

(2016) 07 KL CK 0021
In the High Court Of Kerala
Case No : Writ Appeal No. 127 of 2015

Kerala Small Industries Development Corporation Ltd.	APPELLANT
Vs	
Intelligence Officer	RESPONDENT

Date of Decision : 12-07-2016

Acts Referred:

Constitution of India, 1950 — Article 226
Kerala Value Added Tax Act, 2003 — Section 67(1)

Citation : (2016) 4 KerLJ 38 : (2016) 3 KLT 891

Hon'ble Judges : Mr. Antony Dominic and Mr. Dama Seshadri Naidu, JJ.

Bench : Division Bench

Advocate : Sri. S. Ananthakrishnan and Sri. N.K. Subramanian, Advocates, for the Petitioner; Smt. Shoba Annamma Eapen, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Dama Seshadri Naidu, J.—The appellant filed W.P.(C) No. 35359/14 assailing Exts.P4 to P6 notices issued by the respondent authorities under Section 67(1) of the Kerala Value Added Tax Act, 2003. Later, aggrieved by the dismissal of the writ petition, the appellant has filed this intra-court appeal.

2. The appellant is a public sector Corporation selling and supplying, among other things, water beds to the Government Hospitals. In the course of time, the Intelligence Officer, the Department of Commercial Taxes, issued Exts.P4 to P6 notices under Section 67(1) of the Kerala Value Added Tax Act: that the appellant has misclassified the product and, as a result, not remitted the actual tax due to the Government. Assailing Exts.P4 to P6, the appellant filed a writ petition.

3. A learned Single Judge of this Court dismissed the writ petition on a preliminary ground: Exts.P4 to P6 are show-cause notices and that the appellant ought to have replied to them before taking recourse to any adjudicatory process. Aggrieved, the assessee filed this intra-court appeal.

4. The learned counsel for the appellant has contended that the first respondent lacks jurisdiction to issue Exts.P4 to P6 notices. He has further contended that the authority concerned was predetermined, and any reply by the appellant to Exts.P4 to P6 notices would be an exercise in futility. According to him, as the rate of tax to be applied is only 4%, rather than 12.5%, this Court ought to have, in the first instance, interfered with Exts.P4 to P6 notices. He has rested his case on a few precedents dealing with the public law remedy vis-`-vis a show-cause notice.

5. The learned Government Pleader has, on the other hand, contended that the appellant, as a precondition, ought to have answered the claims set out in the show-cause notices. She has also further submitted that the appellant, even thereafter, has an efficacious alternative remedy to agitate further.

6. Heard the learned counsel for the appellant and the learned Government Pleader, apart from perusing the record.

7. As has been contended by the learned counsel for the appellant, there can be no cavil that this Court, as is well established, can entertain a writ petition under Article 226 of the Constitution of India even regarding a show-cause notice. Through a profusion of precedents, this Court as well as the Hon'ble Supreme Court has affirmed that a show-cause notice can be interfered with, albeit, under certain specified circumstances.

8. Of the decisions cited by the appellant, in *M/s. Reckitt Bensicker (India) Ltd., v. Intelligence Officer (IB)*, (2007) 15 KTR 468 (Ker) a learned Division Bench of this Court has felt that the notice imposing penalty did not disclose any contumacious conduct on the assessee's part. It has, therefore, set aside the notice and directed the authorities to issue a fresh notice and an opportunity of hearing. *Khadeeja Makkar v. State of Kerala*, (2014) 22 KTR 558 (Ker) the learned Division Bench did not deal with the justiciability of a show-cause notice; nor does *Haleel Rahiman v. Commercial Tax Officer*, ILR 2014 (2) (Ker) 1010 a decision by another learned Division Bench.

9. In *Secretary, Aruvikkara Grama Panchayat v. Anandakumar*, [2015 (1) KHC 720] this Court, per one of us (Dama Seshadri Naidu, J), has summarised the precedential position on the adjudicability of a show-cause notice:

"16. There is no invariable principle that a show cause notice should not be a subject matter of judicial adjudication under any circumstance. Courts have held time and again that when the notice (1) suffers from the vice of ultra vires; (2) is a fait accompli or premeditated; or (3) is a product of malice or mala fides, it is justiciable without the party going through the procedural rigmarole."

10. In *Siemens Ltd. v. State of Maharashtra*, 2006 (12) SCC 33 the Hon'ble Supreme Court has held that ordinarily a Writ Court may not exercise its discretionary jurisdiction to entertain a writ petition questioning a notice to show-cause, unless the notice appears to have been without jurisdiction. *Siemens Ltd.,*

draws support from *State of U.P. v. Brahm Datt Sharma*, AIR 1987 SC 943, *Special Director v. Mohd. Ghulam Ghouse*, 2004 (3) SCC 440 and *Union of India v. Kunisetty Satyanarayana*, 2006 (12) SCC 28.

11. First, it cannot be said that the intelligence officer lacks jurisdiction to issue Exhibit P4 to P6 notices; he does have the power. But the issue raised by the appellant on merits is that the rate of tax ought to be at 4% but not 12.5%. Jurisdiction differs from justification.

12. Viewed from another perspective, we need to address another issue: whether the notices are premeditated-a facet of bias. If they are, what is the fallout? In such an event, even if the Court directs the statutory authority to hear the matter afresh, ordinarily such hearing would serve no fruitful purpose. (see *K.I. Shephard v. Union of India*, AIR 1988 SC 686). The principle of futility can be found reiterated by the Apex Court in *M/S Siemens Ltd. v. State of Maharashtra and Others*, [2007 KHC 3379].

13. Without piling up the precedents, we may observe that, in the present instance, a perusal of Exts.P4 to P6 amply demonstrates that the authority concerned has issued a show-cause notice calling upon the appellant to submit its explanation. But the appellant, without giving an explanation, has rushed to the Court. The view taken by the learned Single Judge that the parties have an efficacious alternative remedy, we reckon, is unexceptionable. We, therefore, dismiss the writ appeal as meritless, expressing no opinion on the merits for it might affect the further adjudicatory process.

14. As has been pleaded by the learned counsel for the appellant, this Court, however, preserves the appellant's right to submit an explanation to Exts.P4 to P6 show-cause notices. We further clarify that the appellant can approach the authority concerned seeking redressal of his grievance, if any, in the manner appellant deems it appropriate, subject to its legal sustainability. Writ appeal is dismissed accordingly.