(2009) 06 KL CK 0005

In the High Court Of Kerala

Case No : Writ Petition (C) No. 5167 of 2008 (M)

Shajahan T.K. and Another — APPELLANT

Vs

District Collector and Others — RESPONDENT

Date of Decision : 02-06-2009

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 2, 26A, 7
Kerala General Sales Tax Rules, 1963 — Rule 42, 6, 6(2)
Kerala Revenue Recovery Act, 1968 — Section 44, 44(1), 44(2), 44(3)

Citation : (2009) 3 KLJ 403 : (2009) 3 KLJ 402

Hon'ble Judges : P.R. Ramachandra Menon, J

Bench : Single Bench

Advocate : T.M. Abdul Latheef, for the Appellant; V.K. Shamsudheen, G.P., for the Respondent

Final Decision : Allowed

Judgement

P.R. Ramachandra Menon, J.—The prayer of the petitioners is to set aside Ext.P6 whereby the immovable property purchased by them has been attached in the course of realization of Sales Tax arrears to the tune of Rs. 2,16,232/-stated as due from the 5th respondent in respect of the year 1996 - ''97, whereas the property was purchased by the petitioners from the surety to the 5th respondent much earlier on 21.7.1995 as evident from Ext.Pl sale deed.

2. The father of the second petitioner, by name T.M. Pareed Khan, was a surety to the 5th respondent, in connection with the registration given to the 5th respondent under the KGST Act/Rules. Mr. T.M. Pareed Khan owned about 1.3 acres of land, which was purchased by the first petitioner for valuable consideration as per Ext.Pl sale deed. Subsequently, the first petitioner transferred 77 cents of land to the second petitioner, who in turn has effected subsequent transfers to various other persons as well. The coercive steps, admittedly pursued by the respondents 1 to 4 were mainly against 5th respondent and also his surety by name Mr. Pareed Khali, that too, in respect of

assessment year 1996 - ''97 and as such, the petitioners contend that this could never have adversely affected the rights and interest of the petitioners, particularly when they had obtained properties from the surety Mr. Pareed Khan as per Ext.Pl sale deed executed much earlier,

3. The crucial question to be considered is, whether Ext.Pl sale deed dated 21.7.95 could be regarded as a conveyance effected in contravention of the relevant provisions of law, so as to attract the adverse circumstances as contemplated u/s 44 of the Revenue Recovery Act or for attracting Section 26(A) of the KGST Act. Section 44 of the Kerala Revenue Recovery Act is extracted below:

44. Effect of engagements and transfers by the defaulter - (1) Any engagement entered into by the defaulted with any one in respect of any immovable property after the service of the written demand on him shall not be binding upon the Government

(2) Any transfer of immovable property made by a defaulter after public revenue due on any land from him has fallen in arrear, with intent to defeat or delay the recovery of such arrear, shall not be binding upon the Government.

(3) Where a defaulter transfers immovable property to a near relative or for grossly inadequate consideration after public revenue due on any land from him has fallen in arrear, it shall be presumed until the contrary is proved, that such transfer is made with intent to defeat or delay the recovery of such arrear, and the Collector or the authorised officer may, subject to the order of a competent Court, proceed to recover such arrear of public revenue by attachment and sale of the property so transferred, as if such transfer has not taken place:

Provided that, before proceeding to attach such property, the Collector or the authorised officer shall:

i) give the defaulter an opportunity of being heard; and

(ii) record his reasons therefore in writing.

Explanation - For the purposes of this section, "near relative" includes husband, wife, father, mother, sister, son, daughter, step son, step daughter, uncle, aunt, son-in-law, daughter-in-law, brother-in-law, nephew or niece of the transferor.

4. To attract the Sub-section 1 of Section 44, it is very much necessary that the conveyance of the immovable property (agreement for transfer of immovable property) should have been after the service of the written demand on the defaulter. In the instant case, notice has been admittedly served on Mr. Pareed Khan only on 3.8.2001 as stated in paragraph 2 of the counter affidavit filed on behalf of the respondents 1 to 4. As such sub Section 1 cannot have any application at all.

5. In order to attract the mandate under Sub-section 2 of Section 44, transfer of immovable property should have been after the public revenue due on any land

had "fallen in arrears". In the instant case, admittedly the assessment year in respect of which the amount is sought to be realized is 1996 -97, whereas the transfer of the immovable property was on 21.5.1995 i.e. prior to the assessment year. As such Sub-section 2 is also not relevant to decide the case is hand.

6. Sub-section 3 of Section 44 contemplates transfer of immovable property to a ''near relative'' or for ''grossly inadequate consideration'' after public revenue due on any land had fallen in arrears. In other words, this Sub-section contemplates 3 different circumstances, i.e. (i) transfer should be to a near relative; (ii) amount should have fallen in arrears or (iii) conveyance should be for grossly inadequate consideration. In view of the undisputed facts and figures, none of the 3 circumstances does prevail the present case and as such, the reliance placed on Section 44 by the departmental authorities cannot be of any significance.

7. The learned Counsel for the petitioners further submits that Section 26A of the KGST Act also will not come to the rescue of the revenue, to sustain the proceedings issued by them. Section 26A of the KGST Act is extracted below:

26A. Certain transfers to be void: (1) where, during the pendency of any proceedings under this Act or after the completion thereof, any assessee creates a charge on, or parts with the possession (by way of sale, mortgage, gift, exchange or any other mode of transfer whatsoever), of any of his assets in favour any person, such charge or transfer shall be void as against any claim in respect of any tax of any other sum payable by the assessee under this Act.

8. From the very wordings of the Statute, it is submitted by the learned Counsel for the petitioners that, it will be attracted only if transfer is effected by the assessee. According to the petitioners, the person who effected the transfer of the property as per Ext.P1 sale deed, i.e. person by name Pareed Khan is not an ''assessee'' and as such, the said provision is not attract to the case in hand.

9. The learned Government Pleader appearing on behalf of the respondents submits that, the vendor to Ex.Pl sale deed is very much liable to be regarded as an ''assessee'', in view of the definition of term assessee as given under 2(iii) of KGST Act which is extracted.

2(iii) "Assessee" means a person by whom tax or any other sum of money is payable under this Act, and includes every person in respect of whom any proceedings under this Act have been taken for the assessment of tax payable by him.

10. Considering the admitted facts and circumstances, or atleast the undisputed extent of involvement of the parties concerned, it can be easily seen that Mr. Pareed Khan, vendor to Ext.Pl sales deed, very much comes within the term ''assessee'' as given u/s 2(iii) of the KGST Act, he being a surety to the 5th respondent/original assessee. As such Section 26 (A) is very much attracted to

the case in hand.

11. Now the question is regarding the extent of liability that could fixed on the parties concerned, referring to Ext.R4(a) to R4(c) proceedings (bond, security bond, statement etc.)-executed by Mr. Pareed Khan as early as on 9.7.91. The learned Government Pleader submits that, it was much after executing said bond and the statement that Mr. Pareed Khan chose to transfer the property by executing Ext.Pl sale deed, in favour of the first petitioner. This being in contravention of the statutory prescription, is not reckonable in the eye of law, hence the department is very much entitled to proceed against the concerned property for realization of the due amount, submits the learned Government Pleader.

12. The learned Counsel for the petitioner submits that the extent of liability conceded by aforesaid Mr. Pareed Khan, while executing Ext.R4(a) bond, is only to an extent of Rs. 2,00,000/- [page 3 of Ext.R4 (a)]! However, the learned Government Pleader referring to Ext.R4(c) statement executed by Mr. Pareed Khan submits that the extent of liability undertaken is ''unconditional'' and ''unlimited'' as evident from the wordings used therein.

13. On going through Ext.R4(c) statement, it is seen that it was given by the person concerned before the Sales Tax authorities stating that he had appeared before them in connection with the execution of the Security Bond by one Mr. K. Muneeer and Mr. K. Suneer who were running a provisional store and in connection with securing Sales Tax Registration for conducting such business. It is also pointed out that, Mr. Pareed Khan executed ''Form 6'' Bond voluntarily and that he would undertake to clear such liabilities in connection with the same as specified therein. In other words, it was after executing Ext. R4 (c) statement that Pareed Khan chose to execute Ext.R4(a) Bond, wherein the liability was restricted to an extent of Rs. 2,00,000/-

14. Another important aspect to be noted is that Ext.R4(a) Security Bond is executed in conformity with Rule 6(2)(e) of the KGST Rules. Rule 6 for the purpose of proper analysis is extracted below:

Rule 6 Security to be furnished by certain dealers;- (1) Where the assessing authority is of the opinion that [a dealer who has applied for registration or has been registered] or has applied for renewal of registration should furnish security or additional security for the proper payment of the tax payable by him, the said authority, may direct him in writing to furnish, within such time as may be fixed by the said authority security for an amount, not exceeding one half of the tax payable on the turnover of the dealer for the years as estimated by it or three months, compounded amount in the case of dealers who have opted to pay tax u/s 7. In making such estimate the said authority shall take into account the taxable turnover of the dealer, if any, during the preceding years, the trend of business at the time the estimate is made, the nature of the goods dealt in by him and such other factors as may, in the opinion of the said authority, assist it in making a proper estimate.

(2) Such security may be furnished by the dealer in any of the following ways, namely:

(a) by depositing as security in the Government Treasury the amount fixed by the said authority; or

(b) by depositing with the said authority Government securities for the amount fixed by the said authority; or

(c) by depositing security amount in the Post Office Savings Bank and pledging the Pass book to and depositing it with, the said authority; or

(d) by furnishing to the said authority a guarantee from a Bank, approved in this behalf by the said authority, agreeing to pay to the State Government, on demand, the amount of security fixed by the said authority; or

(e) by furnishing two sureties acceptable to the said authority by executing a security bond for such amount in Found.

[(f) by a bond prescribed under Rule 42 for the amount fixed by the said authority in Form No. 39 duly registered along with title, possession and valuation certificates obtained from the Tahsildar concerned and the value of property shall not be lower than the amount, shown in the bond.

Explanation;- In the case of security furnished in Form 6, surety must be solvent enough for the amount assured]

[(3). The security furnished shall be maintained in full so long as the registration certificate continues to be in force and may in the event of default of payment of any tax be liable to adjustment towards such tax after due intimation].

15. The Rule clearly stipulates that the Security Bond to be executed in respect of such amount is not to exceed 1/2 of the tax payable on the turnover of the dealer for the years as estimated by it or three months'' compounded amount in the case of dealers who have opted to pay tax u/s 7. Thus the amount stipulated in the Security Bond is having ''nexus'' with the specified extent of liability and it cannot be ''unconditional'' or ''unlimited'' as contended by the learned Government Pleader. It is for this reason, that the extent of the security to be provided was actually to be worked out by departmental authorities and to be shown in the Security Bond executed in conformity with the Rules. The position may be different; when the surety contends that despite his acknowledging a wider liability in the Security Bond, he can be proceeded against only to the extent as contemplated under Rule 6(2)(e) of the Rules, for the plain reason that nothing prevents a person from agreeing, accepting and enshouldering a wider liability than the requisite/ specified extent. In the instant case, since the Departmental Authorities have fixed the extent of liability showing the same as Rs. 2 lakhs in the Security Bond, which extent alone was admitted and acknowledged by the petitioner, there is absolutely no merit in contending that

the department is entitled to proceed against the properties for realization of the entire arrears, notwithstanding the extent of the liability specified and limited in Ext.R4(a) Security Bond.

16. Accordingly, it is hereby declared that the departmental authorities will be entitled to proceed against the properties of the petitioner, only to an extent of Rs. 2,00,000/- as stipulated in Ext.R4(a) Security Bond. Subject to the above, interference is made and the Writ Petition is allowed to the above limited extent. No cost.

