(1990) 01 MAD CK 0058

In the Madras High Court

Case No : Writ Petition No. 16119 of 1989

Binnany Synthetics Private Ltd. APPELLANT

Vs

Deputy Commercial Tax Officer, Brough Road Circle, Erode RESPONDENT

Date of Decision : 18-01-1990

Acts Referred:

Citation : (1990) 01 MAD CK 0058

Hon'ble Judges : Srinivasan, J

Bench : Single Bench

Advocate : R.L. Ramani, for the Appellant; Haja Nazirudeen, Government Advocate, for the Respondent

Judgement

Srinivasan, J.—This writ petition is directed against the order dated 13th November, 1989, passed by the Deputy Commercial Tax Officer, Brough Road Circle, Erode, returning the stay petition filed by the petitioner herein informing the petitioner that the petition for stay can be considered only if the petitioner offers any security either in the form of immovable property or in the form of bank guarantee. The order by itself is unsustainable as rule 31 of the Tamil Nadu General Sales Tax Rules, 1959, does not impose a condition that the security should be either in the form of immovable property or in the form of bank guarantee. Under rule 31(1) of the Rules, a person who prefers an appeal or revision against the order of assessment may furnish personal or property security along with the security bond in form XIX or a bank guarantee in form XIX-C as the authority before whom the appeal or application is preferred may, in its discretion, direct.

2. Under rule 31(2) of the Rules, when an applicant or appellant furnishes security referred in sub-rule (1) or any other form of security referred to in sub-rule (15-A) of rule 24, he shall file the security bond or bank guarantee or other security to the assessing authority concerned. It is clear from a reading of the Rules that the order relating to furnishing of security shall be passed in the first instance only by the authority before which the appeal or revision application is

pending. It is only pursuant to such an order the assessee shall furnish security before the assessing authority concerned under rule 31(2). Sub-rule (2) cannot be read independent of sub-rule (1) as it expressly refers to "security referred to in sub-rule (1)". In this case, it is not sufficient if I stop with quashing the order of the Deputy Commercial Tax Officer, impugned in this writ petition.

3. It is brought to my notice that in the appeal preferred by the petitioner herein before the Appellate Assistant Commissioner, Commercial Taxes, Erode, the petitioner applied for stay and the stay application has been returned with the following endorsement :

"The stay petition along with the security bond should be filed before the assessing officer concerned as per rule 31(2) of the Tamil Nadu General Sales Tax Rules, 1959."

No doubt, that order is made on 12th December, 1989, after the impugned order was made by the assessing authority. The petitioner has received the said order on 18th December, 1989. Though the said order is not the subject-matter of the writ petition, as such, finding that the second respondent, who is the appellate authority having passed an illegal order, I am entitled to issue a mandamus to the second respondent also to do his duty in accordance with law. The return of the stay application by the second respondent directing the petitioner to present the same before the assessing officer along with the security bond is wholly against the relevant rules.

4. As I had already pointed out under rule 31(1), it is the appellate authority who has to pass an order relating to furnishing of security, before passing an order of stay. It may be open to him in appropriate cases to grant stay even without furnishing any security as the question will arise only when he decides that the appellant before him should furnish security as a condition for the grant of stay. In that event he shall specify the form of security, whether it shall be personal or property security or bank guarantee. It is only pursuant to such an order by the appellate authority, the assessee is entitled to go before the assessing authority for the purpose of furnishing security and not for the purpose of consideration of the application for stay filed by him. The assessing authority has no jurisdiction to consider the application for stay filed by the petitioner before the appellate authority. Rule 31(2) does not empower the assessing authority to consider the stay petition or the appellate authority to delegate his functions.

5. In the circumstances, while quashing the order dated 13th November, 1989, passed by the first respondent herein, I issue a writ of mandamus directing the second respondent to take up the application for stay filed by the petitioner herein as and when it is re-presented by the petitioner, consider the same on merits and pass appropriate orders in accordance with law. As pointed out already, it is open to him impose a condition for furnishing security or not. If in the circumstances of the case he considers that absolute stay could be granted, he can pass an order accordingly. If on the other hand, he considers that the

petitioner should be permitted to furnish security in a particular form as condition for stay, he may pass an order to that effect. It is also open to him to pass an order directing the petitioner to make payment in instalments as a condition for stay. Whatever may be the order that may be passed by the appellate authority, he shall consider the matter on merits and pass orders in accordance with law. The guidelines therefore have already been issued by this Court in Sri Balaji Trading Company v. Deputy Commercial Tax Officer [1989] 72 STC 417. The second respondent shall bear the same in mind and pass appropriate orders in the case of the petitioner. Till the second respondent disposes of the application for stay by the petitioner there will be no proceeding for recovery of the tax. However, the above direction is subject to the condition that the petitioner shall re-present the application for stay in proper form on or before 9th February, 1990. If the stay petition is not re-presented before that date, there shall not be any further stay of recovery proceedings. The writ petition is allowed with the above direction. There will be no order as to costs.

6. Writ petition allowed.