
(2012) 05 AHC CK 0248
In the Allahabad High Court
Case No : Writ Tax No. 482 of 2012

Smt. Divya Dubey and Another	Vs	APPELLANT
State of U.P. and Others		RESPONDENT

Date of Decision : 09-05-2012

Acts Referred:

Contract Act, 1872 — Section 129, 133, 135
Uttar Pradesh Value Added Tax Act, 2008 — Section 24(1), 25, 26, 28(8), 3

Citation : (2012) 6 ADJ 280 : (2013) 62 VST 204

Hon'ble Judges : Prakash Krishna, J; Ashok Bhushan, J

Bench : Division Bench

Advocate : Ashok Kumar, Praveen Kumar and Swapnil Kumar, for the Appellant;

Final Decision : Dismissed

Judgement

Hon"ble Ashok Bhushan, J.—Heard Sri Ashok Kumar, learned counsel for the petitioners and Sri U.K. Pandey, learned Standing Counsel for the respondents. By this writ petition, the petitioners have prayed for quashing the recovery notice dated 10th January, 2012 issued by the Assistant Collector, Commercial Tax asking the petitioners to deposit the amount as per security/surety bond dated 16th July, 2011 of the petitioners. The consequent recovery citation dated 12th March, 2012 issued by the Tahsildar has also been prayed to be quashed. A writ of mandamus has been sought commanding respondent Nos. 2 and 3 not to proceed against the petitioners in pursuance of the recovery notice dated 10th January, 2012 and recovery citation dated 12th March, 2012.

2. Brief facts of the case as emerge from writ petition are; M/s Barfani Contractors Private Limited (hereinafter referred to as the Company) is a registered company. The Company was also registered under the U.P. Value Added Tax Act, 2008 and under the Central Sales Tax Act. The Assistant Collector, Commercial Tax passed provisional assessment order on 3rd November, 2010 for the period April, 2010 to August, 2010 assessing the Company and issued demand for tax and interest. The demand notice to the tune of Rs.

35,17,819/- was issued by the Deputy Commissioner, Commercial Tax. The Company filed an appeal against the provisional assessment order. The first appellate authority stayed 70% of the disputed amount by directing the Company to deposit 30% of the disputed amount. The Company feeling aggrieved by the appellate order dated 22nd January, 2011, filed a second appeal before the Commercial Tax Tribunal. The Tribunal vide order dated 3rd March, 2011 stayed realisation of 95% of the disputed tax subject to condition that the Company shall furnish adequate security for the stayed amount to the satisfaction of the assessing authority. In pursuance of the order of the Tribunal dated 3rd March, 2011, the security was given by the Company in which the petitioners were sureties. The security/surety was given for an amount of Rs. 33,41,833/- which was 95% of the total disputed tax. By an order dated 7th October, 2011, the Deputy Commissioner, Commercial Tax assessed the Company for the year 2010-11 (provincial) and created a demand of Rs. 70,50,000/- towards tax. The assessment order also referred provisional assessment orders for the months of April, 2010 to August, 2010. The final assessment order was issued for the entire year covering the period for which provisional assessment order was already issued. In essence, the final assessment order was clearly in accord with the provisional assessment order which was referred to and relied in the final assessment order and the demand of tax and interest, which was made by provisional assessment order, stood confirmed by final assessment order. After the final assessment order, a recovery notice dated 10th January, 2012 has been issued to both the petitioners, who had submitted sureties dated 16th July, 2011 in pursuance of the order of Tribunal staying 95% of the demand of tax. The petitioners filed an objection dated 22nd January, 2012 stating that final assessment order having been passed, the provisional assessment order stood merged and the demand created by provisional assessment order shall automatically come to an end and since the petitioners have not given any surety in context of final assessment order, no recovery can be made from the petitioners. The assessing officer having sent the recovery certificate to the Collector, the citation has been issued by the Tahsildar for recovery of Rs. 33,41,833/-. This writ petition has been filed challenging the recovery notice and the citation.

3. Sri Ashok Kumar, learned counsel for the petitioners, challenging the notice and citation, contends that provisional assessment order has come to an end after passing of the final assessment order. The sureties, which were given by the petitioners on 16th July, 2011, stood discharged and no recovery can be pressed against the petitioners. He submits that provisional assessment order being provisional in nature, shall come to an end after final assessment order and the security/sureties given by the petitioners were with regard to order of Tribunal in second appeal arising out of provisional assessment order, which had come to an end after passing of the final assessment order. It is submitted that Tribunal has also subsequently dismissed the second appeal noticing the final assessment order. Thus the security/sureties given by the petitioners stood

discharged and the recovery notice as well as the citation are not enforceable against the petitioners. Learned counsel for the petitioners in support of his submission, has placed reliance on two judgments of this Court in the cases of M/s. Dass Industries, Deoband, Saharanpur v. Commissioner of Sales Tax, 1988 UPTC 641 and Commissioner of Sales Tax v. M/s. Rahul Traders, Kanpur, 1994 UPTC 1035, as well as on a judgment of the Apex Court in the case of State of Maharashtra Vs. Dr. M.N. Kaul (Deceased by his Legal Representatives) and Another, .

4. Sri U.K. Pandey, learned Standing Counsel, refuting the submissions of learned counsel for the petitioners, contends that by passing the final assessment order provisional assessment order is not wiped out, rather provisional assessment order merges with final assessment order as per Section 28(8) of the U.P. Value Added Tax, 2008 and the submission of learned counsel for the petitioners that liability under the provisional assessment order stood discharged, cannot be accepted. He further submits that petitioners having given security/sureties with regard to the amount under provisional assessment order, the security/sureties are not discharged and the petitioners are still bound to pay the amount for which they submitted security/sureties. Mr. Pandey has placed reliance on a Division Bench judgment of this Court in the case of Gangadhar Ramchand Oil Mills v. Sales Tax Officer, Sector VI, Agra and another, 1981 (48) STC 356.

5. We have considered the submissions of learned counsel for the parties and have perused the record.

6. The assessment of a registered dealer is regulated by U.P. Value Added Tax, 2008. Chapter-IV of the 2008 Act deals with Assessments, Payment, Recovery and Collection of Tax. Section 24(1) of the 2008 Act require every taxable dealer to submit tax return for such tax period and within such time, as may be prescribed. Rule 45 of the U.P. Value Added Tax Rules, 2008 provides for submission of return. Rule 45(1)(a) provides that a dealer who becomes liable for payment of tax for the first time in any assessment year, the first tax period for such assessment year shall commence on the date on which the dealer has become liable for payment of tax and shall end with the last day of the calendar month and after expiry of first tax period, each calendar month of the assessment year shall be a tax period. Section 25 of the 2008 Act provides for assessment of tax for a tax period. In the present case, the Company was assessed by provisional assessment order dated 3rd November, 2010 for the tax period April, 2010 to August, 2010 and the total demand of the tax and interest during the said period was raised as Rs. 35,17,819/-. As noted above, the final assessment order was passed on 7th October, 2011 for the assessment year in question in which order provisional assessment orders have been referred to and the final assessment order virtually confirms the earlier demand during the relevant period by provisional assessment order. The final assessment order relates to the entire assessment year including the period for which provisional assessment orders already issued and demands were already raised. The present

is not a case where provisional assessment order stood vacated or discharged holding no tax liability of the Company. The submissions raised by learned counsel for the parties thus have to be examined in context of the facts of the present case.

7. The submission, which has been much pressed by learned counsel for the petitioners, is that in view of final assessment order, provisional assessment order shall stand wiped out/discharged and is non-est and thus any demand raised in pursuance of provisional assessment order shall also come to an end and cannot be enforced against the petitioners. The issue to be answered is as to whether on passing of the final assessment order, the provisional assessment order is discharged including the liabilities created under the provisional assessment order, if any.

8. As noticed above, the 2008 Act specifically contemplates assessment of tax for a tax period u/s 25 whereas Section 26 deals with assessment of tax for an assessment year. Section 28(8) is as follows :

28. Assessment of tax after examination of Records: (1).....

(8) Assessing authority shall not be precluded from making assessment order under this section on the ground of passing of any provisional assessment order in respect of any tax period u/s 25 and such provisional assessment order, if any, shall stand merged in the assessment order passed under this section.

9. Section 7A of the U.P. Trade Tax Act, 1948 dealt with return of turnover for portion of the assessment year. Section 7A of the said Act is quoted below :

7-A. Return of turnover for portion of the assessment year.--(1) The State Government may require any dealer to submit a return for his turnover of a portion of the assessment year, and the Assessing Authority may, without prejudice to the provisions of Section 7, make provisional assessment in respect of such portion of the assessment year in accordance with the provision of this Act in so far as they may be applicable if the turnover of the dealer as determined by the Assessing Authority for such portion of the assessment year is not less than such portion of the amount, if any, specified in or notified under sub-section (2), of Section 3 as the period under assessment years to twelve months.

(2) Where the Assessing Authority has made a provisional assessment under sub-section (1), it shall not, by reason of such assessment, be precluded from re-determining the turnover and making the assessment, for the whole year.

10. Rule 41 of the U.P. Trade Tax Rules, 1948 dealt with submission of return and assessment of tax. Dealing with Rule 41(7) of the said Rules, a learned Single Judge of this Court in M/s. Dass Industries" case (supra) took the view that before a final assessment is made, the assessee shall be entitled and would be called upon to lead evidence and to file such material as it may desire and to prove his disclosed turnover and the provisional assessment in no way is binding

on the assessing officer at the time of final assessment. It was further observed that provisional assessment is in the nature of interim assessment and holds its validity till final assessment is made. Following was observed in paragraph 7 of the said judgment:

7. From the above provisions it is clear, that before a final assessment is made, the assessee would be entitled to and will be called upon to lead evidence and file such material, as it may desire to prove his disclosed turnover. The provisional assessment in no way be binding upon the Assessing Officer at the time of final assessment, when the findings will be arrived at on the basis of such material as the assessee might place before such officer. The provisional assessment is in the nature of interim assessment and holds its validity till final assessment is made. It is intended to be just a provisional stop-gap assessment. The findings recorded in the provisional assessment, notwithstanding they are confirmed by the Appellate Authority, are subject to the final scrutiny and examination of the case, in the regular assessment proceedings. At the time of final assessment as observed earlier, the Assessing Officer is free to re-examine the entire material afresh, whether brought on record before or after the provisional assessment. Likewise, all the explanations, given by the assessee are entitled to fresh consideration at the hands of the Assessing Authority. There is no substance in the argument that at the time of final assessment, because of any findings recorded by the Sales Tax Tribunal, in the proceedings arising out of provisional assessment, the Sales Tax Officer would be debarred or handicapped to draw different conclusion, if so warranted by the evidence on record and otherwise justified in the eye of law.

11. Another judgment, which is relied by learned counsel for the petitioners, is *Commissioner of Sales Tax v. M/s Rahul Traders, Kanpur* (supra). In the said judgment, learned Single Judge has again held that assessing authority is not bound by provisional assessment order while making regular assessment. The proposition, which has been laid down in the aforesaid cases, is to the effect that while making the final assessment the assessing officer is not bound by the provisional assessment and can take a different view. In the present case the assessing officer in the final assessment has not taken any different view nor discharged the tax liability of the Company. The aforesaid two cases are not the authorities for the proposition that tax liability created by provisional assessment shall stand wiped out even if in final assessment order provisional assessment order is confirmed.

12. Section 28(8) of the 2008 Act contemplates merger of provisional assessment order in the final assessment order which clearly mean that provisional assessment order shall merge in the final assessment order, thus the same is subject to the final assessment order but the statutory scheme of the 2008 Act cannot be read to mean that even if the demand of tax and interest raised in the provisional assessment order is confirmed, the liability incurred for payment under the provisional assessment order and the proceedings initiated

for recovery shall automatically come to an end by mere passing of the final assessment order.

13. A Division Bench of this Court in Gangadhar Ramchand Oil Mills" case (supra) had occasion to consider the provisions of the U.P. Sales Tax Act, 1948 and the Rules 41(3), 41(5) and 41(6) of the U.P. Sales Tax Rules, 1948. It is useful to note the facts of the said case. In the said case, the sales tax officer on 14th September, 1970 passed two provisional assessment orders creating tax liability under the U.P. Sales Tax Act, 1948. The Sales Tax Officer had initiated proceedings for final assessment of tax for the assessment year which remained pending. The Sales Tax Officer initiated proceedings for recovery of the amount of tax in first quarter of the year 1970-71 which was objected by the assessee but the objection was overruled and the Sales Tax Officer declined to withdraw the recovery. The same submission was made before the Division Bench that provisional assessment order ceases to be operative at the close of the assessment year and in any case when proceedings for regular assessment are initiated. It was contended that no proceedings for realisation of the amount provisionally assessed can be taken after the year in question is over. The Division Bench noticed the contentions of the parties in the aforesaid case in following words :

The learned counsel appearing for the petitioner contends that a provisional assessment order made under Rule 41(3) of the Rules framed under the U.P. Sales Tax Act ceases to be operative at the close of the assessment year in respect of which the order was made. In any case, it ceases to be effective when the proceedings under Rule 41(5) for regular assessment for the year in question are initiated. Accordingly, no proceedings for realisation of the amount provisionally assessed can be taken after the year in question is over and in any case it cannot be taken after the proceedings for the regular assessment in respect of the relevant year have been initiated.

According to the learned counsel, Section 3 of the U.P. Sales Tax Act is the charging section. It makes the dealer liable to pay sales tax on the turnover of each assessment year. In other words, it is a single integrated levy on the entire turnover of the year. The liability in that regard has to be assessed and satisfied in the manner laid down in Rule 41(5) of the Rules framed under the Act. He contends that there is no provision in the Sales Tax Act which makes the turnover of a part of the assessment year liable to sales tax. However, the legislature has, in its wisdom, provided that a dealer can, after the end of each quarter of the assessment year, be provisionally assessed to sales tax under Rule 41(3) of the Rules framed under the U.P. Sales Tax Act. In the very nature of things, the provisional assessment for different quarters of the assessment year does not lead to a separate and independent liability. This provision has been made with a view to collect a part of the sales tax that may become due for a particular assessment year from a dealer before the year is over and before the Sales Tax Officer is enabled to initiate proceedings for regular assessment for

that year. In the circumstances the two liabilities, that is, the liability for sales tax in respect of each quarter of the assessment year and that for assessment of tax for the entire year, do not run concurrently and no question of making a provisional assessment or proceeding to recover any amount due under such provisional assessment arises when the Sales Tax Officer is in a position to make the final assessment for the year and to recover the sales tax so assessed in the normal way.

14. The Division Bench after considering the contentions of the parties, repelled the contention that recovery initiated for provisional assessment shall come to an end. After considering the provisions of the Act and the Rules, following was laid down by the Division Bench :

The U.P. Sales Tax Act and the Rules framed thereunder clearly contemplate determination of the turnover of a particular year and computation of tax due on such turnover in stages. They also empower the Sales Tax Officer to recover the tax assessed on the periodical turnovers, if the dealer fails to pay the same on demand. The provision in Rules 41(3)(a) and (3)(b) that the tax on the turnover of a particular year shall be provisionally assessed, in the context, merely means that even though such assessment of tax relates to a particular year, it is provisional in the sense that it is not the final determination of the amount payable by the dealer for the entire assessment year in question and that the amount of tax payable by him for the assessment year would be quantified after taking into consideration the turnover for the entire year. It is not provisional in the sense that the turnover for the period has been determined provisionally. In our opinion, the Rules do not contemplate determination of the turnover of a dealer for a particular period again and again, that is, once under Rule 41(3) and again under Rule 41(5). The rule contemplates that once the turnover for a particular period falling within a particular assessment year has been determined, the dealer has to pay the tax payable on such turnover and in case he does not pay the same, the Sales Tax Officer can recover it under Rule 41(6). Viewed in this light, the question of such determination of turnover and the liability for payment of tax thereon becoming ineffective on the assessment year coming to an end or because of initiation of proceedings for final assessment under Rule 41(5), does not arise.

15. The aforesaid Division Bench judgment is fully applicable in the present case. In view of the proposition laid down by the Division Bench in the aforesaid case, the proceedings for recovery initiated for the amount under the provisional assessment shall not become non-est merely by passing of the final assessment order.

16. There is one more reason due to which the petitioners are not entitled for any relief and the recovery proceedings cannot be dropped. The petitioners themselves have enclosed the copy of the security/sureties as Annexure-3 to the writ petition. The contents of the surety clearly indicate that the surety bound themselves to make the payment of surety amount even if the appeal is decided

or become infructuous. Following portion of the surety is relevant, which is quoted below:

17. The petitioners have also brought on the record copy of the order passed in second appeal as Annexure-7 to the writ petition by which order the second appeal filed by the petitioners against the provisional assessment order was dismissed by the Tribunal. The appellate order noticed that during hearing of the appeal counsel for the appellant stated that final assessment order is passed, hence he does not press the appeal. The Tribunal dismissed the appeal as having become infructuous. Thus 95% security was given under the interim order of the Tribunal which was passed in the second appeal during its pendency. The appeal having been finally dismissed, the security/surety given in pursuance of the interim order can very well be enforced by the tax authorities for realisation of the amount. In the final assessment order there is nothing that provisional assessment order has been reversed and the tax liability which was created by the provisional assessment order has come to an end expressly or impliedly. Thus according to the terms and conditions of the sureties undertaken by the petitioners, they are not entitled to contend that their sureties stood discharged.

18. The judgment of the Apex Court in the case of State of Maharashtra v. Dr. M.N. Kaut (supra) laid down that guarantor must not be made liable beyond the terms of his engagement. There cannot be any dispute to the proposition as laid down in the aforesaid case. The present is not a case where the petitioners, who were sureties/guarantors for the amount for which guarantee was given, are being asked to pay any thing beyond the amount for which they submitted sureties. Thus the petitioners cannot take any benefit from the aforesaid judgment.

19. Learned counsel for the petitioners has also referred to Sections 129, 133 and 135 of the Contract Act, 1872. Reference has been made to Illustration (c) as given u/s 129 of the Contract Act, 1872. Section 129 of the Contract Act deals with "continuing guarantee". Illustration (c) of Section 129 is quoted below :

(c). A guarantee payment to B of the price of five sacks of flour to be delivered by B to C and to be paid for in a month. B delivers five sacks to C. C pays for them. Afterwards B delivers four sacks to C, which C does not pay for. The guarantee given by A was not a continuing guarantee", and accordingly he is not liable for the four sacks.

Illustration (c) clearly indicates that guarantee given by A was payment of five sacks of flour only. The said guarantee did not contain payment of any future price and subsequent transaction was rightly held not liable. The said illustration does not help the petitioners in any manner.

20. Section 133 of the Contract Act, 1872 deals with discharge of surety by variance in terms of contract. The petitioners have referred to Illustration (b) of Section 133. Present is not a case where surety can be said to be discharged by variance in any terms of the contract. No variance in the guaranteed document

can be inferred or has been actually made. Thus Section 133 has no application in the present case.

21. Section 135 of the Contract Act, 1872 on which reliance has been placed by the learned counsel for the petitioners provides for discharge of surety when creditor compounds with, gives time to, or agrees not to sue principal debtor. Section 135 of the Contract Act, 1872 is quoted below:

135. Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor. A contract between the creditor and the principal debtor, by which the creditor make a composition with, or promises to give time, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

22. Present is not a case where creditor has compounded or given time or agreed not to sue the principal debtor. Section 135 is clearly not applicable in facts of the present case.

23. In view of the foregoing discussions, we do not find any infirmity in the recovery notice and the citation issued against the petitioners. The petitioners are not entitled for any relief as prayed for in the writ petition. The writ petition is dismissed.