

(2008) 09 GUJ CK 0096
In the Gujarat High Court

Case No : Special Civil Application No's. 5335 and 7804 of 2008

Mahalaxmi Traders and Another

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 09-09-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Gujarat Value Added Tax Act, 2003 — Section 32(4), 33, 34, 44, 46
Value Added Tax Rules, 2006 — Rule 29(1), 85(2)

Citation : (2009) 19 VST 92

Hon'ble Judges : Rajesh H Shukla, J;K.A. Puj, J

Bench : Division Bench

Advocate : Sanjay Suthar, for N.K. Majmudar, for the Appellant; Dipen Desai, Assistant Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Rajesh H. Shukla, J.—The present petitions have been filed by the petitioners who are the proprietors of the respective firms. Special Civil Application No. 5335 of 2008 is filed by Shri Mahalaxmi Traders through its proprietor Smt. Harpritkaur Kaushikkumar Manek and petitioner No. 2 is Smt. Harpritkaur Kaushikkumar Manek. Special Civil Application No. 7804 of 2008 is filed by Shri Bhavani Ispat through the proprietor, Kaushikkumar P. Manek and he is also petitioner No. 2. The proprietors of both the aforesaid firms are the husband and wife and the business of both the firms has been managed, controlled and carried out at the same premises, i.e., C-3-406, Anushruti Towers, Opposite New York Towers, S.G. Highway, Thaltej, Ahmedabad.

2. The present petitions have been filed by the petitioners for the prayer, inter alia, that writ, order or direction quashing and setting aside the illegal and arbitrary action on the part of the respondent-authorities of effecting attachment of the bank account of the petitioner No. 1-firms in each petition, that is, current account of ICICI, Bhavnagar branch and also current account of Syndicate Bank,

Vastrapur branch, the details of which are stated in the petitions, and also for a prayer to declare that the action is illegal, arbitrary and violative of the Gujarat Value Added Tax Act, 2003 ("the VAT Act", for short) and the Rules made thereunder. It is also prayed for quashing and setting aside the alleged illegal and arbitrary action of the respondent-authorities of passing a provisional attachment order dated January 7, 2008 in S.C. A. No. 5335 of 2008 attaching the premises being C-3-406, Anushruti Tower, Mr. Muktidham Jain Derasar, S.G. Highway, Thaltej, and also for appropriate order for restraining the respondent No. 2 from issuing the communication/notices to third parties u/s 44 of the VAT Act. It is required to be noted that identical prayers are also asked for in S.C.A. No. 7804 of 2008 and, conveniently, though the prayer (B) refers to the attachment of the same premises being C-3-406, Anushruti Tower, Nr. Muktidham Jain Derasar, S.G. Highway, Thaltej, there is no such attachment order and in fact it has not been produced by the petitioners in the said petition.

3. The facts of the case, briefly narrated and summarised, are that, as stated above, the proprietors of both the aforesaid firms are the husband and wife and Shri Mahalaxmi Traders is a proprietary concern doing the business of purchase and sales of iron and steel material of which petitioner No. 2-Smt. Harpritkaur Manek (wife) is the proprietor. The petitioner in S.C.A. No. 7804 of 2008, Shri Bhavani, Ispat is again a firm doing the business of purchase and sale of iron and steel of which the proprietor is Mr. Kaushikkumar P. Manek, who is the husband of petitioner No. 2 in S.C.A. No. 5335 of 2008, the proprietor of Shri Mahalaxmi Trader.

4. It is alleged that despite the petitioners having filed all necessary returns and without there being any breach of any of the terms, respondent No. 2 rushed to the place of petitioner No. 1-firm (Shri Mahalaxmi Traders) and in a highhanded manner carried out the inspection of the records of another firm, namely, Shri Bhavani Ispat (S.C.A. No. 7804 of 2008), which is owned, managed and administered by the husband of petitioner No. 2 in S.C.A. No. 5335 of 2008. It is also alleged that while carrying out inspection of the said Shri Bhavani Ispat, the respondent authorities have taken drastic action in respect of petitioner No. 1-firm, i.e., Shri Mahalaxmi Traders, and passed an order for attachment of the flat/office premises of petitioner No. 1-firm, Shri Mahalaxmi Traders, by provisional attachment order dated January 7, 2008 and, therefore, the said action as well as the provisional attachment order passed is challenged by way of the present petitions.

5. It is further alleged that the respondent-authorities have resorted to the proceedings in the nature of issuance of notices upon the third parties to whom the petitioners have sold goods and the respondent-authorities have no right to restrain third parties from making payment in respect of the transactions which have taken place between the petitioners and the third parties and, therefore, the said action has also been challenged by way of the present petitions.

6. It is contended in S.C.A. No. 5335 of 2008 filed by Shri Mahalaxmi Traders

that Shri Bhavani Ispat (S.C.A. No. 7804 of 2008) is a proprietorship concern solely owned, managed and administered by the husband of petitioner No. 2, namely, Kaushikkumar Pravinchandra Manek, and the said Shri Bhavani Ispat and petitioner No. 1-firm Shri Mahalaxmi Traders are having the same office address. The respondent-authorities have carried out the raid at the premises of the firm and the proceedings are initiated. It is also contended that the following notices have been issued to both the firms:

Shri Mahalaxmi Traders (S.C.A. No. 5335 of 2008) Notice in form No. 401
Notice in form No. 301 Provisional attachment order Shri Bhavani Ispat (S.C.A. No. 7804 of 2008) Notice in form No. 104 Notice in form No. 401

7. It is contended that the communication/notice in form No. 401 is purported to have been issued under Sections 67, 70 and 70A of the VAT Act and the proprietor of Shri Bhavani Ispat was directed to remain present on November 19, 2007 in respect of the aforesaid notice. Thereafter also, again, a notice in form No. 301 under Rule 29(1) of the VAT Rules, 2006 was issued. At this juncture, it is also required to be mentioned that a notice in form No. 401 was issued to Shri Bhavani Ispat calling upon them to remain present on November 19, 2007 with the relevant record. Thereafter also, the show-cause notice as per annexure C was issued to remain present for non-compliance with the notice in form No. 401 in exercise of powers under Sections 67, 70 and 70A of the VAT Act specifically stating that it may amount to violation of Rule 85(2) and therefore notice at annexure C in S.C.A. No. 7804 of 2008 has been issued calling upon the petitioners why penal action u/s 85(2) should not be initiated and calling upon them to remain present on November 19, 2007 with all the records.

8. Thereafter also, by communication dated January 7, 2008, the proprietor of Shri Bhavani Ispat was also specifically informed that as he has failed to comply with the notice issued in form No. 401 under Sections 67, 70 and 70A of the VAT Act and failed to produce the relevant record, why penal action u/s 85(2) should not be taken. It appears that in spite of this notice the petitioners have not responded. Further, Shri Bhavani Ispat, petitioner No. 1-firm in S.C.A. No. 7804 of 2008 was issued notice in form No. 104, which is a notice for cancellation of the certificate of registration under the VAT Act.

9. In the same way, the petitioners in S.C.A. No. 5335 of 2008 have also been issued notices in form No. 401 which is at annexure B and also notice in form No. 301 has been issued on January 5, 2008 which clearly states that in spite of the notice in form No. 401, the petitioners therein have failed to remain present and therefore the notice in form No. 301 for the provisional assessment was issued dated January 5, 2008. In spite of such notice they have not remained present and therefore the order regarding the provisional attachment, in exercise of powers under the VAT Act, has been issued, which is at annexure C. Thereafter, notices u/s 44 of the VAT Act have also been issued to Shri Mahalaxmi Traders and therefore the present petitions have been filed on various grounds.

10. It is contended that the petitioners made all the files and the record available and there was no necessity to issue such notices in form No. 401 and thereafter in form No. 301 at annexure C and thereafter the provisional attachment order dated January 7, 2008 at annexure D has been passed (S.C.A. No. 5335 of 2008).

11. Thereafter, another order came to be passed. It has been contended that the dealer would be liable to pay value added tax at four per cent depending upon the purchase and sales during the particular period and the respondents have wrongly worked out the amount of Rs. 49.94 lakhs as the liability of tax under the VAT Act for Shri Mahalaxmi Traders. It has been contended that the petitioners have not evaded any tax and in any case the petitioners are the third parties qua the liability of the Bhavani Ispat and its proprietor and therefore the orders passed freezing bank account of petitioner No. 1-firm, i.e., Shri Mahalaxmi Traders in S.C.A. No. 5335 of 2008 is violative of Article 14 of the Constitution and also the provisions of VAT Act.

12. In S.C.A. No. 7804 of 2008, it has been contended that the action on the part of the authorities freezing the bank account is without any justifiable reasons particularly when the petitioners have not evaded any tax and they do not have any past record of evading tax. It is also contended that the authorities were not having any clarity in respect of the estimated value of four per cent tax on profit amount and it is an arbitrary action of imposing or effecting attachment or freezing the bank account as a result of which the transactions in the business are put to a grinding halt. It is also specifically contended in paras 3.4 and 3.5 in S.C.A. No. 7804 of 2008 that respondent No. 2 had a glance at the transactions of the petitioner No. 1-firm, i.e., Shri Bhavani Ispat along with other firm, namely, Shri Mahalaxmi Traders during the inspection, and therefore straightaway on the same day the proceedings came to be initiated in respect of Shri Mahalaxmi Traders, which is managed by the wife of petitioner No. 2 in S.C.A. No. 7804 of 2008. It is also contended that petitioner No. 1-firm had sold the goods to Shri Mahalaxmi Traders and therefore the proceedings have been initiated against the said firm also. The petitioners have filed the written statement on January 8, 2008 and the premises of petitioner No. 1-firm is subject to attachment (the same premises is also said to have been belonging to Shri Mahalaxmi Traders, petitioner of S.C.A. No. 5335 of 2008). There are other similar averments made in both the petitions and the contentions are also raised on the same lines.

13. The learned advocate Mr. Suthar for learned advocate Mr. Majmudar for the petitioners has strenuously submitted that the entire action is bad and in violation of Article 14 of the Constitution as well as the provisions of the VAT Act and has also violated the principles of natural justice.

14. Though these contentions have been raised by learned advocate Mr. Suthar for learned advocate Mr. Majmudar for the petitioners, a bare reading of the notices in both the petitions and the provisional attachment order in S.C.A. No.

5335 of 2008 passed qua Shri Mahalaxmi Traders would make it clear that the petitioners have failed to respond to the notices issued by the authorities and in spite of repeated notices, they have not submitted the necessary details or the material on the basis of which the assessment could be made. The notice in form No. 401 is issued calling upon them to produce the material. When they failed to comply with the same, further notice is issued for the purpose of provisional attachment to which also when they have not complied with, further orders have been passed including the provisional attachment order of the premises of the business carried on by both the firms and also frozen the bank accounts of both the firms. A contention has been made by the learned advocate that as no assessment has been made, such provisional assessment and the order for attachment is contrary to law and is arbitrary and highhanded.

15. However, such a contention is required to be appreciated in light of the conduct as well as the scheme of the VAT Act. It would be evident from the annexures and notices produced including the order of provisional attachment and the show-cause notice issued in form No. 401 in exercise of powers under Sections 67, 70 and 70A of the VAT Act and also other notice in form No. 301 which specifically provides that they should remain present. It is required to be appreciated and noted that the petitioner in S.C.A. No. 7804 of 2008, i.e., Shri Bhavani Ispat and its proprietor has been issued a notice in form No. 401 calling upon them to remain present in November, 2007. When it has not been complied with, another communication at annexure C has been addressed making it clear that penal action u/s 85(2) could be initiated. Thereafter also by communication dated January 7, 2008 it has been made clear that as they have failed to comply with the notice in form No. 401 calling upon them to produce details and materials which they have not produced, another notice was issued for provisional assessment which is also not complied with and necessary assessment could not be made.

16. It is in these circumstances that the communication was addressed making it clear that penal action u/s 85(2) could be initiated against them and therefore a show-cause notice was issued as to why action u/s 85(2) should not be initiated.

17. The provisions of Section 32(4) provide that the Commissioner can, after giving the notice in the prescribed forms, if the dealer fails to comply with the same, provisionally assess to the best of his judgment the amount of tax payable by the dealer. Further, it also empowers the Commissioner to proceed with making the assessment. Section 33 provides for self-assessment and Section 34 provides for the audit assessment. The notice in form No. 301 also makes it clear that it refers to the provisional assessment. Thus, when in spite of repeated notices and reminders issued in different forms at different stages if the petitioners have failed to comply with the same by producing the necessary material and thereafter when they have been specifically informed that non-compliance with those notices for production of material and thereafter non-compliance with notice in form No. 301 for provisional assessment and notice for

penal action u/s 85(2), there was no response from the petitioners, that the authorities have passed the impugned orders.

18. Section 45 of the Act provides for provisional attachment. It reads as under:

Section 45. Provisional attachment.-(1) Where during the pendency of any proceedings of assessment or reassessment of turnover escaping assessment, the Commissioner is of the opinion that for the purpose of protecting the interest of the Government revenue, it is necessary so to do, he may, by order in writing, attach provisionally any property belonging to the dealer in such a manner as may be prescribed.

(2) Every such provisional attachment shall cease to have effect after the expiry of a period of one year from the date of the order made under Sub-section (1).

19. Thus, it is evident that the petitioners who have not only failed to comply with the notices and have not remained present with the registers, material for the purpose of assessment and even thereafter have not chosen to resort to the remedy as provided under the Act itself, cannot be permitted to invoke the jurisdiction of this Court under Article 226 of the Constitution of India. As a matter of fact, the conduct of the petitioners would disentitle them from any indulgence by this Court or exercise of discretionary relief. The petitioners cannot make a complaint that the assessment has not been made and there is any arbitrary or highhanded action inasmuch as there are specific notices issued to the petitioners and still they have failed and neglected to remain present for the purpose of assessment or clarification. Thereafter, as discussed hereinabove, in exercise of the powers under the Act, the Commissioner has proceeded to make the provisional assessment and attachment for which a grievance cannot be made.

20. Moreover, another facet of the argument is that issuance of notice to third parties u/s 44 may be restrained. However, the provisions of Section 44 which starts with a non obstante clause clearly provide for taking such measures and for recovery of the amount due to any such persons who has not paid the tax and to whom the notices have been served. Further, the provisions of Section 46 provide for "special powers of tax authorities for recovery of tax as arrears of land revenue". Section 73 provides for appeal and Section 74 provides for revision. As the petitioners have failed to exhaust the alternative remedy provided by the statute itself, this Court should decline to exercise the discretion under Article 226 of the Constitution even on that count also.

21. Further, even thereafter the petitioners could have resorted to and exhaust the remedies as provided under the Act and if the petitioners had still any grievance, they could have either made a representation offering co-operation or could have filed an appeal or revision specifically stating that they would remain present with necessary record and even thereafter if the grievance was not satisfied, they could have taken further recourse either under the provisions of the Act or by way of a petition.

22. However, this petition would not be maintainable under Article 226 of the Constitution of India straightaway without, on the one hand, availing the alternative remedy available under the statute and on the other, when the petitioners themselves are responsible for not remaining present in spite of sufficient opportunity given to them for the purpose of assessment. Therefore, this Court is of the opinion that no indulgence can be granted and it does not call for any interference in exercise of its discretionary jurisdiction under Article 226 of the Constitution of India.

23. Therefore, the present petitions deserve to be dismissed summarily and are hereby dismissed.