

(1976) 09 MP CK 0007

In the Madhya Pradesh High Court

Case No : M.P. No's. 86 and 283 of 1976

Suresh Kumar Mishra

APPELLANT

Vs

State of M.P. and others

RESPONDENT

Date of Decision : 30-09-1976

Acts Referred:

Madhya Pradesh General Sales Tax Act, 1958 — Section 33(4)(a)

Citation : (1978) JLI 78

Hon'ble Judges : C. Kondaiah, J;B.R. Dubey, J

Bench : Division Bench

Advocate : M.A. Khan, for the Appellant; G.S. Solanki, Deputy Government Advocate for Respondents No. 1 and 2 and G.M. Chafekar, for Respondent No. 3., for the Respondent

Final Decision : Dismissed

Judgement

Kondaiah, J.—The Petitioner Sureshkumar Mishra is the Petitioner in both these writ petitions. In these writ petitions he challenges the validity of the assessment orders made by the Sales Tax authorities in respect of the firm M/s Rupam Trading Company for the years 1970-71 and 1971-72 and the recovery proceedings thereunder. Miscellaneous Petition No. 86 of 1976 is to challenge the assessment order in respect of the year 1970-71, whereunder a demand of Rs. 28,464.00 has been raised on 29-1-1975 by the assessing authority. Miscellaneous Petition No. 283 of 1976 is directed against the assessment order for the year 1971-72 whereunder a demand of Rs. 27, 775.60 has been raised.

2. The Petitioner was a partner of M/s Rupam Trading Company along with Rajendraprasad Heda, the third Respondent herein. Both of them had equal shares. They did business in electric goods having their place of business at 153, Devi Ahilya Marg (Jail Road) Indore and it was registered as a dealer under the Madhya Pradesh Genral Sales Tax Act, 1958. The partnership business was dissolved on 31-3-1974 due to the retirement of the Petitioner. In fact a deed of dissolution of partnership was drawn up on 11-9-1974 Subsequent to the date of

dissolution of the partnership, the Sales Tax Authorities completed the assessment of the partnership business for the year 1970-71 on 29-1-1975 and consequently served a demand notice (Annexure B) dated 23-8-1975 on the Petitioner. In respect of the assessment for the year 1971-72, the Petitioner received a demand notice dated 21-6-1976 for recovery of Rs. 27, 775.00 Hence these writ petitions.

3. The sum and substance of the contention of Shri M. A. Khan learned Counsel for the Petitioner is three-fold:

(1) That the assessment of a dissolved firm cannot be made by the Assessment Authority under the Sales Tax Act without notice to each one of the erstwhile partners of the dissolved firm and therefore the impugned orders of assessment are illegal and without jurisdiction.

(2) That the recovery of the tax due in respect of a dissolved firm can only be made from a registered dealer unless registration certificate is altered or changed.

(3) No recovery can be made against the Petitioner as he has no means to pay the balance or arrears of tax.

This claim of the Petitioner is resisted by Shri G.S. Solanki, Deputy Government Advocate appearing for the State and the Sales Tax Officer and Shri G.M. Chafekar, learned Counsel for the third Respondent Rajendraprasad Heda, the other partner, contending inter alia that the assessing authority has jurisdiction and is competent to assess the business and turn over of any dissolved firm at if there was no dissolution and the notice served on the other partner, the third Respondent for completing the enquiry before passing the orders of assessment is sufficient compliance with the law and therefore, there is no illegality or lack of jurisdiction in the impugned orders of assessment and that the recovery proceedings against the Petitioner as well as the third Respondent are perfectly valid and justified and the third Respondent has in fact paid more than 50 per cent of the tax due and payable by the partnership firm in respect of the sales tax for the period prior to the date of dissolution and, therefore, these writ petitions may be dismissed.

4. Upon the respective contentions of the parties, the following questions arose for decision:

(1) Whether the Sales Tax assessing authority is competent to complete the assessment of a dissolved firm without issuing notices to each one of the erstwhile partners ?

(2) Whether the recovery proceedings can be initiated against the erstwhile partners, who are not given notice or afforded opportunity before completing the assessment and without the modification of alteration of the registration certificate, granted to the partnership firm ?

(3) Whether the recovery proceedings against the Petitioner are justified ?

5. We shall first take up question No. 1. The answer to this question is provided in the provisions of Section 33(4)(a) of the M. P. General Sales Tax Act, 1958 (hereinafter referred to as the Act) which read thus:

33. Tax payable by transferee of business.

(1) * *

(2) **

(3) **

(4) When a dealer is a firm or association of persons or a joint Hindu family and such firm, association or family has discontinued business-

(a) the tax payable under this Act by such firm, association or family for the period upto the date of such discontinuance may be assessed and determined as if no such discontinuance had taken place.

The framers of the Act have thought fit and proper to make ample provision for completing the assessment of the firms which were dissolved on the date of the completion of the assessments. In the case of a firm or association of persons or a joint Hindu family, which is a dealer within the meaning of Section 2 (d) of the Act and "registered dealer" within the meaning of Section 2 (m) of the Act, the fiction has been created by the statute. The fiction is to the effect that even though the firm or association or family has discontinued business, it must be treated or deemed to be in existence for the purpose of assessment. The assessment may be completed as if no such discontinuance had taken place. In order to rule out the possibility or any difference or distinction between a dissolution of firm or discontinuance of firm, the Legislature has made it clear by incorporating the explanation to Sub-section (4) of Section 33 of the Act to the effect that the dissolution or reconstitution of a firm or association of persons or partition of a joint Hindu family shall be deemed to be discontinuance of business within the meaning of this Sub-section. Hence the fact that M/s Rupam Trading Company was in fact dissolved on 31-3-1974 will have no legal impact in so far as the procedure adopted by the authority for completion of the assessment of such a firm for the periods prior to the date of dissolution. For all practical purposes, the firm was deemed to be in existence and consequently the procedure that must be adopted by the assessing authority in respect of such a dissolved firm is the very same procedure that could have been adopted by the assessing authority in respect of such dissolved firm is the very same procedure that could have been adopted when the firm was in existence. It admits of no doubt that the third Respondent was one of the partners of this firm along with the Petitioner. Under the Partnership Act any partner of a firm can make valid representation for and on behalf of the firm. In fact notice, before the completion of the assessments, as to why the assessment should not be made on the firm in respect of the business for the years 1970-71 and 1971-72, was served on the

third Respondent. He has attended the office of the Sales Tax Assessing Authority. He has filed the return, produced the accounts and other documents pertaining to the business, for the material period and appeared before the Sales Tax authorities. The Sales Tax Authorities completed the assessments and raised the demand as referred to earlier. Hence we do not find any illegality or irregularity muchless lack of jurisdiction in the impugned assessments made by the Assessing Authority under the Sales Tax Act.

6. The submission of the Petitioner's counsel that each one of the erstwhile partners must be served with a notice before completing the assessment of a dissolved firm, although they may pertain to the periods prior to the date of the dissolution cannot be acceded to. No authority in support of such proposition or view has been placed before us, we may add that the legal position on this aspect has been very well settled.

7. Under the Indian Income Tax, Act 1922, a similar question arose before the High Court of Andhra Pradesh in *Raj Lingam Vs. Somanna (died) and Others*, That case arose u/s 44 of the Income Tax Act, 1922, which is similar to the provisions of Section 33(4) of the present Act. Therein all the members of the dissolved association were not served before completing the assessment, although the assessment pertains to the years prior to the date of dissolution of association. The High Court of Andhra Pradesh took the view in *Rajareddy Malaram v. Commissioner of Income Tax (supra)* that the assessment was illegal and without jurisdiction. That view has been reversed by the Supreme Court in *Commissioner of Income Tax, Hyderabad Vs. Sri Rajareddy Mallaram*, after reviewing the case law on the subject. They referred to the earlier decision of the Supreme Court in *C.A. Abraham, Uppotttil, Kottayam Vs. The Income Tax Officer, Kottayam and Another*, wherein it was held that Section 44 of the Income Tax Act was enacted manifestly with a view to ensure continuity in the application of the machinery provided for assessment and imposition of tax liability notwithstanding discontinuance of the business of firms and by virtue of the fiction, the firm is deemed to continue after discontinuance for the purpose of assessment. The learned Judge, Shah J. speaking for the Court observed at page 828 thus:

The effect of S. 44 is, as we have stated, merely to ensure continuity in the application of the machinery provided in Ch IV of the Act for assessment and for imposition of tax liability notwithstanding discontinuance of the business of the association or its dissolution. By virtue of S. 44 the personality of the association is continued for the purpose of assessment and Ch. IV applies thereto. What can be assessed is the income of the association received prior to its dissolution and the members of the association would be jointly and severally assessed thereto in their capacity as members of the association. For the purpose of such assessment, the procedure is that applicable for assessment of the income of the association as if it had continued. A notice to the appropriate person u/s 63(2) would, therefore, be sufficient to enable the authority to assess to tax the

association. The plea that the Respondent not having been served personally with the notice of assessment is not liable to pay the tax assessed cannot therefore be sustained.

8. The decision of the Supreme Court referred to above, though one under the Income Tax Act would equally apply to the present case as in substance the provisions of Section 33(4)(a) of the Act are analogous to these of Section 44 of the Income Tax Act. In the present case a regular deeming provision has been inserted by the legislature and there is no ambiguity in this regard. Section 33 (4) (b) of the Act makes every person who was at the time of such discontinuance a partner of such firm or a member of such association or family shall, notwithstanding such discontinuance, be liable severally and jointly for the payment of the tax assessed as payable by such firm, association or family, whether such assessment is made prior to or after such discontinuance. By virtue of this provision, the Sales Tax authorities are empowered to raise demands and issue demand notices to the Petitioner although he was not served with any notices before completion of the assessment. There is joint and several liability cast under the statute upon each and every one of the erstwhile partners of the dissolved firm. It is, therefore, open to the Sales Tax authorities either to proceed against both the partners of the dissolved firm or only either of them or against the properties of the firm and all the modes of recovery permissible to them under the law can be initiated either simultaneously or successively. There is no bar for the, Sales Tax authorities not to proceed against the Petitioner and proceed against the third Respondent only. It is stated in the return filed by Respondents 1 and 2 that out of the total arrears of sales tax due and payable by the firm, which amounts to Rs. 86,573.00 Respondent No 3 Rajendraprasad Heda has deposited Rs. 62,359.00 and the writ Petitioner has deposited only Rs. 13,000. In the circumstances it cannot be said that the recovery proceedings initiated against the Petitioner are in any way illegal or unjust. We, therefore hold that the assessments are valid and the recovery proceedings initiated by the Sales Tax authorities against the Petitioner as well as the third Respondent are perfectly valid and justified and there is no illegality nor is there any violation of the principles of natural justice justifying any interference by this Court under Art 226 of the Constitution of India. The question No. 1 must, therefore, be answered against the Petitioner.

9. This brings us to examine the question whether the recovery proceedings against the Petitioner are not permissible on the ground that no change or alteration in the registration certificate granted to the firm as a dealer has been made in para 10 of the return filed by Respondent 1 and 2 it is stated that the registration certificate was duly amended, This is the answer to the allegation made by the Petitioner in para 10 (c) of his petition. The department was aware of the fact that the Petitioner was partner of the firm before the dissolution of the firm i. e. 31-3-1974 and, therefore, he is responsible and liable for the dues of the firm for the period upto 31-3-1974. This factual situation itself would be sufficient answer to the point raised by the Petitioner. Even assuming without

admitting that there was no change or alteration in the registration certificate of the dealer the Petitioner cannot challenge the validity of the recovery proceedings. We have already pointed out that there is a statutory joint and several liability cast on the Petitioner as well as the third Respondent to pay all the taxes and amounts due and payable by the dissolved firm in respect of its business for the period prior to the date of the dissolution. He cannot escape this liability. We have already pointed out that the Sales Tax authority may proceed against the assets of the firm if there are any. There is no sufficient data before us to give a finding about the existence or otherwise of any assets of the erstwhile firm of which the Petitioner was a partner. If there are any assets belonging to the firm subsequent to 1-4-1974, they cannot be proceeded against for the recovery of the arrears of tax due and payable by the dissolved firm. There may be cases where there is alteration of the firm or alteration in the constitution of the firm which was continuing its business. If there is any transferee of the business of the previous firm the transferee firm would be liable to pay the arrears of the erstwhile firm. The third Respondent does not stand in the shoes of either a transferee or the firm whose constitution has been changed or altered. Hence that provision cannot be applied to the present case. It may also be noticed that the transferee firm or the firm whose constitution has been changed would have a right to proceed against the erstwhile partners of the dissolved firm for the recovery of the amounts collected by authorities from them. Judged from any angle we are satisfied that there is no merit in this contention. The second ground also falls to the ground.

10. With regard to the means, the Petitioner stated that he is a lecturer in a college and he has no means to pay the arrears of Sales Tax and, therefore, recovery should be made from the third Respondent who is in possession of the assets of the firm. We need not go into this particular question. It is open to the Petitioner to supply the requisite information to the Sales Tax authorities, who are incharge of the recovery proceedings. If he gives satisfactory evidence and material in this regard, we are sure the Sales Tax authorities may enquire into the matter and proceed against the properties and assets which are found to belong to the erstwhile partnership. We are also not having any satisfactory material to hold that there is no means for the Petitioner to pay the arrears of tax. It is the providence of the Sales Tax authorities who are charged with this duty to note this question and take appropriate action. The Petitioner is stated to be a lecturer in a college. It cannot be said that his salary and other emoluments cannot be attached by the Sales Tax authorities for the recovery of the dues from the Petitioner. We are satisfied to hold that the Sales Tax authorities have jurisdiction and competence to proceed against the Petitioner for the recovery of the arrears of sales tax due and payable by the partners of the erstwhile partnership. We therefore, find no merit in these writ petitions.

11. In the result, these writ petitions must fail and are hereby dismissed. On a consideration of the facts, we direct each party to bear its own costs in these petitions. The amount of security deposit be refunded to the Petitioner.