

(2011) 08 AP CK 0006

In the Andhra Pradesh High Court

Case No : Writ Petition No. 1466 of 2011

Pratibha Constructions Engineers and Contractors (India)
Private Limited

APPELLANT

Vs

Commercial Tax Officer, Aryapuram Circle, Rajahmundry

RESPONDENT

Date of Decision : 26-08-2011

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2012) 47 VST 328

Hon'ble Judges : Goda Raghuram, J;Ashutosh Mohunta, J

Bench : Division Bench

Advocate : S. Dwarakanath, for the Appellant; A.V. Krishna Kowndinya for Commercial Taxes, for the Respondent

Final Decision : Allowed

Judgement

Ashutosh Mohunta, J.—The petitioner, M/s. Pratibha Constructions Engineers & Contractors (India) Private Limited, Kolhapur, Maharashtra State, assails the order dated July 24, 2008, passed by the Commercial Tax Officer, Aryapuram Circle, Rajahmundry, East Godavari District, the respondent, in G.I. No. 4225/2002-03 which was served on it by registered post on December 27, 2010 as illegal, arbitrary, without jurisdiction and barred by time. The petitioner-company is engaged in execution of works contracts. It has its registered office at Kolhapur, Maharashtra. It obtained a certificate of registration under the Andhra Pradesh General Sales Tax Act, 1957 (for short, "the 1957 Act") on the rolls of the respondent which was valid from November, 2002 and the same was surrendered to the respondent in April, 2005 as it had completed its works awarded by its principal contractor in the State of Andhra Pradesh. The petitioner-company commenced its works in Andhra Pradesh from the year 2002-03 and the final assessment thereof was completed by the respondent by order dated February 20, 2006 determining the gross and net turnovers as Rs. 4,05,87,600.

2. Challenging the same, the petitioner-company preferred an appeal before the

appellate authority, viz., the Appellate Deputy Commissioner (CT), Visakhapatnam Division. The appellate authority by its order dated July 17, 2006 while allowing the appeal of the petitioner-company directed the respondent to assess the petitioner-company under rule 6(3)(i) of the Andhra Pradesh General Sales Tax Rules (for short, "the Rules") as the works said to have been executed by it were spread over a period of more than one year.

3. Basing on the said order passed by the appellate authority, the respondent passed the consequential order dated April 10, 2007, whereby the petitioner-company was demanded to pay the balance tax of Rs. 41,858 for the assessment year 2002-03. However, the petitioner-company had requested the respondent to adjust the said amount in the refunds due to it for the assessment year 2003-04.

4. Further, the petitioner-company filed its applications in June 2009 seeking refund for the assessment years 2003-04 and 2004-05. As there was no response from the respondent on the said applications, the petitioner-company filed Writ Petition Nos. 12171 and 12238 of 2010 before this court. However, the respondent in the counter filed in W.P. No. 12238 of 2010 averred that the assessment order for the assessment year 2002-03 was revised by its order dated July 24, 2008 whereby the petitioner-company was demanded to pay the balance tax of Rs. 9,47,203 and that the said order was said to have served on it by way of affixture on July 27, 2008 as its business activities were found to have been closed without any intimation and without furnishing its address. It was further averred that the petitioner-company would therefore be entitled to the balance amount of Rs. 2,13,892 after adjusting the demand made for the assessment year 2002-03 under the order dated July 24, 2008 against the refund due for the assessment years 2003-04 and 2004-05 for which the petitioner-company is required to file its application afresh. It was also indicated that though the endorsement to the that effect was communicated to the petitioner-company by ordinary post without responding to the same, the petitioner-company filed the writ petitions earlier seeking refund in respect of the assessment years 2003-04 and 2004-05.

5. In reply to the said counter, the petitioner-company, while disputing the averments of the respondent, stated that it was not aware of the so-called revision of the assessment order passed by the respondent earlier for the assessment year 2002-03 as no proposal or order thereof was served upon it. It also stated that the alleged service of said revised assessment order dated July 24, 2008, by way of affixture can only be invoked as a last resort. However, the said writ petitions, W.P. Nos. 12171 and 12238 of 2010, were disposed of by this court on December 30, 2010 directing the respondent to refund the amounts due to the petitioner-company within four weeks from the date of the said order.

6. While matters stood thus, the respondent served the alleged revised assessment order claimed to have been passed on July 24, 2008, by registered post with acknowledgement due to the registered office of the petitioner-company at Kolhapur, Maharashtra, on December 27, 2010. The said revised

assessment order was appeared to have been passed by the respondent based on the objections raised by the Accountant-General (Audit), who opined that light diesel oil (LDO) purchased from M/s. Indian Oil Corporation Limited by the petitioner-company was an item ineligible to be purchased against G forms under G.O. Ms. No. 200 dated April 18, 2002 whereunder the difference tax of 17.33 per cent was sought to be recovered from the petitioner-company who was the buyer though under the scheme of the 1957 Act the liability is on the seller. Aggrieved by the order dated July 24, 2008 of the respondent, the present writ petition is filed.

7. The respondent filed a counter-affidavit stating that the petitioner-company has got an efficacious alternative remedy of appeal under the provision of the Andhra Pradesh Value Added Tax Act, 2005 and without taking recourse thereto it approached this court straightaway and that as the extraordinary jurisdiction of this court under article 226 of the Constitution is not meant to short-circuit or circumvent the alternative appellate remedy available under an enactment, this writ petition is liable to be dismissed on that ground. On facts, it is averred that after the appeal filed by the petitioner-company was allowed by the appellate authority on July 17, 2006, the respondent passed a consequential order on April 10, 2007. Thereafter, based on the report of the audit party, the respondent issued a show-cause notice dated July 15, 2008 to the petitioner-company proposing to revise the earlier assessment order dated April 10, 2007 but the said notice could not be served upon the petitioner as it closed down its business in Rajahmundry without any intimation to the respondent. However, the said show-cause notice was sent to the petitioner-company by ordinary post on August 26, 2009. As there was no response from the petitioner-company, the respondent passed the revised assessment order on July 24, 2008 and the same was served by way of affixture on July 27, 2008.

8. While so, after the filing of the Writ Petition Nos. 12171 and 12238 of 2010 by the petitioner-company seeking refund of the amounts for the assessment years 2003-04 and 2004-05, the respondent came to know about the address of the petitioner-company and accordingly the respondent sent a copy of the revised assessment order to the said address, which is now impugned in the present writ petition. In reply to the contention of the petitioner-company that the impugned order was barred by limitation, it is stated that the earlier assessment order dated April 10, 2007 was revised on July 24, 2008 and the same was finally served on the petitioner-company by registered post with acknowledgement due on December 27, 2010 and therefore the service of the same is within the period of limitation. It is also averred that the respondent after going through the report and upon verification of the record passed the impugned order independently. The respondent also denied the contention that no show-cause notice was issued prior to the passing of the revised assessment order as show-cause notice dated July 15, 2008 was served upon the petitioner-company by way of affixture as it closed down its business activities without any intimation to the respondent.

9. Refuting the averments made in the said counter, the petitioner-company while reiterating what has been averred in the writ affidavit stated that though the impugned order is an appealable order but in view of the fact that the same is challenged on the grounds of without jurisdiction and barred by limitation, the question of relegating the petitioner to appellate remedy does not arise. It is also stated that the impugned order being a consequential order having been passed pursuant to the order passed by the appellate authority, the initial assessment order dated February 20, 2006 got itself merged into the appellate order and therefore the question of revising the initial assessment order suo motu does not arise and that the opinion of audit party does not constitute fresh material dehors the record. It is further stated that G2 registration certificate was issued to the petitioner-company on November 30, 2002 which includes LDO as one of the eligible commodities much after issuance of G.O. Ms. No. 200 dated April 18, 2002 but the said certificate was neither amended nor cancelled so as to give effect to the said G.O. and therefore the said certificate cannot be found fault with. As to the averment of the respondent that show-cause notice dated July 15, 2008 was sent by ordinary post on August 26, 2009 to the petitioner, it is stated that when the alleged show-cause notice and the subsequent order culminated in 2008, it is astonished to see as to how a notice could have been sent by ordinary post, after more than one year, i.e., on August 26, 2009 which is incongruous.

10. Heard the learned counsel for the petitioner-company and the learned Special Standing Counsel for Commercial Taxes for the respondent. Perused the case file carefully.

11. The learned counsel for the petitioner-company submitted that the impugned order is illegal and without jurisdiction as the 1957 Act does not permit the respondent to revise his own order on the self-same material. He further submitted that objections raised by the audit party cannot be a ground to re-open the assessment as the same do not constitute fresh material de hors the record. In support of this contention, he placed reliance on the judgment of this court in Girdharlal and Company Vs. State of Andhra Pradesh, . He also argued that the impugned order is barred by limitation by placing reliance on the judgment of this court in State of Andhra Pradesh v. M. Ramakishtaiah & Co. (1994) 93 STC 406 (SC). The learned counsel further submitted that the alleged show-cause notice dated July 15, 2008 was not served upon the petitioner-company as per the procedure prescribed under rule 58 of the Rules and therefore there was no notice upon the petitioner-company before passing the impugned order. In this connection, he placed reliance on the judgment of this court in Kanaka Durga Wines, Gunur v. Commissioner of Commercial Taxes, Hyderabad (2001) 33 APSTJ 89. He therefore prayed that the impugned order is liable to be set aside and the writ petition be allowed in limine.

12. Per contra, the learned Special Standing Counsel for Commercial Taxes while supporting the impugned order submitted that pursuant to the order dated July

17, 2006 passed by the appellate authority the assessment order dated April 10, 2007 was passed and thereafter based on the objections raised by the audit party of the Accountant-General, a show-cause notice was served upon the petitioner-company by way of affixture as per rule 58 of the Rules as it closed down its business activities and as there was no response to the said notice from the petitioner-company, the respondent rightly passed the impugned order dated July 24, 2008 independently. He also argued that as soon as the respondent came to know the exact address of the petitioner-company pursuant to the filing of its two writ petitions before this court in W.P. Nos. 12171 and 12238 of 2010, a copy of the impugned order was communicated to the petitioner-company by registered post with acknowledgement due on December 27, 2010 and thus the service of the same was well within the period of limitation. He therefore contended that the impugned order does not warrant interference by this court and accordingly prayed that the writ appeal be dismissed.

13. We have gone through the impugned order and the other material placed on record. Admittedly, in the first instance the assessment order was passed on February 20, 2006 which was served upon the petitioner-company on March 20, 2006 by the respondent. Aggrieved thereby, the petitioner-company preferred an appeal before the appellate authority and by its order dated July 17, 2006 the said appeal was allowed. Pursuant thereto, the respondent passed the consequential order dated April 10, 2007. It is therefore clear that the earlier assessment order dated February 20, 2006 itself got merged into the appellate order dated July 17, 2006. Thereafter, the petitioner-company made a request to the petitioner-company to adjust the demanded amount under the order dated April 10, 2007 against the amount of refund sought by the petitioner-company for the assessment year 2003-04. While so, it is the case of the respondent that basing on the objections raised by the audit party of the Accountant-General, the earlier assessment order for the year 2002-03 was revised through orders dated July 24, 2008. However, it is the contention of the petitioner-company that no show-cause notice was issued to it before passing the said revised assessment order dated July 24, 2008 while it is the case of the respondent that as the petitioner-company closed down its business activities, the show-cause notice dated July 15, 2008 was sent to it by ordinary post on August 26, 2009, more than a year after the date of the show-cause notice. It is not understandable as to how the show-cause notice dated July 15, 2008 could have been sent to the petitioner-company, that too by ordinary post, more particularly when the consequential revised assessment order was alleged to have been passed on July 24, 2008. Even the alleged revised assessment order dated July 24, 2008 was served upon the petitioner-company by way of affixture and that after filing of the two writ petitions by the petitioner-company, a copy of the said order dated July 24, 2008 was said to have been finally served by registered post with acknowledgement due on December 27, 2010. It is clear from the record that the petitioner-company among other things furnished the details regarding its registered office at Kolhapur, Maharashtra State. Therefore, the respondent now

cannot be permitted to state that the petitioner-company closed down its business activities at Rajahmundry office without intimation to him and therefore the respondent does not know the further address of the petitioner-company.

14. Rule 58 of the Rules clearly contemplates as to how any notices, summons, order or proceedings under the 1957 Act or under the Rules may be effected. Rule 58 of the Rules reads thus :

58. The service on a dealer an assessing of any notice, summons, order or proceedings under the Act or under these Rules, may be effected in any of the following ways, namely:-

(a) by giving or tendering it to such dealer or his manager or agent;

(b) if such dealer or his manager or his agent is not found, by leaving it at his last known place of business or residence or by giving or tendering it to adult member of his family; or

(c) if the address of such dealer is known to the assessing authority, by sending it to him, by registered post, and if it is returned unserved, it shall be put in notice board of the office of the assessing authority or the notice board in the office of the local chamber of commerce or traders' association, and it shall be deemed that the said notice or summons or proceedings are served on the dealer and action shall be taken in pursuance thereof accordingly; or

(d) if any or all of the modes aforesaid is not practicable, by affixing it in some conspicuous place at his last known place of business or residence.

15. From a reading of the above provision, it is manifest that the so-called service of the alleged show-cause notice dated July 15, 2008 and the consequential revised assessment order dated July 24, 2008 by the respondent to the petitioner-company is in flagrant violation of the statutory procedure prescribed therefor and the doctrine of audi alteram partem.

16. In this regard, reference may be made to the judgment of this court in *Kanaka Durga Wines, Gunur v. Commissioner of Commercial Taxes, Hyderabad* (2001) 33 APSTJ 89. Therein, it was held thus :

Be that as it may, the reassessment order passed by the Commissioner on June 4, 1998 is also required to be set at naught for one more reason. In the counter filed on behalf of the Department, not a word is said about the allegations made by the appellant/assessee that the second show-cause notice dated January 12, 1998, proposing to revise the order of the Commercial Tax Officer to an extent of Rs. 1.3 crores tax liability was not served on the appellant. It is also not the case of the respondent that a copy of the said notice was served on the counsel of the appellant/assessee who appeared for the appellant before the Appellate Deputy Commissioner. We are satisfied that the respondent-authorities have not taken appropriate steps to serve notice on the appellant in accordance with the modes prescribed in rule 58. In that view of the matter, we hold that the order made by

the Commissioner on June 4, 1998 is in violation of the principles of natural justice and rule 58 of the Rules.

17. Further, the alleged revised assessment order dated July 24, 2008 was passed only based on a report of the audit party of the Accountant-General and there is no other material on record to do so than what was already considered by the respondent while passing the earlier order dated April 10, 2007 pursuant to the appellate order dated July 17, 2006. It is therefore clear that the respondent under the impugned order revised assessment of the petitioner-company for the year 2002-03 suo motu without any new material on record which ought to have been considered but not considered earlier. The respondent cannot revise the assessment order passed by him earlier on his own volition without there being any new material on record for doing so. In *Girdharlal and Company Vs. State of Andhra Pradesh*, , while dealing with the aspect of condition precedent for reopening assessment, held thus (pages 444 and 445 in 97 STC):

... The criterion to judge whether there has been a reasonable exercise of power under the said provision is not whether there was lack of diligence but whether there was lack of material at the time of assessment that necessitated exercise of the power. If necessary material was available on record but the assessing authorities had not adverted to relevant aspect due to lack of diligence, it would not afford a ground to the assessing authority or his successor to exercise power u/s 14(4), but if the record did not contain the relevant material which comes to the notice of the authority from other sources after the assessment then it would afford a justifiable ground to exercise power under that section. In other words, for the exercise of power u/s 14(4), reliance should be made not on the material on record but on the material de hors the record which came to the notice of the assessing authority subsequent to the assessment. In short, non-application of mind by the assessing authority to the material on record at the time of assessment, is not a justifiable ground to invoke power u/s 14(4) of the Act. The same view is taken by a Division Bench of this court in *Girdharlal and Company Vs. State of Andhra Pradesh*,) to which one of us (Syed Shah Mohammad Quadri, J.) was a party. To the same effect is the pronouncement in *State of Andhra Pradesh v. Ratna Sree Box Makers* [1989] 75 STC 82 (AP). That being the position in law, the exercise of power u/s 14(4) in the instant case on the mere ground that the assessing authority did not advert to the aspect, viz., that there has been purchase of the silver and gold ornaments from an unregistered dealer, cannot be a justifiable reason. In our view the Tribunal was right in coming to the conclusion that the original authority himself did not advert to the aspect of purchase of old jewellery by the assessee and also utilisation of the old jewellery in the manufacture of new jewellery which was sold by the assessee.

(emphasis supplied)

18. Furthermore, even if the contentions of the respondent as to the service of show-cause notice dated July 15, 2008 and the revised assessment order dated

July 24, 2008 are accepted to be true and legally valid in law strictly for the sake of argument, still the same is barred by limitation as in the first instance the assessment order for the assessment year 2002-03 was passed on February 20, 2006 which was served upon the petitioner-company on March 20, 2006 and therefore the period of limitation of four years for passing reassessment order if any in accordance with law would expire by March 19, 2010 whereas in the present case the revised assessment order dated July 24, 2008 was served upon the petitioner on December 27, 2010 by registered post with acknowledgement due. There is thus no plausible explanation forthcoming for this inordinate delay in effecting service of the same upon the petitioner. Therefore, the same is barred by limitation. The Supreme Court in *State of Andhra Pradesh v. M. Ramakishiaiah & Co.* (1994) 93 STC 406 (SC), while dealing with the period of limitation of four years under the 1957 Act, held thus (page 407 in 93 STC) :

We are of the opinion that the theory evolved by the High Court may not be really called for in the circumstances of the case. We are of the opinion that this appeal has to be dismissed on the ground urged by the assessee himself. As stated above, the order of the Deputy Commissioner is said to have been made on January 6, 1973, but it was served upon the assessee on November 21, 1973, i.e., precisely 10½ months later. There is no explanation from the Deputy Commissioner why it was so delayed. If there had been a proper explanation, it would have been a different matter. But, in the absence of any explanation whatsoever, we must presume that the order was not made on the date it purports to have been made. It could have been made after the expiry of the prescribed four years" period. The civil appeal is accordingly dismissed.

19. In the light of the above discussion, the contention of the respondent that the impugned order is appealable and therefore the writ petition is not maintainable as the extraordinary jurisdiction of this court under article 226 of the Constitution cannot be invoked to short-circuit or circumvent the statutory appellate remedies, cannot be countenanced for the reasons more than one that the impugned order is illegal, arbitrary, without jurisdiction and even barred by limitation as indicated hereinabove.

20. For the foregoing reasons, the other contentions of the petitioner-company as well as the respondent need not be gone into. Consequently, the impugned order dated July 24, 2008 is liable to be set aside, which we accordingly do so. In the result, the writ petition is allowed but in the circumstances of the case, the parties shall bear their own costs.