

(1961) 10 MAD CK 0021

In the Madras High Court

Case No : Writ Petition No. 288 of 1959

R.M.P.R.M.P. Valliappa Chettiar and Others

APPELLANT

Vs

The State of Madras

RESPONDENT

Date of Decision : 06-10-1961

Acts Referred:

Citation : AIR 1962 Mad 372

Hon'ble Judges : Jagadisan, J

Bench : Single Bench

Judgement

Jagadisan, J.—This is a petition under Art. 228 of the Constitution for the issue of a writ of certiorari or other appropriate writ, order or

direction for quashing the order of the Additional Joint Commercial tax Officer (Assessments). Madurai-South dated 28-3-1959 passed under the

Madras General Sales-tax Act.

2. The petitioner is a dealer in textiles in Madurai. In respect of the assessment year 1-4-1957 to 31-3-1958 he submitted a return or his business

turnover under the Madras General Sales-tax Act declaring a net, assessable turnover of Rs. 4,78,058--10nP. The assessing authority, the

respondent herein, issued the notice dated 20th March 1959 to the petitioner pointing out inter alia, that he will have to pay an additional duty

under S. 3(2) of the Act in respect of sale of cloth purchased by him from outside the State and in respect of the stock of goods held by him on

31-12-1957 and sold in the year of assessment. The respondent proposed to determine the net turnover of the petitioner in the sum of Rs.

5,85,716-02nP and called for objections, if any, from the petitioner to the proposed assessment within three days from the date of receipt of the

notice. The petitioner was further informed by that notice that if he desired to be heard in person, he should present himself ore the respondent with

all relevant records at 11 a.m. on 24-3-1959 at his office at Madurai. The petitioner wrote a letter to the respondent on 24-3-1959 requesting that

time may be granted to file objections and to submit, oral explanation, till 11 a.m. on the 28th March 1959. The respondent granted time as prayed

for on 24-3-1959 itself and informed the petitioner that if no objections were filed before the 28th orders will be passed as proposed.

The petitioner having thus obtained time to prefer she objections till the 28th March 1959 filed the above writ petition in this court an 26-3-1959

praying for the issue of a writ of prohibition or such other appropriate writ, order or direction as this court may deem fit calling for the records

relating to the assessment of sales-tax payable by the petitioner for the year 1957-58 and to prohibit the respondent from taking any steps to levy

an additional tax of 8 per cent on the sale of cloth from 1-4-1957 to 31A-1958. According to the petitioner, This court adjourned the writ petition

for three weeks from 26-3-1959 directing him to comply with the respondent's nonce calling for objections to the proposed assessment. The

petitioner had therefore necessarily to file a statement of objections before the respondent, and this he did on 27-3-1959. The petitioner submitted

in his statement of objections that he was not liable to pay an, additional tax of 8 Per cent for sale of cloth effected between 1-4-1957 and 13-12-

1957 as he had not collected the tax from the purchasers. He claimed that he was entitled the benefit of waiver of tax on the part of the State as

per the Government Order in Memo No. 98975/M/57 dated 7-1-1959. He drew the attention of the respondent to tie fact that he had already

submitted his accounts and sale bills to prove that he had not collected the additional tax during the said period & Submitted that his accounts and

sale bills conclusively established the fact of his not having collected tax from his purchasers.

The petitioner also disputed his liability to pay the additional tax in regard to the sale or stocks sold by him on 13-12-1957 on the ground that the

Central Act 58 of 1957 levying excise duty would not apply to his stocks as it was not stock held by the mills on the date when that Act came into,

force B his order dated 28-2-1959 the respondent disbelieved the petitioner's version that he did not collect the additional duty from his

purchasers, between 1-4-1957 and 13-12-1957 on a scrutiny of the account books and bills produced by the petitioner. The respondent took the view that the petitioner had collected the additional tax in a disguised form from the purchasers without, including the tax collected as a specific item in the bill but by adding the tax to the price of the goods sold. The respondent also overruled the objection of the petitioner that there can be no, tax on the sale of cloth held by him on 13-12-1957 holding that the petitioner failed to avail himself of the benefit of "compounding" presumably under Ordinance 4 of 1957. On 6-4-1959, the petitioner filed C. M. P. No. 2391 of 1959 in this court praying for, the amendment of the original writ of prohibition into one for the writ of certiorari and this petition was ordered on 21-4-1959. On that date rule nisi was issued by this Court in the amended writ petition, which is one for the issue of a writ of certiorari as pointed out already.

3. For a proper appreciation of the contentions raised on behalf of the petitioner in this writ petition it is necessary to refer to the genesis of "the

Government Order the Protection of which is said to have been denied to the petitioner. in respect of cloth other than handloom the Legislature

introduced an additional levy under the Madras General Sale-tax in 1954 on the first sale in the State of mill cloth of several varieties, "fine" and

super-fine" Madras Act XX of 1954 which commenced to operate on and from 23-8-1954 brought in an additional charge in respect of the, said

commodities at the rate of one anna and three pies in the rupee. Madras Act I of 1957 modified the rate into one of 8 per cent on the sales

effected from 1-1-1957. The taxable event which attracted the additional levy was the "first sale" in the State and the statute did not specify

whether the first sale should be a sale by a dealer in the, State or whether it can include a sale by a nonresident outside the State.

In or about March 1956, the Sales-tax appellate Tribunal interpreted the word "first sale" attracting additional levy as, including a sale by a non-

resident dealer to a dealer in the state. This meant that a sale by a dealer in the State of, cloth purchased non-resident outside the State became

second sales" not within, the purview of the additional levy. As the interpretation placed by the Tribunal on the words of the statute. was quite just

and proper, the State amended the Act by Act XXIII of 1957 substituting the words "by a dealer who is residing in the, State of Madras for the

words ""by a dealer"" formerly occurring the Statute. On this amendment of the statute, it became plain that a sale by a dealer in the State of goods

purchased by him from outside the State from a non-resident dealer was the first sale subject to the additional levy, of, eight per This amendment

was given retrospective effect from 23rd August 1954. Section 4 of the Act, Act XXIII of 1957, validated the levy and collection of all taxes

made before the Act notwithstanding any judgment or order of the court to the contrary. The result of this drastic legislation was to place the

dealers in textiles in a quandary and in an unenviable position.

Acting on the interpretation placed by the appellate Tribunal on the unamended statute as, it obtained prior to 1957 the dealers could not collect

the additional levy of 8 per cent from their purchasers. By retrospective operation given to the amended legislation of the year 1957, the dealers

because liable to pay the additional tax in respect of, sales in which they did not collect the tax from their Purchasers. The dealers therefore

became subject to the additional levy without their having had opportunity to pass on be tax-to their any purchasers and collect it from them. it is at

this juncture when loud protests were made on behalf o f the textile merchants against the inequities caused to them by retrospective tax legislation

that the Government passed the Government Order which is in these terms:

It has been represented to tile Government, that since 1-1-1957 some of the dealers have not collected the additional tax in respect the sales of

mill cloth etc. made by them. The government have decided that in cases where the dealers prove to the satisfaction of the assessing authorities that

they have not a collected the additional tax from their customers the collection of the additional tax should he waived in respect of their sales of mill

cloth etc. during the period from 1-1-1957 to 12-12-1957. The onus of proving that he bag not collected the additional tax frost his customers will

in that of the dealer. The Government have further decided that in cases in which dealers had not, collected the additional tax from their customers

for their sales during from 1-1-1957 to 17-12-1957 but had paid tax to the department, refunds should he allowed on application by each dealer,

after a careful scrutiny of each case.

The substance of the Government Order is that the dealers who had failed to collect the additional tax from their purchaser need not pay the

additional duty to the Government and if the dealers had paid the additional duty to the Government without having collected it from their

purchasers, they would be entitled to a refund from the Government.

4. The petitioner's contention is that during the relevant dates 1-4-1957, to 12-12-1957 he did not collect the additional duty from his purchasers

and that he was entitled to the benefit of aforesaid Government Order. The simple point in issue is whether the petitioner has not collected the

additional tax from his purchasers. This is a fact which is peculiarly within the knowledge of the petitioner and the terms of the Government Order

make quite clear that the onus of establishing this is upon the petitioner. It may be that the petitioner's account books and bills of sale do not ex

facie show any collection of the additional tax of 8 per cent but this circumstance cannot conclude the issues in his favour. It is yet competent to the

authorities to probe into the matter and find out whether in fact the petitioner had collected the tax, though in a disguised form. I am unable to see

any error of law in the order of the respondent holding that the petitioner is not entitled to the benefit of the Government order.

5. The contention of the petitioner that there can be no levy of additional duty in regard to the sale of stock held by him on 13-12-1957 is clearly

unsustainable. After the enactment of Madras Act XXIII of 1957 it became clear that the sales effected by the petitioner, though in goods

purchased from non-resident dealers outside the State, attracted the additional levy as they constituted first sale. Central Act 58 of 1957 received

the assent of the President on 24-12-1957. Section 3 of that Act is in these terms..

There shall be levied and collected in respect of the following goods, namely, sugar, tobacco, cotton fabrics, rayon or artificial silk fabrics and

woollen fabrics produced or manufactured in India and on all such goods lying in stock within the precincts of any factory, warehouse or other

premises where the said goods were manufactured, stored or produced, or in any premises appurtenant thereto, duties of excise at the rate or

rates specified in the First Schedule to this Act.

Item No. 12 in First Schedule is cotton fabrics, The first, Schedule contains different rates of levy of tax for superfine, fine, medium and coarse

cotton fabrics. The State Government promulgated the Ordinance, Madras

ordinance No. IV of 1957. Section 3 of the Ordinance is in these terms:

1. Notwithstanding anything contained in the 1939 Act, and in the 1954 Act, any dealer, liable to pay sales tax in respect of mill cloth or sugar

under the provisions of S. 3(2) of the 1939 Act or under the 1954 Act, may, on application to the officer having jurisdiction to assess him to sales-

tax made within two weeks of the commencement of this ordinance, be permitted to compound the sales tax that would become payable in respect

of those goods in his possession at the commencement of this Ordinance by paying in lieu thereof a sum equivalent to the additional excise duty

which would have been payable on those goods had such mill cloth or sugar remained with the producer or manufacturer.

2. He may make a similar application before the 31st of January 1958, in respect of mill cloth and sugar received by him after the commencement

of this Ordinance and within one month after such commencement.

6. The petitioner admittedly failed to avail himself of the benefit of compounding to which he was entitled under the provisions of the Ordinance.

The Ordinance did not relieve him completely from the burden of additional taxation under S. 3(2) of the Madras General Sales-tax Act and

from the date of the Ordinance. The petitioner had a choice to pay either the additional duty as per the provisions of the Madras General Sales-tax

Act or to confound the liability of such additional duty in the manner prescribed under the Ordinance. It is impossible to read the provision of the

Ordinance as affording a total immunity from the additional levy under the Sales-tax Act after the promulgation of the Ordinance. There is really no

substance in this contention of the petitioner.

7. I have no hesitation in holding that the impugned order of the respondent is not susceptible of being quashed by any appropriate writ under Art.

226 of the Constitution.

8. Learned counsel for the petitioner relied upon a decision of a Division Bench of this court in W. P. Nos. 832 to 834 and 887 of 1958 (Mad) in

which this court issued a writ of certiorari quashing order of the Deputy Commercial tax Officer, Godown Division, Madras in respect of an

assessment of a dealer in piecegoods. One of the questions raised in that case was whether the petitioner was entitled to the benefit of the

Government Order extracted above. An important feature of that case was that no opportunity was given to the dealer to substantiate his

contention that he had not collected the additional tax from his purchasers. In fact, it was conceded by the taxing authority itself that no such

opportunity was given to the dealer as is obvious from the following observation Contained in the judgment.

It is conceded that no such opportunity was given to the petitioners; that they had nor even been directed to prove what they stated namely that they

had (not?) in fact collected additional tax from their customers.

On this concession, the Division Bench held that there was a denial of reasonable opportunity to the aggrieved dealer and that therefore the

proceedings of the taxing authority were opposed to the principles of natural justice. The nonobservance of fair and proper procedure in the

enforcement of tax laws by the taxing authorities really amounts to failure of performance of public duties, and this court can and must intervene to

safeguard the subject from being victims of such a procedure. I am not persuaded to hold that a writ must issue in the present case because of the

decision of the Division Bench, which must be taken to, be a decision turning on the peculiar facts of that case.

9. There is not the faintest suggestion or the modest whisper, in the two affidavits filed by the petitioner the one in support of the writ petition and

the other in support of the C. M. P. No. 2391 of 1959. of the petitioner having been deprived of any fair opportunity to put forward and

substantiate the objections raised by him to the proposed assessment. It is quite obvious that the order of the assessing authority in this case cannot

be quashed on the ground of violation of principles of natural justice in the procedure adopted by that authority.

10. The exercise of jurisdiction of this court under Art. 226 of the Constitution in granting writs is purely discretionary and seldom can an applicant

ask for it as of right. Prerogative writs are not issued as a matter of course. There can be no standard of discretion which should guide the court in

exercising its powers under this provision of law as very much depends upon the facts and circumstances of each case. But the court cannot act on

its mere will and pleasure as that is the essence of arbitrariness. An arbitrary exercise of power is the very negation of exercise of discretion and

therefore what is plainly arbitrary cannot be accepted to be the result of exercise of discretion. The area of discretion is so large that it is

impossible to expect a set pattern of judicial uniformity.

Having regard to the growing and steady practice obtaining in this court of writ petitions being filed from the decisions and orders or subordinate

authorities and tribunals unmindful and quite regardless of the remedies open to the aggrieved suitor by way of appeal and revision provided for

statutory, I wish to express my firm opinion that as a rule, ordinarily and normally, in the absence of special facts or extraordinary circumstances,

the discretion of this court under Art. 226 should not be exercised in granting writs before the special remedies have been availed of and exhausted

by the applicant. Most of the questions arising for determination in these writ petitions are disputes questions of fact which can only be decided by

the competent authorities and tribunals on materials properly placed before them. This court cannot, embark upon investigation of facts and should

not be compelled to make such investigation merely because it suits the applicant to seek the aid of this court in reference to the other remedies

deliberately abandoned or by-passed by him.

11. The petitioner failed to pursue the statutory remedy prescribed under the Act against the impugned order of assessment, and assuming that the

said order is vitiated by any error of law apparent on the face of the record, I am of opinion that the discretion to issue the writ should not be

exercised in his favour.

12. The petitioner lion averred that the order of the assessing authority is void ab initio and is patently lacking in jurisdiction and that his

fundamental rights under Art. 19(1)(g) and Art. 14 of the Constitution stand infringed. Learned counsel for the petitioner did not adduce any

argument in support of this plea. There, can be no doubt that the assessing authority had Jurisdiction to pass the, order and that the order even if it

be unsustainable in law or on facts cannot be called void. The writ petition fails and is dismissed with costs. Rule nisi is discharged. Counsel's fee

Rs. 100/-.