(1970) 07 KAR CK 0006

In the Karnataka High Court

Case No : S.T.R.P. No''s. 18, 19 and 20 of 1970

B.M. Moidin Kunhi — APPELLANT

Vs

The State of Mysore — RESPONDENT

Date of Decision : 06-07-1970

Acts Referred:

Mysore Sales Tax Act, 1957 — Section 20, 20 (3), 23
Mysore Sales Tax Rules, 1948 — Rule 30B

Citation : (1971) 27 STC 154

Hon'ble Judges : G.K. Govinda Bhat, J;B. Venkataswami, J

Bench : Division Bench

Advocate : P. Vasudeva Aithala, for the Appellant; S.R. Rajasekhara Murthy, High Court Government Pleader, for the Respondent

Judgement

Govinda Bhat, J.—These are three revision petitions by a common assessee u/s 23 of the Mysore Sales Tax Act, 1957, hereinafter referred to as the Act, and they are directed against the common order dated 18th March, 1970, made in S.T.A. Nos. 71, 72 and 73 of 1970 on the file of the Mysore Sales Tax Appellate Tribunal, Bangalore.

2. The assessee was assessed to sales tax for the years 1964-65, 1965-66 and 1966-67 by three separate assessment orders dated 17th September, 1969, made by the Commercial Tax Officer, Puttur, South Kanara. By the said assessment orders, a total sum of Rs. 65,101.75 was levied as tax and penalty for the said three years. The assessee preferred three separate appeals before the Deputy Commissioner of Commercial Taxes, Mangalore Division, Mangalore, u/s 20 of the Act. In the said appeals, he made applications for entertaining the appeals without payment of the tax and penalty. He also prayed for stay of the recovery of the said amounts. In the applications for stay, the assessee stated that the tax and penalty levied is heavy and he has no liquid resources to pay the huge amount and that he is prepared to furnish security of immovable properties situated in two villages of Sullia Taluk. The Deputy Commissioner

heard the Advocate for the assessee and made three separate orders on 15th December, 1969; thereby he ordered that the assessee should pay a part of the tax assessed and should furnish a bank guarantee for the balance amount of tax and the entire penalty. The order further stated that if the assessee failed to comply with the said order before 1st January, 1970, the appeals filed by the assessee would be rejected without further notice. The orders of the Deputy Commissioner were served on the assessee, according to him, on the 3rd February, 1970, long after the expiry of the date within which he was required to pay part of the tax and furnish security.

3. Aggrieved by the orders of the Deputy Commissioner, the assessee preferred three appeals to the Mysore Sales Tax Appellate Tribunal, Bangalore, the appeals being S.T.A. Nos. 71, 72 and 73 of 1970 as aforesaid. The Tribunal modified the order of the Deputy Commissioner by directing the assessee to furnish bank guarantee for the entire tax amount and penalty. Before the Tribunal the assessee contended that he was not in a position to furnish bank guarantee and that the Deputy Commissioner was in error in not considering his offer to furnish security of immovable properties. The Tribunal purporting to rely on the decision of this court in K. M. Muniswamappa v. State of Mysore [1968] 22 S.T.C. 536 rejected the contention of the assessee on the view that the question as to the form of security is a matter of discretion vesting in the Deputy Commissioner and that in the matter of exercise of discretion the Tribunal will not interfere. Aggrieved by the said order of the Tribunal, the assessee has preferred the above revision petitions.

4. Sri P. V. Aithala, the learned counsel for the assessee, before us urged that the Deputy Commissioner in the instant cases has not given reasons for rejecting the offer of security of immovable properties and that his insistence on furnishing security of a bank guarantee is an arbitrary exercise of discretion and, therefore, we should direct the Deputy Commissioner to consider as to whether the security offered by the assessee is sufficient. In our opinion, the contention of the learned counsel for the assessee is well-founded. The relevant provision under which the Deputy Commissioner made the order in question is sub-section (3) of section 20 of the Act, until it was amended by Mysore Act No. 9 of 1970. It reads thus :

"No appeal against an order of assessment shall be entertained by the appellate authority unless it is accompanied by satisfactory proof of the payment of the tax assessed and penalty, if any, due :

Provided that the authority may, if it thinks fit, for reasons to be recorded in writing, entertain an appeal against such order,

(a) without payment of the tax and penalty, if any, but on furnishing security to its satisfaction in such form and in such manner as may be prescribed; or

(b) on proof of payment of such smaller sum, which or without security, in the like manner, for such amount of the tax and penalty which remains unpaid, as it may direct."

Sub-section (3) as now amended reads thus :

"(a) No appeal against an order of assessment shall be entertained by the appellate authority unless it is accompanied by satisfactory proof of the payment of the tax and penalty not disputed in the appeal.

(b) Notwithstanding that an appeal has been preferred under sub-section (1), the tax or other amount shall be paid in accordance with the order against which the appeal has been preferred :

Provided that the appellate authority may, in its discretion, give such directions as it thinks fit in regard to the payment of tax or other amount payable under clause (b) if the appellant furnishes sufficient security to its satisfaction in such form and in such manner as may be prescribed."

Rule 30-B of the Rules which prescribes the form of security that may be directed to be furnished reads :

"Where it is provided in the Act that an appellant (or an applicant in revision proceedings) shall furnish security in regard to the payment of tax, or fee or other amount, the appellant (or applicant) or any person on his behalf shall furnish person or property security or bank guarantee as the authority before which the appeal or application is preferred may in its discretion direct. The security bond shall be in form 35 with suitable modification wherever necessary."

5. Sub-section (3) of section 20 as it stood before it was amended by Mysore Act No. 9 of 1970 laid down stringent conditions on the assessee to enable him to prefer appeals; no appeal against an order of assessment shall be entertained by the appellate authority unless it was accompanied by satisfactory proof of the payment of the tax assessed and penalty, if any. The proviso to the sub-section however partially relieved the stringent condition and the appellate authority was empowered to entertain the appeal without payment of the tax and penalty, if any, but on furnishing security to its satisfaction in such form and in such manner as may be prescribed. The appellate authority has to record reasons for entertaining the appeal without payment of the tax and payment, but on furnishing security to its satisfaction. Rule 30-B prescribes that the appellate authority may in its discretion direct the assessee to furnish (a) personal security, (b) property security or (c) bank guarantee. The rule envisages that security in any of the above three forms can be accepted. If the appellate authority were to arbitrarily direct the assessee to insist on bank guarantee, the proviso to sub-section (3) which was intended to partially relax the stringent condition provided by the main sub-section will not serve its purpose. It is common knowledge that banks would not guarantee any payment unless the party has bank deposits or deposits with the bank Government securities and the like. Petty traders may not be in a position to obtain bank guarantees.

6. In the instant case, the assessee in his application for stay had submitted that he had no cash resources, that the amount involved in the three appeals was

large and that he was offering security of immovable properties situated in two villages of Sullia Taluk in South Kanara District. The order made under the proviso to sub-section (3) being an appealable order, the appellate authority ought to give reasons for the rejection of the offer of security made by the assessee. The order of the Deputy Commissioner does not make any reference to the offer of security of immovable properties made by the assessee. When the rule states that the appellate authority at its discretion may direct security in any one of the forms prescribed in the rule, it means that the discretion so vested has to be exercised in a judicial manner and not capriciously and arbitrarily. The appellate authority has to exercise its discretion taking into consideration the facts and circumstances of the case. It is seen from the assessment orders that the assessee is a resident of a village in Sullia Taluk of South Kanara District. The Deputy Commissioner has not considered the question whether the assessee is in a position to obtain the bank guarantee. In fact, it has to be inferred from his application that he is not in a position to obtain bank guarantee and therefore that he offers security of immovable property. If the appellate authority arbitrarily directs the furnishing of a bank guarantee which the appellant before it is not in a position to secure, he will be denied the right of pursuing his remedy of appeal. The stringency of the provisions of sub-section (3) of section 20 has now been considerably relaxed by the amendment made by Mysore Act No. 9 of 1970. By virtue of the said amendment, an assessee is entitled to appeal provided he furnishes proof of the payment of the tax and penalty in dispute in appeal. Clause (b) of sub-section (3) also provides for stay of the recovery of the disputed tax and penalty if the appellant furnishes sufficient security to the satisfaction of the appellate authority. The security to be furnished should be in any one of the forms prescribed in rule 30-B. In exercise of the discretion of granting stay of recovery of disputed tax or penalty pending the appeal, the appellate authority should exercise the discretion in accordance with settled judicial principles. The question which the appellate authority should consider is whether the security offered by the assessee is sufficient. Where the assessee offers security of immovable property, the appellate authority should consider whether that property is unencumbered; whether its title is clear and it is adequate to fully secure the payment. In the application for stay, the assessee should ordinarily furnish the form of security that he is offering. He should also mention, where the security offered is immovable property, whether it is unencumbered, the nature of the title and the value of the property. In order to consider whether the property offered is sufficient security, the appellate authority may direct the assessee to produce the following : (a) the encumbrance certificate of the property; (b) its title deeds accompanied by a certificate of an Advocate that the title is clear, and also (c) the valuation report made by a valuer appointed under the Estate Duty Act and the Wealth Tax Act. On a consideration of the relevant materials so furnished, the appellate authority should decide whether the security is sufficient. If the assessee himself offers bank guarantee, the appellate authority may direct him to furnish bank guarantee and then the question of sufficient of the security does not arise.

7. The decision in Muniswamappa v. State of Mysore [1968] 22 S.T.C. 536 relied on by the Sales Tax Appellate Tribunal does not lay down that where an appellate authority arbitrarily directs the assessee to furnish bank guarantee the Tribunal or the High Court ought not to interfere. It is seen from the report of the case that the Advocate for the assessee had consented before the Deputy Commissioner to the production of a bank guarantee.

8. In the instant case, the Deputy Commissioner, in our opinion, has acted arbitrarily in the exercise of his discretion and therefore his orders call for interference in revision.

9. For the above reasons, these revision petitions are allowed, the orders of the Deputy Commissioner as modified by the Sales Tax Appellate Tribunal are set aside and the Deputy Commissioner is directed to dispose of the applications of the assessee in the light of this order. The petitioner is entitled to his costs. Advocate''s fee Rs. 100, one set.

10. Petitions allowed.