned proceedings were sustainable, under Section 27 of the TNGST Act, 1959.

17. The learned counsel for the Commercial Tax Department/respondents further submits that there is no case made out for revision as it is only a notice calling upon the petitioners to pay the amount and therefore, the revision application has been rightly rejected vide impugned orders dated 07.02.2006 referred to supra.

18. I have considered the arguments advanced by the learned counsel for the petitioner and the respondents.

19. There is no dispute that there was a transfer of ownership of business of the proprietary concern of Mr.K.Y.Gaitonde to the newly constituted partnership firm. The proprietary concern also which also took over the name M/s.Gomukhi Charma Kendra of the proprietary concern of Mr.K.Y.Gaitonde. Thus, all the assets including good will of the erstwhile proprietary concern of Mr.K.Y.Gaitonde was taken over by the partnership firm, which consisted of three partners namely Mr.K.Y.Gaitonde and the 2 petitioners. The respective petitioners held 50% and 41.67% of the shares in the profit and loss of the business of the partnership firm based on the credit standing in their name in the books of accounts with the proprietary concern of Mr.K.Y.Gaitonde of the erstwhile proprietary concerned by name M/s.Gomukhi Charma Kendra. It clearly shows that there was a transfer of business in favour of the partnership concerned.

20. Therefore, there can be no question that the petitioners not being made liable to pay for arrears of tax of the proprietary concern of Mr.K.Y.Gaitonde. However, they are liable only to the extent of the assets that were transferred on the date of execution of the partnership deed dated 29.03.2002 as it is evident from a reading of Section 27 of the TNGST Act, 1959. The proviso to Section 27 of the TNGST Act, 1959 reads as under:-

> "27.Recovery of tax where business of dealer is transferred-
>
> Where the ownership of the business of a dealer liable to pay tax or other amount is transferred, any tax or other amount payable under this Act in respect of such business and remaining unpaid at the time of the transfer and any tax or other amount due up to the date of transfer though unassessed may, without prejudice to any action that may be taken for its recovery from the transferor, be recovered from the transferee as if he were the dealer liable to pay such tax or other amount:
>
> Provided that the recovery from the transferee of the arrears of taxes due for the period prior to the date of the transfer shall be limited to the value of the assets he obtained by transfer."

21. Therefore, it was incumbent on the part of the respondents to particularize the extent of liability to which they can be exposed while issuing notice under Section 27 of the TNGST Act, 1959. However, the impugned notice dated 26.12.2005 has not given the particulars instead straight away calls upon the petitioners to pay arrears of tax liability of the said proprietary concern namely Mr.K.Y.Gaitonde, whose business was taken over by the partnership concern represented by the petitioners and the said Mr.K.Y.Gaitonde. Since the impugned communications does not particularize the extent of liability, it is liable to be quashed as far as the petitioners are concerned as arbitrary and contrary to proviso to Section 27 of the TNGST Act, 1959. Therefore, the consequential order rejecting the application filed by the petitioners under Section 33 of the TNGST Act, 1959 are also quashed.

22. While quashing the impugned order, liberty is however given to the respondents to issue a fresh notice to the petitioners to recover the amounts from the petitioners to the extent of assets transferred and were taken over by the

partnership concern in terms of proviso to Section 27 of the TNGST Act, 1959.

23. Liberty is also given to the respondents to initiate appropriate proceedings under the other provisions of the TNGST Act, 1959 against the persons to whom the said Mr.K.Y.Gaitonde may have been transferred his assets contrary to Section 24(a) of the TNGST Act, 1959. Such proceedings shall be carried out in accordance with law.

24. In the result, these writ petitions stand allowed with liberty to the respondents to initiate appropriate proceedings against the petitioners to the extent of assets that were transferred to the partnership firm on 29.03.2002. The respondents may therefore issue appropriate notice to the respective petitioners within a period of three months from the date of receipt of a copy of this order. No costs. Consequently, connected Writ Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To
1. The Commercial Tax Officer,
Periamet Assessment Circle,
3 Ritherdon Avenue,
Vepery, Chennai - 600 007.

2. The Deputy Commissioner (CT),
Chennai (Central) Division,
Chennai - 600 006.

+1cc to Mr.N.Inbarajan, Advocate Sr.No.14792
+1cc to The Special Government Pleader SR.No.15327 and 15328

akm/15.04.21/8P-5C/

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and
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