

(2006) 02 KL CK 0021

In the High Court Of Kerala

Case No : Writ Petition No. 31079 of 2005 etc.

Gupta Enterprises

APPELLANT

Vs

Dy. Commissioner

RESPONDENT

Date of Decision : 27-02-2006

Acts Referred:

Constitution of India, 1950 — Article 226
Kerala General Sales Tax Act, 1963 — Section 19, 35

Citation : (2006) 2 KLT 494 : (2008) 12 VST 313

Hon'ble Judges : K. Balakrishnan Nair, J

Bench : Single Bench

Advocate : A. Kumar, for the Appellant; Julian Xavier, Government Pleader (Taxes), for the Respondent

Final Decision : Dismissed

Judgement

Balakrishnan Nair, J.—These cases arise under the KGST Act. They may, generally, be called appeal pending matters, though, in some cases, appeals are not filed. Since identical points are involved in these cases, they are heard and disposed of by a common judgment.

W.P. (C) No. 31079/05

2. In this case, the petitioner challenges Exhibit P4 proceedings of the Deputy Commissioner, Commercial Taxes, Idukki, passed u/s 35 of the KGST Act, setting aside the final assessment orders, passed by the Sales Tax Officer, Devikulam, for the years 1992-93, 1993-94 and 1994-95, and remitting them back to the assessing authority for fresh disposal, in accordance with law. Pursuant to the said remand, the Commercial , Tax Officer has issued Exhibit P5 notice, proposing to hear the petitioner for completing the assessment. This writ petition is filed, challenging Exhibit P5, without invoking the appellate remedy available to the petitioner. When there is an appellate remedy available under the Act, a frog leap made to this Court under Article 226 of the Constitution of India, by filing this writ petition, cannot be entertained.

W.P.(C) No. 3715/06

3. This writ petition is filed, challenging Exhibit P1 assessment order of the Commercial Tax Officer, for the year 2001-02 and the consequential revenue recovery notice Exhibit P2. The petitioner has not filed any appeal against Exhibit P1 and therefore, there is nothing wrong with the revenue recovery proceedings initiated, to recover the amount covered by it. Further, the approach to this Court, challenging the assessment order, without invoking the statutory remedy cannot be entertained.

W.P.(C) No. 3964/06

4. This writ petition is filed by the petitioner, challenging Exhibit P1 assessment order, assessing the sale tax payable by the petitioner for the year 2001-02. It is an order passed u/s 19 of the KGST Act, reopening the earlier assessments. Since the petitioner did not pay the amount due under Exhibit P1, Exhibit P3 revenue recovery notice has been issued on 17.1.2006. This writ petition is filed, challenging Exhibit P3, stating that he proposes to file an appeal against Exhibit P1. If an assessee proposes to file an appeal, the respondents do not have a duty to stay further proceedings to recover the amount. So, this writ petition is ex facie unsustainable.

W.P. (C) No. 5649/06

5. The petitioner is aggrieved by Exhibits P1 and P2 assessment orders of the Sales Tax Officer, Ponkunnam for the years 1992-93 and 1993-94 respectively. Against Exhibit P1, the petitioner has filed Exhibit P3 appeal. Though, he has filed an early hearing petition, he has not filed any stay application along with the appeal. Now, Exhibit P4 revenue recovery notice has been served on him, proposing to recover the amounts covered by Exhibits P1 and P2. Since there is no challenge against Exhibit P2, the recovery of the amount covered by Exhibit P2, is perfectly legal and valid. Filing of an appeal, against Exhibit P1, will not operate as stay of it. Therefore, I find nothing illegal about the recovery of the amount covered by Exhibit P1, especially, in view of the fact that the petitioner has not, even now, filed or moved any stay application in the appeal.

W.P.(C) No. 5729/06

6. The petitioner challenges Exhibit P1 assessment order of the Sales tax Officer for the year 2002-03. The petitioner has got a statutory remedy against that assessment order. This writ petition, filed without invoking that remedy, cannot be entertained.

W.P.(C) No. 5753/06

7. This Writ Petition is filed, challenging Exhibit P3 order of the second respondent, Deputy Commissioner, Commercial Taxes, Kozhikode, disposing of an appeal without hearing the petitioner. Against the said order, the petitioner has got a right of appeal before the Sales Tax Appellate Tribunal, headed by a

District Judge. Therefore, it is unnecessary for this Court to entertain this writ petition. Accordingly, it is liable to be dismissed.

8. All these cases arise under the "appeal pending jurisprudence". Admittedly, there is no provision in the KGST Act, authorising the High Court to interfere with the revenue recovery proceedings, when appeals are pending. But, the petitioners have approached this Court, under Article 226 of the Constitution of India, to issue the writs of mandamus and certiorari. When this Court can issue a writ of mandamus, is well settled by the pronouncements of various authorities. Writ of mandamus is a high prerogative writ, which is normally issued to compel the performance of a public duty on an application made by one, who has got a legal right to the performance of that duty by the concerned public authority. In Halsbury's Law of England (4th Edition, Vol.1, Paragraph 89) it is stated that the object of mandamus is:

to remedy defects of justice; and accordingly, it will issue, to the end that justice may be done, in all cases where there is a specific right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.

In Administrative Law (H.W.R.Wade & C.S.Forsyth - 8th Edition) it is stated:

The prerogative remedy of mandamus has long provided the normal means of enforcing the performance of public duties by public authorities of all kinds. Like the other prerogative remedies, it is normally granted on the application of a private litigant, though it may equally well be used by one public authority against another. The commonest employment of mandamus is a weapon in the hands of an ordinary citizen when a public authority fails to do its duty by him. Certiorari and prohibition deal with wrongful action, mandamus deals with wrongful inaction. The prerogative remedies thus together cover the field of governmental powers and duties.

In Judicial Review of Administrative Action by De Smith, Woolf and Jowell (5th Edn), it is stated:

Today the main role of order of mandamus, now obtainable only in Order 53 proceedings, is to compel inferior tribunals to exercise jurisdiction that they have wrongfully declined, and to enforce the exercise of statutory duties and discretion in accordance with the law.

Our Supreme Court in The Praga Tools Corporation Vs. Shri C.A. Imanuel and Others, has observed:

...The condition precedent for the issue of mandamus is that there is in one claiming it a legal right to the performance of a legal duty by one against whom it is sought.

Again, the Apex Court in Mani Subrat Jain and Others Vs. State of Haryana and

Others, has held as follows:

It is elementary that it is to be restated that none can ask for mandamus without a legal right. There must be a judicially enforceable right as well as a legally protected right before one, suffering a legal grievance, can ask for a mandamus. A person can be said to be aggrieved only when a person is denied a legal right by some one, who has a legal duty to do something or to abstain from doing something.

Again the Supreme Court in *State of Kerala v. Lekshmikutty* 1987 (2) KLT 26 (SC) : (1986) 4 SCC 632 reiterated:

It is well settled that a writ of mandamus is not a writ of course or a writ of right, but, is as a rule discretionary. There must be a judicially enforceable right for the enforcement of which, a mandamus will lie. The legal right to enforce the performance of a duty must be in the applicant himself. In general, therefore, the court will only enforce the performance of statutory duties by public bodies on an application of a person who can show that he has himself a legal right to insist on such performance....The existence of a right is the foundation of the jurisdiction of a Court to issue a writ of mandamus.

Recently, his Lordship Sri. B.N. Srikrishna, Chief Justice (as his Lordship then was), noticing the alarming number of Writ Petitions filed before this Court, seeking writ of mandamus, has held in *Jayachandran v. State of Kerala* (2002 (3) KLT 125), as follows:

A writ of mandamus is to be issued after circumspection, and only upon the Court being satisfied that the "State" is either refusing or unduly delaying to act, ignoring its statutory responsibilities and has thus failed to discharge its constitutional duties. That too can be done after a specific notice drawing the attention of the statutory authority demanding redressal has failed to evoke satisfactory response. It appears that the principle underlying Article 226 of the Constitution is not being paid the attention it really deserves. Orders are often issued under Article 226 as if emanating from a slot machine at the drop of a coin and the pulling of a handle. It is time to change. Petitions under Article 226 need to be considered with greater circumspection and dealt with the seriousness they deserve. It may, perhaps, be said in extenuation, that the learned Judges are overburdened and inundated by the unabated deluge of Original Petitions in this Court under Article 226 of the Constitution of India. The contributing factors appear to be two-fold. First, there is no court fee levied on Original Petitions. We are informed that originally a court fee of Rs. 25 had been levied, but now that also has been abolished. A Full Court Resolution of this Court recommending reimposition of a reasonable court fee sent to the State Government is yet to elicit action from the State Government, despite reminders. The second, and, by far, the saddest factor is that Original Petitions are being filed in the most undeserving and flimsiest of cases. It is high time that legal fraternity also realises its responsibility and exercises its discretion by ensuring that

constitutional remedies are resorted to only in deserving cases where there is no other equally efficacious alternative remedy and that the High Prerogative Writs remain really High Prerogative Writs and do not become devalued and degenerated by over-use and abuse. We make these observations with the sad realisation of what is happening and with the hope that both the State and members of the bar will rise to the occasion and co-operate with us to effectively grapple with this problem of menacing proportions which is fast getting out of control.

(emphasis supplied).

Though, the State has introduced a court fee for the writ petitions, the situation, which evoked the above comments from the then Honourable Chief Justice, remains unchanged.

9. Normally, in appeal pending matters, this Court can interfere, if the appellate authority or the Tribunal has failed to dispose of the stay application filed by the appellants. This Court can direct the appellate authority or the Tribunal to consider the stay petitions, if they are not disposed of, even after the appellants moved for the same. If the appellate authority passes a stay order, which is ultra vires or without jurisdiction, this Court may judicially review it and quash it by issuing a writ of certiorari. But, in many of these cases, filed before this Court, I find that the petitioners have not filed any stay applications and even if, applications are filed, without moving them, this Court is being approached. I find that in one of the cases, the petitioner has stated that he is proposing to file an appeal and therefore, this Court should grant stay. The respondents do not owe any duty to the petitioners, not to proceed with the revenue recovery proceedings, for the reason that they have filed appeals or stay applications or they propose to file appeals or stay applications. The petitioners do not have a corresponding legal right also. So, the prayer of the petitioners for interfering with the revenue recovery notices made before this Court, is ex facie unsustainable. In some of the cases, without invoking the statutory remedy, they have approached this Court directly. In tax matters, a hierarchy of authorities, competent to grant remedies, is provided and thereafter, a provision to move this Court in revision is also made. So, the writ petitions, challenging the assessment orders, need not be entertained.

In view of the above position, all the writ petitions fail and they are dismissed. The dismissal of these writ petitions is without prejudice to the contentions of the petitioners and their right to move the statutory authorities for appropriate reliefs.