

(2008) 01 MAD CK 0215

In the Madras High Court

Case No : Writ Petition (MD) No. 159 of 2008 and M.P. (MD) No's. 1 and 2 of 2008

Sri Mappillai Vinayakar Cine Complex

APPELLANT

Vs

Commercial Tax Officer

RESPONDENT

Date of Decision : 30-01-2008

Acts Referred:

Revenue Recovery Act, 1864 — Section 27
Tamil Nadu General Sales Tax Act, 1959 — Section 25, 26
Tamil Nadu General Sales Tax Rules, 1959 — Rule 40

Citation : (2008) 146 CompCas 110 : (2010) 97 SCL 252 : (2008) 14 VST 459 : (2008) WritLR 223

Hon'ble Judges : K. Mohan Ram, J

Bench : Single Bench

Advocate : P. Radhakrishnan, for the Appellant; D. Sasikumar, Government Advocate, for the Respondent

Judgement

K. Mohan Ram, J.—Admit. With consent of learned Counsel on either side the writ petition itself is taken up for final disposal.

2. The brief facts that are necessary for disposal of the writ petition are set out below:

The petitioner is a partnership firm originally constituted in the year 1984 and it is running a cinema theatre under a duly granted licence; on the demise of one of the partners in 1997 the partnership was reconstituted and the business was continued; in 2006 the partnership was again reconstituted and the new partnership firm was registered under the Indian Partnership Act, 1932 bearing Registration No. 206 of 2006 on the file of the Registrar of Firms, Madurai (South); the petitioner-firm is also an assessee on the file of the respondent under the Tamil Nadu Entertainments Tax Act, 1939 and as on today the following persons are the partners in the petitioner-firm:

(a) Sri. Kathirvel

- (b) Smt. K. Neethimallika
- (c) K. K. Ambalavanan
- (d) Sri. K. Balamuruganandam
- (e) Smt. K. B. Malini
- (f) Sri. B. Karthikeyan
- (g) K. Vetrivel Kannan
- (h) Sri. Vanan V. Kannan

3. According to the petitioner, the petitioner is not having any arrears of entertainment tax. While so, a demand notice in Form No. 4 dated October 9, 2007 was issued prior to the attachment of a property for arrears of sales tax and the said notice was addressed to the following three partners of the petitioner-firm:

- (a) Sri. Kathirvel
- (b) Sri. K. Balamuruganandam
- (c) Sri. K. Vetrivel Kannan

calling upon them to pay a sum of Rs. 61,16,921 within 15 days from the date of receipt of the same failing which they were informed that the property in T.S. No. 31/6A Arappalayam Village, Madurai South Taluk, will be attached. Challenging the said demand notice the petitioners have filed W. P. No. 8976 of 2007. In the said writ petition notice alone was ordered and no interim orders were granted in favour of the petitioner. While the said writ petition is pending a notice of attachment in form No. 5 dated October 29, 2007 has been issued by the respondent u/s 27 of the Revenue Recovery Act on November 9, 2007 and by the said notice the respondent has attached the petitioner's property for the sales tax arrears of other two private limited companies and another partnership firm. Being aggrieved by that, the petitioner is before this Court in the above writ petition.

4. It is the contention of the petitioner that M/s. Sri Mappillai Vinayagar Spinning Mills Ltd., and M/s. Sri Manicka Vinayagar Spinning Mills Ltd., are limited companies incorporated under the Indian Companies Act, 1913 and simply because some of the partners in the petitioner's firm are directors of the said limited companies, the property belonging to the petitioner, which is a partnership firm cannot be attached for the arrears of the said limited companies since the said limited companies and the petitioner herein are two different legal entities.

5. It is the further contention of the petitioner that M/s. Sri Mappillai Vinayagar Roller Flour Mills is a partnership firm with different partners and simply because some of its partners are also partners in the petitioner's firm, the property

belonging to the petitioner cannot be attached for the sales tax arrears of M/s. Sri Mappillai Vinayagar Roller Flour Mills.

6. It is the case of the petitioner that M/s. Sri Mappillai Vinayagar Spinning Mills Ltd., and M/s. Sri Manicka Vinayagar Spinning Mills Ltd., are still functioning and they have not been wound up and similarly M/s. Sri Mappillai Vinayagar Roller Flour Mills is also carrying on its business.

7. The respondent has filed a counter-affidavit, inter alia, contending as follows:

M/s. Sri Mappillai Vinayagar Cine Complex is functioning from August 2, 1984 and its licence is being renewed from time to time. M/s. Sri Manicka Vinayagar Theatre is functioning from September 13, 1988 and its licence has been renewed up to October 24, 2008. As per the licence issued the firm consists of three partners, namely, K. Kathirvel, K. Balamuruga-nandam and K. Vetrivel Kannan. It is stated in the counter-affidavit that the petitioner-firm is not consisting of eight partners from the commencement of the theatre and the registered partnership deed No. 206 of 2006 has not been brought to the notice of the Collector who issued the licence under the Cinematograph Act, 1952 and the concerned Commercial Tax Officer who permitted the petitioner to run the theatre under TNET Act.

8. According to the respondent, the said document is a manipulated one to suit their convenience and to escape from sales tax arrears relating to other firms in which the above partners are also partners. In the counter-affidavit the details of the constitution of M/s. Sri Mappillai Vinayagar Spinning Mills Ltd., 2. M/s. Sri Manicka Vinayagar Spinning Mills Ltd., 3. M/s. Sri Mappillai Vinayagar Roller Flour Mills (Partnership firm), 4. M/s. Sri Mappillai Vinayagar Cine Complex (Theatre) and 5. M/s. Sri Manicka Vinayagar (Theatre) have been furnished. Though M/s. Sri Mappillai Vinayagar Spinning Mills Ltd., and M/s. Sri Manicka Vinayagar Spinning Mills Ltd., are limited companies, the Directors in the said companies are one and the same and they are also partners in M/s. Sri Mappillai Vinayagar Cine Complex and therefore, the arrears of tax due from the limited companies and the firm are equally liable to be recovered from the properties owned by the same partners in M/s. Sri Mappillai Vinayagar Cine Complex.

9. It is the contention of the respondent that the petitioner-firm has been brought into existence with an intention to defraud the Government revenue payable by the partners from the years 1998-99 to 2004-05. It is further contended that as per Rule 40 of the TNGST Rules, 1959, the properties belonging to the common partners are liable to be proceeded against. Only to safeguard the interest of the Revenue the attachment notice has been issued and the respondent is taking steps to attach the other immovable properties of the assessee-firm. On the abovesaid contentions the respondent is seeking dismissal of the writ petition.

10. Heard Mr. P. Radhakrishnan, learned Counsel for the petitioner and Mr. D. Sasikumar, learned Government Advocate appearing for the respondent.

11. In support of the abovesaid contentions, Mr. P. Radhakrishnan learned Counsel for the petitioner, relies upon the following decisions:

(1) K.S. Narasimhan v. Commercial Tax Officer, Kuralagam Annexe, Chennai [2008] 11 VST 283 .

(2) Karuna Elastics v. Commercial Tax Officer, Tirupur [2006] 145 STC 493 (Mad).

12. In K.S. Narasimhan v. Commercial Tax Officer, Kuralagam Annexe, Chennai [2008] 11 VST 283, the learned judge of this Court has held that a company is a legal entity by itself and it can sue or can be sued as a legal entity and any dues from the company has to be recovered only from the company and not from its directors, by relying on the judgments of various High Courts.

13. In Karuna Elastics v. Commercial Tax Officer, Tirupur [2006] 145 STC 13 493 another learned judge of this Court has held that two partnership firms are separate legal entities and the bank account of one firm cannot be attached for the liability of another firm for arrears of sales tax though there are common partners in both the firms. It is seen that the said judgment came to be rendered on the concession made by the Government Advocate in that case.

14. Mr. D. Sasikumar, learned Government Advocate for the respondent, by placing reliance on the decision India Waste Energy Development Ltd. v. Government of NCT of Delhi reported in [2003] 129 STC 436 (Delhi) contended that the petitioner-firm has been constituted to defraud the revenue and as such it is permissible for the department to pierce the corporate veil and the lifting of corporate veil is permissible even in the absence of statutory provisions.

15. In the said decision in paragraph 18 a Division Bench of the Delhi High Court has observed as under (at page 445 of 129 STC):

18. It is trite that a company, registered under the Companies Act, is a legal personality distinct from its members and generally corporate veil may not be lifted unless the Legislature so provides but in certain exceptional cases, which would embrace those cases where the corporate entity is used for tax evasion or to circumvent tax obligation, the court is entitled to lift the corporate veil and to pay regard to the economic realities behind the legal facade. If the situation so demands and for the ends of justice the corporate personality itself may be disregarded. It is thus, well-settled that the corporate veil can be cracked open even in the absence of a statutory provision, when it is felt that the corporate entity is being used as a device or cloak to circumvent tax obligations or as an instrument of fraud.

16. The learned Government Advocate further submitted that under Rule 40 of the TNGST Rules, the partners of the petitioner-firm being directors in the two private limited companies and partners in the other assessee-firm are liable for the sales tax arrears of the two private limited companies and the firm jointly and severally.

17. I have carefully considered the said submissions made on either side.

18. The issue that arises for consideration in the above writ petition, viz., whether the properties of the partners of the petitioner-firm who are also admittedly the directors of the abovesaid two private limited companies and partners of the assessee-firm, namely, M/s. Sri Mappillai Vinayagar Roller Flour Mills are liable to be proceeded against for the sales tax arrears of M/s. Sri Mappillai Vinayagar Roller Flour Mills is no longer res integra. As far as the liability of the directors of the company is concerned it is settled proposition of law as laid down in K.S. Narasimhan v. Commercial Tax Officer, Kuralagam Annex, Chennai [2008] 11 VST 283 that the company being a legal entity by itself can sue and can be sued as a legal entity and any dues from the company has to be recovered only from that company and not from its directors. Therefore, the impugned proceedings which seek to attach the properties of the petitioner-firm on the ground that the partners of the petitioner-firm are also directors of the abovesaid two private limited companies, namely, M/s. Sri Mappillai Vinayagar Spinning Mills Ltd., and M/s. Sri Manicka Vinayagar Spinning Mills Ltd., cannot be sustained.

19. As far as the liability of the properties of the partners of the petitioner-firm towards the tax arrears of the another firm M/s. Sri Mappillai Vinayagar Roller Flour Mills in which also they are partners, is concerned, it has to be pointed out that since there are other partners in the petitioner-firm apart from the abovesaid common partners the entire properties of the petitioner-firm cannot be proceeded against. But at the same time the respective shares of the common partners of the petitioner-firm, who are also partners in the assessee-firm can be attached.

20. The abovesaid view of mine is fortified by the decision K.O. Mohamed Sulaiman and Co. Vs. State of Madras, . In that case, the question that arose for consideration was that if a person happens to be a common partner in two firms, the State, while realising the arrears of sales tax due from one of the firms or from him as a partner thereof, is entitled to seize the immovable properties of the other firm, of which also he is a partner, which firm, however, is not liable for the sales tax in question. In the said case, the following contention came to be put forth by the petitioner, namely (at pages 573 and 574):

...so long as the partnership is a going concern and there has been no dissolution and settlement of accounts amongst the partners inter se, no partner can assert or predicate that he is the owner of any particular share in any particular asset, movable or immovable, and that it is only after a dissolution and settlement of accounts he may become the owner of any item of partnership property depending upon the terms of dissolution and settlement. Until dissolution a member of the partnership cannot claim a right to separate enjoyment and possession of any asset of the firm; nor can he exclude or prevent the firm or the partners of the firm from enjoying and being in possession of the property on behalf of the firm. According to learned Counsel the result, therefore, is that no

person, whether State or any creditor, to whom moneys are due from an individual partner of a firm can, under the guise of recovering such moneys, take physical possession by seizure, thus excluding and preventing the partners of the firm from using and being in enjoyment and possession of the assets of the firm. Learned Counsel contends that the State may have a right to obtain a garnishee order or file a suit for dissolution and for taking of accounts for the purpose of working out the rights of the dealer with a view to obtain satisfaction of the claim out of any assets that may be allotted or allottable to the dealer on such dissolution and settlement of accounts, and thus till that stage is reached, the State cannot possibly take possession of the assets by seizure....

21. While considering the said submissions the learned judge has accepted the contention that the State have a right to obtain a garnishee order or file a suit for dissolution and for taking of accounts for the purpose of working out the rights of the dealer with a view to obtain satisfaction of the claim out of any assets that may be allotted or allottable to the dealer on such dissolution and settlement of accounts, and till that stage is reached, the State cannot possibly take possession of the assets by seizure.

22. The abovesaid decision makes it clear that the State has got a right to obtain a garnishee order against the shares of the common partner towards the tax liability of one firm against the share of the common partner in the other firm.

23. In a decision *Swamy and Co.* Deputy Commercial Tax Officer reported in [1995] 99 STC 75, a Division Bench of this Court had an occasion to consider a similar question. In paragraphs 5 and 6 of the said decision it is observed as follows:

5. It is contended before us that to the extent of the interest of the said Nelliappan in the petitioner-firms, the sales tax arrears due from the Vigneswara and Venkateswara Corporation, in which the said Nelliappan is a partner, can be recovered but not to the extent affecting the interests of other partners. It may be pointed out here that in *M/s. Yamakayas & Co.*, the said Nelliappan has only five per cent interest, whereas in *M/s. Swami & Co.*, he has got 55 per cent share (interest) and in *M/s. Balaji Forwarding Agencies*, he has 80 per cent share. The Commercial Tax Department can proceed against these partnership firms only to the extent of shares of interest held by Nelliappan and not beyond that. Sections 25 and 26 of the Tamil Nadu General Sales Tax Act, 1959, cannot be interpreted so as to enable the Commercial Tax Department to proceed against the interest of others, who are not shown to be in any way liable to pay any amount to Nelliappan or to *M/s. Vigneswara and Venkateswara Corporation*. Therefore, we find it difficult to agree with the view taken by the learned single judge. Accordingly, these writ appeals are allowed and the order passed by the learned single judge dated September 19, 1994, in W.P. Nos. 9380 to 9382 of 1987 is set aside. The above writ petitions are disposed of in the following terms.

6. The first respondent is directed not to issue any direction to the bank in

respect of the three partnership concerns in question beyond the interest held by Nelliappan without affecting the interests of other partners, for the recovery of sales tax arrears of Rs. 5,35,621 due from M/s. Vigneswara and Venkateswara Corporation.

24. Thus, it is clear that while the Revenue is entitled to proceed against the shares of the common partners in the petitioner's partnership firm towards the sales tax arrears of the assessee-firm the Revenue cannot attach the shares of the remaining partners who are not partners of the assessee-firm.

25. Therefore, the impugned proceedings which seek to attach the entire properties of the petitioner-firm including the shares of the partners, who are admittedly not the partners of the assessee-firm, viz., M/s. Sri Mappillai Vinayagar Roller Flour Mills firm is bad in law and hence so far as such partners are concerned the impugned attachment order cannot be sustained and accordingly set aside. Similarly in view of the view taken by this Court in respect of the liability of the partners of the petitioner-firm as far as the liability of the two private limited companies are concerned, the impugned attachment order seeking to enforce the liability of the aforesaid two private limited companies as against the properties of the partners of the petitioner-firm can also not be sustained.

26. At this juncture, the learned Counsel for the petitioner submitted that pursuant to the order dated October 31, 2007 passed in the appeal in A.P. No. 60 of 2007 by the Appellate Assistant Commissioner (C.T.), Madurai filed by M/s. Sri Mappillai Vinayagar Roller Flour Mills relief has been granted to the assessee and taking that into consideration the fact that the respondent has recalculated the tax arrears at Rs. 5,95,963 only.

27. The learned Counsel for the petitioner submits that the petitioner is willing to pay the said sum of Rs. 5,95,963 and seek a direction from this Court to the respondent to raise the attachment in respect of the properties of the petitioner-firm on such payment.

28. In light of the abovesaid view taken by this court, if M/s. Sri Mappillai Vinayagar Roller Flour Mills pays the sum of Rs. 5,95,963, then there may not be any arrears of sales tax as far as they are concerned and as such, the attachment of the properties of the partners of the petitioner have to be raised.

29. The learned Counsel for the petitioner undertakes that the said sum of Rs. 5,95,963 will be paid by M/s. Sri Mappillai Vinayagar Roller Flour Mills immediately and seeks a direction from this Court to the respondent to raise the attachment on such payment.

30. Considering the said submission, the respondent is hereby directed to raise the attachment in respect of the properties of the petitioner-firm with effect from the date of payment of the said sum of Rs. 5,95,963 by M/s. Sri Mappillai Vinayagar Roller Flour Mills.

31. With the above directions, the writ petition is disposed of. No costs. Consequently, the connected M.P. is closed.