(2014) 11 KL CK 0174

In the High Court Of Kerala

Case No : WP(C). No. 1665 of 2009 (W)

Moulana Hospital APPELLANT

Vs

The Intelligence Officer RESPONDENT

Date of Decision : 11-11-2014

Acts Referred:
Kerala Value Added Tax Act, 2003 — Section 26, 67

Citation : (2014) 11 KL CK 0174

Hon'ble Judges : A.K. Jayasankaran Nambiar, J

Bench : Single Bench

Advocate : S. Anil Kumar (Trivandrum) and K.S. Hariharan, Advocate for the Appellant; K.T. Lilly, Govt. Pleader, M.G. Deviprasada, Jose Thomas and Remadevi G, Advocate for the Respondent

Judgement

A.K. Jayasankaran Nambiar, J.—The petitioner is a hospital registered under the Kerala Value Added Tax Act, 2003. It had leased out a shop, in a shopping complex attached to the hospital, to the 2nd respondent for running a hotel and the hospital canteen. The arrangement between the petitioner and the 2nd respondent was basically in the nature of a lease of premises for specified purposes and the petitioner was receiving rent from the 2nd respondent pursuant to the said arrangement. By Ext. P5 notice dated 15.10.2008, the petitioner was informed by the 1st respondent of a proposal for imposition of penalty for the assessment years 2005-2006 to 2008-2009 based on an inspection that was allegedly carried out at the canteen premises on 01.07.2008. The notice indicated that the proceedings were taken in terms of Section 67 of the Kerala Value Added Tax Act, and that the proceedings were taken against both the petitioner and the 2nd respondent on a protective basis as contemplated in Section 26 of the Kerala Value Added Tax Act. On receipt of the notice, the petitioner made enquiries with the respondents and obtained a copy of the shop inspection report which is produced as Ext. P6. Thereafter, the petitioner preferred a detailed reply to the notice received by him. The said reply produced as Ext. P7. Thereafter, by Ext. P8 order of the 1st respondent, a penalty was imposed jointly on the petitioner and the 2nd respondent. Ext. P8 order, to the extent it makes the petitioner liable jointly with the 2nd respondent for the penalty amounts thereunder, is impugned in the writ petition.

2. A counter affidavit has been filed on behalf of the 1st respondent wherein the sequence of events leading to the issuance of the notice and the passing of the order by the 1st respondent are narrated. It is pointed out that the 2nd respondent had taken out registration under the Kerala Value Added Tax Act, only with effect from 01.04.2008, and therefore, the petitioner could not avoid the liability to tax for the period from 01.04.2005 to 31.03.2008. It is also pointed out that the petitioner had given the canteen to a contractor who was an agent of the petitioner and it was in that capacity that the petitioner was sought to be proceeded against for the defaults committed by the 2nd respondent.

3. I have heard Sri. S. Anil Kumar, the learned counsel for the petitioner as also the learned Government Pleader appearing on behalf of the respondents.

4. On a consideration of the facts and circumstances of the case and the submissions made across the Bar, I find that this is a case where the respondents have chosen to rely on the provisions of Section 26 of the Kerala Value Added Tax Act, while issuing Ext. P5 notice proposing the imposition of penalty and Ext. P8 order levying the penalty subsequently. Section 26 reads as under:

"26. Protective assessment.-Notwithstanding anything to the contrary contained in any judgment, decree, order, direction or decision of any Court, Tribunal or other Authority, where the assessing authority has reason to believe that any person is, or was carrying on business in the name of, or in association with any other person, either directly or indirectly, whether as agent, employee, manager, power of attorney holder, guarantor or in any other capacity, such person and the person in whose name the registration certificate, if any, is taken, shall, jointly and severally, be liable for the payment of the tax, penalty or other amount due under this Act which shall be assessed, levied and recovered from all or any of such person or persons, as if such person or persons are dealers:

Provided that before taking action under this section, the persons concerned shall be given a reasonable opportunity of being heard."

5. It is apparent from a reading of Section 26 of the Kerala Value Added Tax Act, that before invoking the provisions of that Section it is incumbent upon the assessing authority to arrive at a finding with regard to the existence of reasons to believe that any person is or was carrying on business in the name of, or in association with any other person, either directly or indirectly whether as agent, employee, manager, power of attorney holder, guarantor or any other capacity. This finding has necessarily to be arrived at, by the authority that seeks to invoke the provisions of Section 26, for proceeding against any person, other than an assessee. In the instant case, the petitioner has been proceeded against on the assumption that he is closely associated with the 2nd respondent in the conduct of the canteen. There is nothing in Ext. P5 notice or Ext. P8 order, other

than a bland averment that "the canteen contractor as well as the partners of the hospital are jointly and severally liable for payment of tax penalty or other amounts due", to suggest that the petitioner is in any way connected with the business activities of the 2nd respondent. In my view, the mere mechanical averment of the requirements of section 26 will not suffice to confer a jurisdiction on the assessing authority to proceed against a person other than the assessee, by invoking the provisions of Section 26 of the Act. This aspect has been noticed in an earlier decision of this Court in Vasantha Anirudhan Vs. State of Kerala and Another wherein, while dealing with the liability of a guarantor to be proceeded against under section 26 of the Kerala Value Added Tax Act, it was held in paragraph 12 as follows:

"12............... The jurisdictional factor which enables the assessing authority to proceed under section 26 of the VAT Act is that there should be reason to believe that any person is or was carrying on business in the name or in association with any other person. It is the actual association with the business of the assessee (or the person in whose name the registration stands) that fulfils the basic jurisdictional factor for the assessing authority to proceed against a person other than the assessee under section 26 of the VAT Act. If there is a business association between the assessee and the non-assessee, as the case may be, then the latter cannot claim immunity from a proceeding under Section 26 of the VAT Act by styling himself to be an agent, employee, manager, power of attorney holder or a guarantor. In other words, it is not the existence of the jural relationship between an agent and principal, employer and employee, employer and manager or a principal and power of attorney holder that gives rise to proceedings under section 26 of the VAT Act. What the provision, therefore, provides for is that, if a person is associated with the business of another and the latter is an assessee or if the latter is actually a benami of the former, the mere fact that the non-assessee is in a position to pin on the label of an agent/ employer/manager on his lapel should not give him the opportunity to escape the clutches of law, Section 26 of the VAT Act does not mean or is intended to mean that an agent/employee/manager or power of attorney holder of an assessee, would be automatically vulnerable to be proceeded against under section 26 of the VAT Act merely by reason of the fact that they are placed in such a jural relationship between the principal and the agent, or an employee/employer or a principal and power of attorney holder that enables the assessing authority to invoke the power under section 26 of the VAT Act. It is the association of the non-assessee with the assessee in the pursuit of business that would satisfy the jurisdictional factors contemplated under/section 26 of the VAT Act."

6. I also take note of the submissions of counsel for the petitioner, based on the documents received by the petitioner pursuant to an RTI application, that the 2nd respondent had in fact filed returns and paid tax for the period from 2005-2006 to 2008-2009, the period covered by Ext. P5 notice as well as Ext. P8 order of penalty. If the said information is true, then it is clear that the business of running the canteen was one that was carried on by the 2nd respondent alone

and the petitioner could not be made liable for any tax or penalty arising on account of the conduct of the said business by the 2nd respondent. In the light of the discussions above, I quash Ext. P8 order of the 1st respondent, to the extent it imposes a penalty on the petitioner on protective basis. I make it clear that Ext. P8 order of the 1st respondent, to the extent it confirms the penalty on the 2nd respondent, is not interfered with in this judgment. It will be open to the respondents to proceed against the 2nd respondent for realisation of the amounts found due under Ext. P8 order of the 1st respondent.

The writ petition is allowed as above.

