

(2015) 10 GUJ CK 0066

In the Gujarat High Court

Case No : Special Civil Application No. 13641 of 2015

Automark Industries (I) Ltd.

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 17-10-2015

Acts Referred:

Constitution of India, 1950 — Article 226

Gujarat Value Added Tax Act, 2003 — Section 27, 35(1), 44, 73

Citation : (2016) 53 GST 178 : (2016) 88 VST 295

Hon'ble Judges : Harsha Devani and Abdullah Gulamahmed Uraizee, JJ.

Bench : Division Bench

Advocate : S.N. Soparkar, Senior Advocate and Dhaval Shah, Advocate, for the Appellant; Maithili Mehta, Assistant Government Pleader, for the Respondent

Judgement

Harsha Devani, J.—Leave to amend the prayer clause.

2. Rule. Ms. Maithili Mehta, learned Assistant Government Pleader waives service of notice of rule on behalf of the respondents. With the consent of the learned advocates for the respective parties, the petition is taken up for final hearing today.

3. By this petition under Article 226 of the Constitution of India, the petitioner has challenged the orders dated 21.7.2015, 22.7.2015, 10.8.2015 (Annexure-E Collectively) relating to year 2010-11 issued by the respondents under section 44 of the Gujarat Value Added Tax Act, 2003 attaching the bank accounts of the petitioner and directing the petitioner to pay the amount demanded under the said notice to the fourth respondent. The petitioner has also challenged the orders dated 11.9.2015 made by the fourth respondent under section 44 of the Act attaching the bank accounts of the petitioner in relation to demands relating to assessment years 2009-10, 2011-12, 2012-13 and 2013-14.

4. The petitioner is a company engaged in trading of Thermoplastic Road Marking Material and is registered under the Gujarat Value Added Tax Act, 2003

(hereinafter referred to as "the Act"). The petitioner, during the period under consideration, was receiving goods from the manufacturer under Form C and the dealer was re-selling the goods in Gujarat without carrying out any further process and accordingly, classified the goods under the Gujarat VAT Schedule II vide entry 42A at Entry No. 145 as per notification dated 31.3.2006. The petitioner filed the monthly returns for the period in question and the returns were assessed by the Commercial Tax Officer (3) Unit 22 (respondent No. 4 herein) in the year 2012 without demanding any differential duty. Subsequently, the assessment order was subjected to reassessment under section 35(1) by the fourth respondent by a notice dated 12.5.2014. The petitioner participated in the proceedings which culminated into an order of reassessment dated 30.4.2015 passed by the fourth respondent whereby the demand of differential duty on Thermoplastic Road Marking Material was raised. Being aggrieved, the petitioner preferred an appeal together with the stay application before the Deputy Commissioner of Commercial Tax (Appeals) under section 73 of the Act on 6.7.2015, well within the period of limitation. However, during the pendency of the hearing of the stay application and the appeal, the fourth respondent issued attachment orders dated 21.7.2015, 22.7.2015 and 10.8.2015 attaching the bank accounts operated by the petitioner at the Naroda branch of Bank of India, Yavatmal Branch of Bank of India and Nagpur Branch of Bank of India in Maharashtra, respectively.

5. On 27.7.2015, the third respondent Deputy Commissioner of Commercial Tax (Appeals) granted personal hearing on the stay application and directed the petitioner to deposit 20% of the amount for granting the stay. It is the case of the petitioner that the amount as directed has already been paid. Despite the aforesaid position, since the attachment orders were not lifted, the petitioner filed the present petition challenging the orders dated 21.7.2015, 22.7.2015 and 10.8.2015 in relation to year 2010-11.

6. In response to the notice issued by this court, an affidavit-in-reply came to be filed by the fourth respondent stating that while in relation to year 2010-11, the first appellate authority had granted stay subject to deposit of 20% of the demand, assessment orders have been passed in relation to year 2011-12, 2012-13 and 2013-14 and that demands in relation to these years are still pending. It is further the case of the respondents that in relation to year 2009-10 also, an amount of Rs. 34,44,765/- remains to be recovered. It is submitted that in the light of the demands in relation to years 2009-10, 2011-12, 2012-13 and 2013-14, the attachment has been continued, pursuant to which, orders under section 44 of the Act have been passed on 11.9.2015, copies whereof are annexed at Annexure-R-III Collectively to the affidavit-in-reply.

7. Having regard to the stand taken by the respondents for continuing the attachment of the bank accounts of the petitioner, the petitioner sought permission to amend the present petition by challenging the orders dated 11.9.2015 made by the fourth respondent under section 44 of the Act and such

permission came to be granted

8. Mr. S.N. Soparkar, Senior Advocate, learned counsel with Mr. Dhaval Shah, learned advocate for the petitioner vehemently assailed the action of the respondents by submitting that very drastic action of attaching the bank accounts of the petitioner has been taken by the respondents which was not warranted in the facts and circumstances of the case. It was pointed out that on both the occasions in relation to year 2010-11 as well as subsequently in relation to other assessment years, three bank accounts of the petitioner have been sought to be attached. In each of the notices, the entire demand is sought to be recovered through each bank account. It was submitted that in case each bank account of the petitioner had sufficient funds, the respondents would have recovered the entire amount thrice over. The attention of the court was invited to the notice dated 11.9.2015 issued by the fourth respondent, whereby the petitioner was called upon to pay the amount under the demand notice within a period of three days together with interest at 18%. It was submitted that despite such notice having been issued on 11.9.2015, on the same day, without waiting for the notice period to be over, all the three bank accounts of the petitioner came to be attached in exercise of powers under section 44 of the Act, once again in relation to the entire demand covered under the demand notices. It was submitted that it is the case of the respondents that pursuant to the demand notices, the amount was required to be paid within a period of 30 days on receipt of the same; however, the respondents have ignored the fact that the petitioner has filed a stay petition as well as an appeal against the assessment orders. It was urged that on the one hand, the third respondent is not deciding the stay application filed by the petitioner and on the other hand, the fourth respondent has proceeded to attach the bank accounts of the petitioner. It was urged that a person's right to carry on business is seriously affected by the conduct of the respondents in taking such coercive measures routinely as a normal thing. It was submitted that when the petitioner has preferred appeals together with the stay applications within the period of limitation for filing such appeals, there was no warrant for the respondents to resort to the drastic action under section 44 of the Act and, therefore, the orders under section 44 of the Act are required to be quashed and set aside.

8.1 In support of his submissions, the learned counsel placed reliance upon the decision of the Bombay High Court in the case of Mahindra and Mahindra Ltd. Vs. Union of India, , wherein the court has expressed the view that it was highly improper on the part of the Collector and Assistant Collector to encash the bank guarantees before expiry of the statutory period of three months and in particular when the petitioners had specifically informed that the stay application is fixed for hearing on a particular date.

8.2 Reliance was also placed upon an unreported decision dated 15.3.2004 of this court rendered in the case of Oil and Natural Gas Corporation v. State of Gujarat, Special Civil Application No. 3107 of 2004, wherein the grievance voiced

in the petition was that even though the period of limitation for preferring appeal to the Sales Tax Tribunal had not expired, the respondent authorities were seeking to recover the amount by coercive method. The court expressed the view that since the petitioner was going to file an appeal within the period of limitation, the authorities are expected not to take any coercive action till the stay application comes up for hearing before the Tribunal for which the petitioner shall make an endeavour before the Tribunal for early hearing of the application. Reliance was also placed upon an unreported decision of this court in the assessee's own case rendered on 28.11.2014 in Special Civil Application No. 12592 of 2014.

9. Opposing the petition, Ms. Maithili Mehta, learned Assistant Government Pleader reiterated the contentions of the affidavit-in-reply filed on behalf of the respondents No. 3 and 4. It was submitted that the petitioner had been issued notice in Form 305 as contemplated under rule 27 of the Gujarat Value Added Tax Rules, 2006 (hereinafter referred to as "the rules") calling upon the petitioner to pay the amount thereunder within a period of 30 days from the date of service of such notice. However, the petitioner having failed to pay such amount within the period stipulated in the notice, the fourth respondent was wholly justified in resorting to the provisions of section 44 of the Act for recovery of such amount. It was further submitted that the petitioner at the time of registration has submitted a form together with a checklist which reveals that the petitioner has no property situated in the State of Gujarat. It is in these circumstances, that with a view to secure the interest of the Government revenue, the orders under section 44 of the Act came to be passed. It was submitted that, therefore, the action of the fourth respondent being in consonance with the statutory provisions of section 44 of the Act, there is no warrant for interference by this court.

10. From the facts as emerging from the record, it appears that pursuant to the order of assessment (Annexure-B to the petition) made in relation to assessment year 2010-11, a notice of demand came to be issued to the petitioner for a sum of Rs. 1,16,18,836/- with interest at the rate of 18% for the period from 1.4.2010 to 31.3.2011. Against the order of assessment, the petitioner preferred an appeal within the prescribed period of limitation together with a stay application. However, during the pendency of the stay application and the appeal, the fourth respondent Commercial Tax Officer (3), Ahmedabad in the exercise of powers under section 44 of the Act, attached three bank accounts maintained by the petitioner with the Bank of India, Yavatmal Branch, Bank of India, Nagpur Branch as well as Bank of India, Naroda Branch, respectively. Each order under section 44 of the Act stated that the petitioner had not paid value added tax of Rs. 1,16,18,836/- with interest at 18% for the aforesaid period. Subsequently, the first appellate authority heard the stay application of the petitioner and directed the petitioner to deposit 20% of the demanded amount, which was duly deposited by the petitioner. However, despite the fact that the amount as directed by the order passed on the stay application was deposited, the

attachment was not lifted and hence, the petitioner approached this court by way of the present petition. It is pursuant to the notice issued by this court that the respondents have brought to the notice of the court that previously the attachment had been made in relation to year 2010-11. However, subsequently, demands have been raised in relation to years 2009-10, 2011-12, 2012-13 and 2013-14 in respect of which, powers have been exercised under section 44 of the Act and the above three bank accounts have again been attached. A perusal of the orders under section 44 of the Act dated 11.9.2015 issued to each of the above referred banks shows that each bank has been directed to send to the fourth respondent Pay Order/Demand Draft of Rs. 5,43,37,080/- plus interest at 18%.

11. It may be noted that on 11.9.2015 in relation to the above referred demand of Rs. 5,43,37,080/- with interest, the fourth respondent had issued notice to the petitioner calling upon it to pay the amount under the demand notice within a period of three days, failing which, he would initiate recovery proceedings. However, without waiting for the period of three days as stated in the notice dated 11.9.2015 to elapse, the fourth respondent, on the very same day, has attached the above three bank accounts in relation to the demand notice pertaining to the above referred years.

12. It may be noted that in relation to each of the assessment years, the petitioner has filed appeals and the stay applications, all of which are pending before the first appellate authority for consideration. However, on the one hand, the first appellate authority is not taking any decision on the stay applications and on the other hand, the fourth respondent is proceeding to make coercive recovery by attaching the bank accounts of the petitioner.

13. While it is true that under rule 27 of the rules, the respondent is empowered to call upon the petitioner to pay the amount assessed within a period of thirty days from the date of service of such notice, however, when the petitioner has preferred an appeal together with the stay application within the prescribed period of limitation, the respondents are required to act in a reasonable manner in connection with the notice issued under section 27 of the Act. The fourth respondent is required to keep in mind the fact that the petitioner has preferred appeals before the first appellate authority and that the stay applications are pending. That if the stay applications are allowed or partly allowed, the petitioner would be required to deposit only a part of the demand covered under the notice or may be even granted complete unconditional stay. Under the circumstances, it is expected of the fourth respondent to stay his hands till the stay application of the petitioner is decided, unless the stay application is not decided on account of default on the part of the petitioner or it is found that the petitioner is unnecessarily delaying the hearing of the stay application. However, in the absence of any exceptional circumstances, there is no warrant for the respondent authorities to proceed to initiate coercive recovery in exercise of powers under section 44 of the Act by attaching the bank accounts of the petitioner.

14. As rightly submitted by the learned counsel for the petitioner, a man's right to carry on business is seriously affected when such coercive action of attaching of the bank accounts is taken by the respondents. Attachment of bank accounts seriously affects a person's reputation not only in the eye of the bank but also in the business community, thereby affecting the business itself.

15. At this juncture reference may be made to the decision of the Supreme Court in the case of Dr Rash Lal Yadav Vs. State of Bihar and Others, , wherein the Supreme Court though in a different context held thus:

"6. The concept of natural justice is not a static one but is an ever expanding concept. In the initial stages it was thought that it had only two elements, namely, (i) no one shall be a judge in his own cause and (ii) no one shall be condemned unheard. With the passage of time a third element was introduced, namely, of procedural reasonableness because the main objective of the requirement of rule of natural justice is to promote justice and prevent its miscarriage. Therefore, when the legislature confers power in the State Government to be exercised in certain circumstances or eventualities, it would be right to presume that the legislature intends that the said power be exercised in the manner envisaged by the statute. If the statute confers drastic powers it goes without saying that such powers must be exercised in a proper and fair manner. Drastic substantive laws can be suffered only if they are fairly and reasonably applied. In order to ensure fair and reasonable application of such laws courts have, over a period of time, devised rules of fair procedure to avoid arbitrary exercise of such powers."

16. In the facts of the present case, it is not the case of the respondents that the petitioner is a fly by night operator or that the petitioner has closed down its business warranting exercise of powers under section 44 of the Act in such a drastic manner. When the petitioner had already preferred an appeal with a stay application, the least that was expected of the fourth respondent was to wait for the outcome of the stay application before resorting to coercive measures as has been done in the present case. Besides, the orders under section 44 of the Act also suffer from the vice of non-application of mind, inasmuch as, in the notices issued to each of the banks, the fourth respondent has sought to recover the entire demand covered under the notice from each of the banks. As rightly submitted by the learned counsel for the petitioner, in case there were sufficient funds in each of the bank accounts, the fourth respondent would have succeeded in recovering thrice the amount covered under the demand notice. When drastic powers are conferred on the executive, it is imperative that those powers be exercised with due sense of responsibility and with circumspection by an officer or authority. While the fourth respondent is vested with drastic powers under section 44 of the Act, it is expected that such powers are exercised in a reasonable manner and not arbitrarily, as has been done in the present case. As noticed hereinabove, though notice has been issued on 11.9.2015 calling upon the petitioner to pay the amount under the demand notice within a period of

three days, without even waiting for such period to be over, the fourth respondent has resorted to the drastic measure of attaching the three bank accounts of the petitioner on the same day. In the opinion of this court, the conduct of the fourth respondent in attaching the bank accounts under section 44 of the Act in the facts and circumstances of the case was not warranted when the appeals preferred by the petitioner together with the stay applications were pending consideration before the first appellate authority. The impugned orders dated 17.7.2015, 9.6.2015 and 17.7.2015 (Annexure-E collectively to the petition) as well as the impugned orders dated 11.9.2015 Annexure-R-III Collectively, to the affidavit in reply of the respondent cannot be sustained.

17. For the foregoing reasons, the petition succeeds and is, accordingly, allowed. The impugned orders dated 17.7.2015, 9.6.2015 and 17.7.2015 (Annexure-E collectively to the petition) as well as the impugned orders dated 11.9.2015 Annexure-R-III collectively to the affidavit-in-reply of the respondent are hereby quashed and set aside. The third respondent Deputy Commissioner of Commercial Tax (Appeals) is directed to decide the stay applications filed by the petitioner within a period of fifteen days from the date of receipt of a copy of this order. Rule is made absolute accordingly with no order as to costs.