(2013) 05 AHC CK 0462

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 158 of 2007

Stephen Verghese	APPELLANT
Vs	
State of U.P. and Others	RESPONDENT

Date of Decision : 10-05-2013

Acts Referred:

Citation : (2013) 64 VST 75

Hon'ble Judges : Prakash Krishna, J;Manoj Kumar Gupta, J

Bench : Division Bench

Advocate : Anurag Khanna, for the Appellant; C.B. Tripathi, Special Counsel, for the Respondent

Final Decision : Dismissed

Judgement

Prakash Krishna, J.—By means of the present writ petition, the petitioner has challenged the recovery certificates issued by the Trade Tax Officer, Noida, Gautam Buddh Nagar/respondent No. 4 all dated 28th November, 2006 for the assessment years 1990-91, 1991-92 and 1992-93 for a sum of Rs. 19,42,398, Rs. 22,97,089 and Rs. 5,04,589, respectively. The challenge to these recovery notices is on the allegations that earlier M/s. Stejac Video Products was a proprietorship concern and was having eligibility certificate No. 615/ADI/STE/89 dated May 11, 1989 under which the turnover of the said proprietorship concern was exempted from payment of trade tax as envisaged u/s 4A of the U.P. Trade Tax Act (hereinafter referred to as "the Act"). On November 16, 1990, the said proprietorship concern was converted into private limited company having the petitioner as one of the directors. The said company did not charge any sales tax/ trade tax from the customers. The company on December 18, 1990 filed an application u/s 4A(2B) of the U.P. Trade Tax Act for claiming exemption from payment of trade/sales tax for remaining period but the same was rejected. Thereafter an application was filed before the Commissioner of Sales Tax through registered post for continuation of eligibility certificate. It appears that the assessing officer framed ex parte assessment orders for these assessment years.

Consequent thereto, the impugned recovery notices have been issued. The respondents cannot issue recovery certificate against the petitioner for the dues of the company as the petitioner was a director in the said private limited company. The company has been wound up by the order passed by the Delhi High Court. The petitioner did not offer any personal guarantee to the Trade Tax Department and as such, the recovery of the company dues from the personal assets of the petitioner is illegal, hence the present writ petition.

2. In the counter-affidavit filed by the respondents, it has been stated that the petitioner was one of the directors of the private limited company holding 95 per cent shares of the company. The eligibility certificate was granted to the proprietorship concern but it was not granted to the successor-company nor the petitioner could place any order u/s 4A(2B) of the Act before the assessing authority granting exemption to the assessee-company, the assessment orders were validly passed for all these assessment years. It has been further stated that the liability of the assessee-company is both, i.e., under the U.P. Trade Tax Act/Sales Tax Act as well as under the Central Sales Tax Act. In substance, the recovery proceedings against the petitioner to recover the outstanding dues of the assessee-company was justified by the respondents on the ground that the proprietor firm had became the managing director of the company having 95 per cent share in the company. It was further stated that the successor-company had not followed the rules properly and no application u/s 4A(2B) of the Act was received in the Commissioner''s office within the period of 60 days from the date of succession.

3. In rejoinder affidavit, the stand, taken in writ petition has been reiterated.

4. Heard Sri Anurag Khanna, learned counsel for the petitioner and Sri C.B. Tripathi, learned Special Counsel, for the respondents.

5. The learned counsel for the petitioner submitted the following two points for consideration before this court:

(1) The assessment orders creating the liability of sales/trade tax dues is illegal and void inasmuch as admittedly the eligibility certificate was granted to proprietorship concern and the assessee-company succeeded to the business of proprietorship concern and it was entitled to avail of the benefit of the eligibility certificate for remaining unexpired period.

(2) At any rate, the outstanding liability of the private limited company cannot be recovered from the personal assets of the petitioner who was the director in the company having 95 per cent holding. Considered the aforesaid submissions of the learned counsel for the petitioner.

Point No. 1:

6. At the very outset, it may be stated that the petitioner has not challenged the legality and validity of the assessment orders for all these three assessment years. The only relief claimed in the present writ petition is for quashing of the

recovery certificates all dated November 28, 2006 and the writ of mandamus restraining the respondents from taking action against the petitioner pursuant to the said recovery certificates. What is more important is that the assessment orders sought to be challenged, during the course of argument, have not been annexed along with writ petition. This is sufficient to reject the plea with regard to the assessment orders. The only averment in the writ petition is that the company was entitled to avail of exemption for remaining unexpired period and for that purpose, an application purporting to be u/s 4A(2B) of the Act was filed before the Commissioner of Sales Tax through registered post. The respondents in the counter-affidavit have denied the receipt of any such application. They have come forward with the case that the records do not show filing of any such application. Further, the copy of alleged registered receipt is not legible and it is difficult to decipher as to on what date and from which post office, the alleged postal registered letter was sent. In other words, the very factum of filing of such an application is highly disputed. In view of the fact that highly disputed question of fact is involved, in the absence of any corroborative material, it is not possible to accept the contention of the petitioner in this regard. The fact remains that even such an application was filed, the matter was not pursued by the petitioner and no attempt was made by him to obtain any order thereon. This itself is suggestive of fact that the assertion of the petitioner in this regard is highly doubtful.

7. Our conclusion is further fortified by the fact that no such plea was put forward before the assessing authority. The notice of assessment was served on the company and the authorized representative appeared on few dates and thereafter disappeared. These facts find mention in the assessment order for the assessment years (Central) 1990-91 for the period November 16, 1990 to March 31, 1991 filed as annexure II to the rejoinder affidavit. The other assessment orders are not on the record. All assessment orders are appealable before the appellate authority and thereafter before the Tribunal and then a revision is provided before the High Court. The petitioner could have challenged the assessment order if he was so aggrieved by availing of remedy of appeal which is more effective as there, the question of fact sought to be raised here for the first time with regard to filing of the application could be adjudicated upon more appropriately.

8. The upshot of the above discussion is that in the absence of relevant documents and the pleadings, we do not find any merit in the point No. 1.

Point No. 2:

9. In fact, this is the main point which was urged by the petitioner''s counsel with all force and vigour. Learned counsel for the petitioner on the strength of a Division Bench decision of this court in Meekin Transmission Ltd. and Purushottam Sootwala Vs. State of Uttar Pradesh and Others, , submitted that in any case, the sales/trade tax dues is of the private limited company, which cannot be recovered from personal assets of its director, here from the petitioner.

He relied upon that decision to support the above contention. However, learned standing counsel for the respondents, on the other hand, submits that it was a case of fraud and therefore, the court should tear the veil and find out the real face behind it. Submission is that it was the petitioner who was managing the entire show. Earlier, it was proprietorship concern of the petitioner and the petitioner got it converted into a private limited company having 95 per cent share with him. In this fact-situation, he submits that the petitioner cannot escape his liability to pay the outstanding trade tax dues. The other limb of the argument is that in view of section 18 of the Central Sales Tax Act at any rate, the Central sales tax dues can be recovered from the petitioner.

10. The details of outstanding U.P. Trade tax/sales tax dues and Central sales tax dues are as follows:

11. The above fact is not in dispute. There appears to be no pleading of fraud in the counter-affidavit. So far the dues under the U.P. trade tax/sales tax are concerned, in the absence of proper pleading it is not appropriate to examine the plea of fraud. The contention of the petitioner that the outstanding trade tax dues/sales tax of the private limited company cannot be recovered personally from the petitioner is well founded in view of the aforesaid decision in Meekin Transmission Ltd. and Purushottam Sootwala Vs. State of Uttar Pradesh and Others, . We therefore, hold that for the assessment years 1990-91, 1991-92 and 1992-93, the trade tax/sales tax dues under the U.P. Trade Tax Act/Sales Tax Act cannot be recovered from the personal assets of the petitioner.

12. With regard to the liability under Central Sales Tax Act is concerned, the position is different in view of statutory provision. There is specific provision, namely, section 18 in the Central Sales Tax Act dealing with the liability of the directors of private limited company in liquidation. For the sake of convenience, the said provision is reproduced below:

Section 18. Liability of directors of private company in liquidation.--Notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), when any private company is wound up after the commencement of this Act, and any tax assessed on the company under this Act for any period, whether before or in the course of or after its liquidation, cannot be recovered, then every person who was a director of the private company at any time during the period for which the tax is due shall be jointly and severally liable for the payment of such tax unless he proves that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company.

13. A bare perusal of the above quoted provision would show that every person who was a director of the private company at any time during the period for which the tax is due shall be jointly and severally liable for the payment of Central sales tax dues, unless he proves that non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the

affairs of the company. The liability of the director of private company in liquidation to pay Central sales tax dues is joint and several liabilities of all the directors. Only exception is when such director proves that non-recovery is not attributable to his any gross neglect, misfeasance or breach of duty. The burden to prove these facts is on such director and unless and until any such case is proved by leading evidence, a director of private limited company in liquidation is jointly and severally liable to pay Central sales tax dues of a company in liquidation.

14. In this view of this specific provision, we hold that the liability of the petitioner to pay Central sales tax dues of the private limited company is on him. To this extent his plea that he is not liable to pay outstanding Central sales tax of the company has got no force and the same is hereby, rejected.

15. In view of the above discussion, the petitioner is not personally liable to pay the outstanding dues under the U.P. Trade Tax/Sales Tax Act of the private limited company but in view of specific provision of section 18 of the Central Sales Tax Act, is liable to pay the dues under Central Sales Tax Act and to this extent, the recovery proceedings are valid.

16. The upshot of the above discussion is that the dues under the Central Sales Tax Act for the assessment years 1990-91, 1991-92 and 1992-93 amounting to Rs. 10,70,696, Rs. 13,41,001 and Rs. 1,79,178, respectively, can be recovered along with interest, if any, from the petitioner and his assets but the recovery citations for these assessment years referred to above issued under the U.P. Trade Tax/Sales Tax Act cannot be pressed against the petitioner.

17. The hearing was concluded and judgment was notified for delivery, learned counsel for the petitioner on May 8, 2013 filed the written submission.

18. A bare perusal of the written submission would show that the petitioner has raised number of factual pleas therein. Unfortunately for the petitioner, there is no pleading in respect thereof either in the writ petition or in the rejoinder affidavit. In the written submission, it has been stated that for invoking section 18 of the Central Sales Tax Act against the director, the assessing authority has to first establish that the tax dues cannot be recovered from the company. The assessing authority has to record the finding which it failed to do so that the non-recovery of the tax was due to any misfeasance, gross neglect, or breach of duty on the part of the directors with the assets of the company. It has been stated that no inquiry was conducted by the assessing authority. Reference has been made to section 16(1) of the Act.

19. The written submission is based on hypothesis and assumption of certain facts but their existence have not been shown on the record. No attempt has been made by the petitioner to raise such pleas by getting them incorporated in the writ petition by way of amendment. The scope of written submission cannot be enlarged beyond the pleas raised in the writ petition or argument advanced at the time of hearing of the writ petition.

20. After close of hearing, the pleas particularly factual pleas cannot be permitted to be raised by way of written submission. The pleadings as stand today and arguments which were raised during the course of hearing of the writ petition, it is not possible to adjudicate upon the points sought to be raised through written submission for the first time touching the factual aspect of the case. The pleadings of the petitioner are short of necessary averments. Therefore, we are not in a position to entertain such factual aspect of the case, not pleaded in the writ petition, raised for the first time by way of written submission.

21. Before closing the judgment, we may put on the record that learned counsel for the petitioner did not raise any submission with regard to the effect of winding up order passed by the Delhi High Court on the assessment proceedings, if any. In the result, the writ petition succeeds and is allowed in part so far as it relates to the dues of the company under the U.P. Trade Tax/U.P. Sales Tax Act. As regards the recovery of Central sales tax dues, the writ petition is dismissed. No order as to costs.

