2022 LiveLaw (SC) 359

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

DINESH MAHESHWARI; ANIRUDDHA BOSE, JJ.

March 30, 2022

CIVIL APPEAL NOS. 2859-2861 OF 2022 (ARISING OUT OF SLP (C) Nos. 3384-3386 OF 2017)

CHANDRA PRAKASH MISHRA *VERSUS* **FLIPKART INDIA PRIVATE LIMITED & ORS.**

Administrative Law - Every erroneous, illegal or even perverse order/action by a Statutory authority, by itself, cannot be termed as wanting in good faith or suffering from malafide - For imputing motives and drawing inference about want of good faith in any person, particularly a statutory authority, something more than mere error or fault ought to exist. *(Para 13, 16)*

Summary: Appeal challenging adverse Remarks made in the Allahabad HC judgment regarding a Statutory authority - Allowed - Even if the High Court found that the impugned actions of the authorities concerned, particularly of the appellant, had not been strictly in conformity with law or were irregular or were illegal or even perverse, such findings, by themselves, were not leading to an inference as corollary that there had been any deliberate action or omission on the part of the Assessing Authority or the Registering Authority; or that any 'tactics' were adopted.

(Arising out of impugned final judgment and order dated 29-02-2016 in CMWP No. 80/2016, 29-02-2016 in CMWP No. 168/2016, 02-08-2016 in WT No. 546/2016 passed by the High Court of Judicature at Allahabad)

For Petitioner(s) Mr. Pallav Sisodia, Sr. Adv. Mr. Praveen Agrawal, AOR Mr. Gautam Kumar Latta, Adv. Mrs. Kiran Mahato, Adv.; For Respondent(s) Mr. Tarun Gulati, Sr. Adv. Mr. Kishore Kumar, Adv. Mr. Manish Rastogi, Adv. Mr. Rony Oommen John, AOR Mr. R. K. Raizada, Sr. Adv. Mr. Bhakti Vardhan Singh, AOR

J U D G M E N T

DINESH MAHESHWARI, J.

Leave granted.

2. In these appeals, the appellant, presently working as Joint Commissioner, Commercial Tax, Moradabad, has questioned the order dated 29.02.2016 in Writ Petition Nos. 80 of 2016 and 168 of 2016 as also the order dated 02.08.2016 in Writ Tax No. 546 of 2016, as passed by the High Court of Judicature at Allahabad.

2.1. The appellant is aggrieved of the orders impugned, insofar as adverse observations and remarks have been made and directions have been issued in relation to his acts and omissions while functioning as the Deputy Commissioner, Commercial Tax, Range-II, Sector-2, Noida, viz., passing *ex parte* assessment orders

and enforcing recovery proceedings under the Uttar Pradesh Value Added Tax Act, 2008[1], concerning the writ petitioner (respondent No. 1 herein)[2].

1 Hereinafter referred to as 'the UP VAT Act'.

2 The impugned orders had been passed in the writ petitions filed by the respondent No. 1. For continuity of narrations and in the given context, the respondent No. 1 has also been referred to as 'the writ petitioner'.

3. The impugned orders have otherwise not been challenged by the State or by the writ petitioner. Therefore, dilation on all the factual aspects is not necessary. The aspects relevant for the present purpose are as follows:

3.1. By way of Writ Petition No. 80 of 2016, the writ petitioner questioned the recovery proceedings, as taken up against it pursuant to the *ex parte* provisional assessment order passed by the appellant in his capacity as the Assessing Authority. In response to the said writ petition, it was pointed out on behalf of the department that an application made by the writ petitioner for registering the changed address had already been rejected on 02.09.2014 and, therefore, *ex parte* order had rightly been passed after taking due steps for service of notice.

3.2. The said order dated 02.09.2014, as passed by the Registering Authority (not the appellant) rejecting the prayer for registering the changed address was challenged in the other writ petition bearing No. 168 of 2016.

3.3. Thus, in sum and substance, the *ex parte* provisional assessment order dated 15.12.2015 and the recovery proceedings as also the order dated 02.09.2014 rejecting the prayer for registration of the changed address were in challenge before the High Court in the said writ petitions bearing Nos. 80 of 2016 and 168 of 2016. As noticed, the appellant had been functioning as the Deputy Commissioner, Commercial Tax, Range-II, Sector-2, Noida and had passed the aforesaid *ex parte* order in his capacity as the Assessing Authority. However, the aforesaid order rejecting the prayer for registering the changed address was passed by the Registering Authority, being the Assistant Commissioner, Commercial Tax, Divison-2, Noida.

4. The issues involved in the said writ petitions were considered and dealt with by the High Court in its common order dated 29.02.2016.

4.1. The High Court essentially found that the *ex parte* order was passed against the writ petitioner without proper service of notice. The facts were taken note of that, according to the writ petitioner, it had shifted its place of business from Noida to Ghaziabad, which was very much in the knowledge of the department in view of the applications made and other communications addressed by it. There was a suggestion on behalf of the State as regards service of notice at Ghaziabad but, that service was also not taken as sufficient by the High Court after its interpretation of the requirements under the rules.

4.2. The High Court, therefore, set aside the *ex parte* assessment order dated 15.12.2015 and quashed the recovery proceedings. The High Court also set aside the order dated 02.09.2014, rejecting the writ petitioner's application for registration of the change of place of business and directed the Registering Authority to process the application made by the writ petitioner on 05.12.2013 for change of place of business after permitting the writ petitioner to deposit the requisite fees.

4.3. The High Court found that a huge amount to the tune of Rs. 49,82,01,250/- had been withdrawn by the department from the writ petitioner's account without authority of law. Hence, the Deputy Commissioner, Commercial Taxes, Range-II, Noida was directed to refund the said amount together with interest as per Section 40 of the UP VAT Act after adjusting the admitted tax. The High Court, of course, left it open for the Assessing Authority to make fresh assessments in accordance with law, after proper service of notice upon the writ petitioner and after giving them an opportunity of hearing.

5. In the aforesaid part of the impugned common order dated 29.02.2016 i.e., upto paragraph 34, the High Court dealt with the core issues involved in the case and contentions of the respective parties and, thereafter, passed the orders consequent to its findings on the material issues that there had not been proper service of notice upon the writ petitioner and the *ex parte* orders were not sustainable.

6. However, before closing the matter, the High Court proceeded to express its opinion that the impugned actions, leading to *ex parte* orders/proceedings without proper service of notice, were of deliberate attempt on the part of the department against the interests of the writ petitioner; and the Assessing Authority adopted unfair tactics in getting the service effected in gross violation of the applicable rules.

6.1. The High Court, therefore, imposed costs to the tune of Rs. 2,00,000/-, to be paid by the department to the writ petitioner, and left it open for the Commissioner, Commercial Tax, Lucknow to institute an inquiry and to fix responsibility on the erring officer for recovery of the amount of costs. The said part of the order dated 29.02.2016, which has been questioned by the appellant in this appeal, reads as under: -

"35. Before parting, we must observe the manner in which the respondents have proceeded with the assessment and recovered the amount from the petitioner's Bank account in haste is deplorable and in gross violation of the provisions of the Act. We find that for the assessment years 2011-12, 2013-14 and 2014-15 ex-parte assessment orders were made without adequate service of notices upon the petitioner. These assessment proceedings were set aside in appeal on the short ground that the service of the summons were sent at the address where the petitioner was no longer carrying on its business. Inspite of this knowledge, the respondents chose deliberately to serve the notice for provisional assessment for the period April to October, 2015 upon the petitioner at the Noida address

knowing fully well that the petitioner was not carrying any business from the Noida address. The respondents knew very well that the petitioner had shifted its place of business from Noida to Ghaziabad as they made a futile attempt to serve the notice at Ghaziabad but later for the reasons best known to them, chose deliberately to serve the notice by affixation at the Noida address. Such tactics adopted by the assessing authority in getting the service effected upon the petitioner was in gross violation of Rule 72 of the Rules.

36. We also find that the entire exercise of service was done within four days without taking recourse to the other mode of service, namely simultaneously service by registered post with acknowledgment due. The assessment order indicates that the first and last date of hearing of the assessment proceedings was 10.12.2015 and that the assessment order was passed on 15.12.2015. The counter affidavit reveals that the assessment order was served by attachment at the Noida address. This was done deliberately by the respondents so that the respondents could withdraw the amount through garnishee notices by exerting pressure upon the bank authorities. The Court gets an uncanny feeling that a deliberate attempt was made by the respondents to withdraw the money from the petitioner's bank account through dubious mean by passing ex-parte assessment orders and not allowing it to be served validly upon the petitioner. If in this cavalier fashion the Commercial Tax Department functions and withdraws huge sums of money without valid service, it would be difficult for big business houses to carry on their business. Such business houses would be forced to shift their business outside the State of Uttar Pradesh.

37. Consequently, the petitioners are entitled for cost. The writ petitions are allowed with cost amounting to Rs. 2,00,000/- (Rupees two lakhs only), which will be paid by the Commercial Tax Department to the petitioner within two weeks from the date of filing of a certified copy of this order. If the amount is not paid, it would be open to the petitioner to move an appropriate application in this petition.

38. It would be open to the Commercial Tax Commissioner, Lucknow to institute an enquiry and fix responsibility on the erring officer for recovery of the said amount."

7. Even after the order so passed by the High Court, the appellant, again in his capacity as the Assessing Authority, drew up another assessment order dated 04.05.2016 against the writ petitioner. This order was again questioned by the writ petitioner by way of another writ petition in the High Court, being Writ Tax No. 546 of 2016. In this subsequent writ petition, the present appellant was personally impleaded as respondent No. 1.

7.1. On 11.07.2016, while initially dealing with the said petition, Writ Tax No. 546 of 2016, the High Court referred to the background aspects, in particular to the aforesaid order dated 29.02.2016 and then, took exception that the present appellant at all chose to pass the impugned assessment order on 04.05.2016, which was not in conformity with what was held in the order dated 29.02.2016. The High Court, while issuing notice and staying operation of the impugned assessment order and the consequential notice, observed as under: -

"1. It is contended that petitioners' registered office address has been changed to Ghaziabad and Deputy Commissioner of Commercial Tax, Noida had no jurisdiction to make assessment and this was also observed by this Court in its judgment dated 29.02.2016 in Flipkart India Pvt. Ltd. Vs State of U.P. and others, reported in 2016 NTN (Vol. 60) 313 wherein Court observed that authority at Noida had no jurisdiction to make assessment after change of place of business/registered office of petitioner company at Ghaziabad, still respondent no. 1 has proceeded to serve notice at the supposed address at Noida and thereafter has passed impugned order.

2. It is contended that the order impugned is patently illegal, without jurisdiction and has been passed to frustrate the judgment of this Court in which serious strictures had been passed against the officer concerned and this Court had imposed cost of Rs. Two Lacs.

3. We find it a serious matter. Let respondent 1 himself appear along with relevant records on 02.08.2016 before this Court. He shall also file para-wise reply to the writ petition on the next date.

4. Until further orders, the effect and operation of impugned assessment order dated 04.05.2016 and notice dated 07.04.2016 shall remain stayed."

7.2. When the matter was taken up for further consideration by the High Court on 02.08.2016, it was submitted by the learned standing counsel for the department that the impugned assessment orders had since been withdrawn by the present appellant on 23.07.2016 and, therefore, the writ petition was practically rendered infructuous. It was also stated on behalf of the appellant, who was present in Court, that there had been a mistake on his part and he was tendering an apology, which could be considered by the Court.

7.3. The High Court, however, viewed the functioning of the appellant seriously questionable, particularly for his acts and omissions after the strictures in, and penal costs imposed by, the order dated 29.02.2016. Thus, while imposing costs of Rs. 50,000/- personally on the appellant, the High Court made the observations that departmental action be taken and finalised at the earliest and the department would also consider as to whether the appellant was a person fit to be assigned such important quasi-judicial functions. The relevant part of the order dated 02.08.2016 could be usefully extracted as under:-

"13. Additional Commissioner, Commercial Tax, Noida, sought a clarification from Commissioner, Commercial Tax, vide letter dated 29.06.2016 whereupon the Commissioner vide letter dated 20.07.2016 directed the registering authority to pass appropriate order in accordance with directions of this Court. The registering authority has passed an order on 23.07.2016 under Section 17(14)(a) of the Act transferring the place of business of petitioner from Noida to Ghaziabad w.e.f. 20.01.2013 and consequently now the Deputy Commissioner, Commercial Tax, Sector 7, Ghaziabad becomes Assessing authority of petitioner w.e.f. 20.01.2013. Pursuant thereto respondent 1 has passed an order on

23.03.2016 (*sic*)[3] withdrawing the assessment orders dated 04.05.2016 impugned in this writ petition.

3 The date '23.03.2016' is of typographical error. The correct date is '23.07.2016'.

14. It is admitted that application for transfer of business address was filed on 05.12.2013 which was rejected by respondent 1 on 02.09.2014 and the said order was set aside by this Court vide judgment dated 29.02.2016.

15. Learned Standing Counsel at the outset clearly stated that since the assessment orders impugned in this writ petition have now been withdrawn by respondent No. 1 by order dated 23.07.2016 in substance, writ petition has rendered infructuous and be dismissed accordingly.

16. We however required him to tell us as to how respondent 1 could dare to pass further assessment orders, when earlier orders passed by him were declared without jurisdiction by this Court by referring to the similar application of petitioner for change of business address. In reply thereto a very bulky counter affidavit has been filed separately by respondent l. Despite he could not explain as to what was the occasion for any confusion when the needs were very clearly disclosed and decided in Courts' judgment dated 29.02.2016 and why respondent 1 was in so such a hurry so as to pass the impugned assessment orders on 04.05.2016.

17. Sri S.D. Singh, learned Senior Counsel, representing respondent 1 who is also present in person before this Court at the outset stated that there is a mistake on the part of respondent 1 which cannot be explained satisfactorily but respondent 1 dedicates apology and therefore, Court may consider the same and pass appropriate order.

18. In these facts and circumstances we are satisfied that here is a forced litigation by unmindful illegal act on the part of respondent 1 and realizing the same he has also withdrawn the impugned orders and also considered the fact he is an authority which was already adversely commenced by this Court in its order dated 29.02.2016 still he did not care to such observations. It is again a fit case where respondent 1 himself would be saddled with cost by this litigation. Since the impugned order of assessment have already been recalled by order dated 23.07.2016 in this regard no further order is required but we hold that respondent 1 being guilty of compelling and forcing second round of litigation upon petitioner must be saddled with cost which we quantify to Rs. 50,000/-.

19. We also direct Principal Secretary, Trade Tax, U.P. Government to look into the manner in which respondent 1 has functioned in this case and despite strictures and penal cost imposed by this Court in earlier judgment dated 29.02.2016 and also directing Commissioner Trade Tax to get an inquiry conducted against erring officials, respondent 1 has not cared to mend his ways to conduct but has proceeded to harass a dealer like petitioner and appropriate disciplinary action be taken at the earliest and finalise the same. It may also be considered by Principal Secretary, Trade Tax, U.P. Government as to whether, respondent 1 is a person fit to be assigned such important quasi-judicial functions.

20. A copy of this order shall be communicated forthwith for communication and compliance of the direction.

21. Writ petition is accordingly disposed of."

8. Seeking to question the orders aforesaid, insofar they operate against the appellant, Mr. Pallav Shishodia, learned senior counsel has submitted that the adverse observations and directions by the High Court against the appellant were not called for, even if the orders passed by the appellant in his capacity as the Assessing Authority were not approved because, there had not been any malice on the part of the appellant, who only carried out his statutory duties of timely completing the assessments and taking follow up actions.

8.1. Learned senior counsel has forcefully submitted that the proposition of change of address by the writ petitioner (respondent No.1) had been suffering from several shortcomings including the fundamental one that the application made on 05.12.2013 while alleging the change of business address in the month of January 2013, was not in conformity with the requirement of Section 75 of the UP VAT Act whereunder, such an application was required to be made within 30 days of the event.

8.2. Learned senior counsel for the appellant would submit that when the belatedly filed application had been rejected on 02.09.2014, the appellant, acting as an Assessing Authority, could have only proceeded on the basis of the registered address available on the record. Moreover, it is clear that when the respondent No. 1 was not available at the registered address, the appellant, acting in *bonafide* discharge of his duties, even attempted to get the notices served at Ghaziabad but, the High Court did not accept that service to be a proper service.

8.3. Learned senior counsel would submit that the appellant as an Assessing Authority only proceeded in accordance with the facts available on record and nothing of want of good faith could be imputed on him. Learned senior counsel has further referred to the subsequent facts that the application for change of address was ultimately granted on 22.07.2016 whereby, the department accepted the change of address with effect from 20.01.2013; and that immediately after passing of such an order by the Registering Authority i.e., the Assistant Commissioner, Commercial Tax, Division-2, Noida, the appellant withdrew the order dated 04.05.2016 passed by him because with such change of address, he ceased to be having jurisdiction in the matter. The contention of the learned senior counsel, however, is that before passing of such an order by the competent authority, the appellant could have only proceeded on the basis of position obtainable on record and as such, want of *bonafide* cannot be imputed on him. Thus, according to the learned counsel, the strictures and other observations made in the orders impugned deserve to be set aside.

8.4. Learned senior counsel for the appellant has also referred to Section 67 of the UP VAT Act to submit that statutory protection is available to the officers like the appellant against legal proceedings in relation to anything done in good faith in discharge of their duties and jurisdiction.

9. Mr. R. K. Raizada, learned senior counsel appearing for the State has submitted that the State has proceeded in adequate compliance of the orders passed by the High Court; and has carried out inquiry as contemplated by the order dated 29.02.2016 but, further proceedings are put on hold, in view of the stay order passed by this Court in this matter on 27.01.2017.

10. Mr. Tarun Gulati, learned senior counsel appearing for the respondent No. 1 (writ petitioner) has submitted that the respondent No. 1 had not taken up any personal *lis* against the present appellant nor the first two petitions were founded on any grounds personal to the appellant; and only the action of the State and its officers were questioned, particularly because of denial of adequate opportunity of hearing with proper notice.

10.1. Learned senior counsel has further submitted that the High Court had rightly disapproved the actions as taken and the orders as passed *ex parte* by the present appellant in his capacity as the Assessing Authority. The other part of the order dated 29.02.2016, according to the learned counsel, had been based on the views of the High Court because of the harassment apparently faced by the respondent No. 1 and because of want of appropriate and lawful action by the functionaries of the State. The learned counsel would further submit that in the later writ petition i.e., Writ Tax No. 546 of 2018, the appellant was personally impleaded as a partyrespondent for the reason that he chose to pass the order dated 04.05.2016, rather at conflict with the High Court's order dated 29.02.2016.

10.2. Learned senior counsel has, however, frankly submitted that the respondent No. 1 is otherwise carrying no grievance personally against the appellant; and respondent No. 1 is not keen to even retain the amount of costs awarded by the High Court and would be willing to return the same as may be directed by this Court. It has also been pointed out that the respondent No. 1 has only received the amount of Rs. 2,00,000/- towards cost, as awarded by the order dated 29.02.2016; and the other amount of Rs. 50,000/-, as awarded by the order dated 02.08.2016, has not been received in view of the stay order passed by this Court.

11. Having given thoughtful consideration to the submissions made and having examined the material placed on record, we are clearly of the view that the questioned parts of the orders impugned deserve to be annulled with appropriate order towards the amount of Rs. 2,00,000/- awarded as costs, which has been fairly given up by the respondent No. 1.

12. So far as the observations and findings in the impugned order dated 29.02.2016 relating to the merits of the case are concerned, no comments are required in that relation, for the same having not been challenged by the State. However, in our view, even when all the findings of the High Court in the principal part of order dated 29.02.2016 are accepted, they would only lead to the result that the impugned actions

in drawing up *ex parte* assessment orders and then seeking to enforce recovery as also the impugned action in rejecting the application for registration of change of place of business did not meet with the approval of the High Court. Such disapproval of the High Court had been essentially based on its interpretation of the applicable rules as also its analysis of the factual aspects concerning the issues involved in the writ petition.

13. Having examined the matter in its totality, we are of the view that even if the High Court found that the impugned actions of the authorities concerned, particularly of the appellant, had not been strictly in conformity with law or were irregular or were illegal or even perverse, such findings, by themselves, were not leading to an inference as corollary that there had been any deliberate action or omission on the part of the Assessing Authority or the Registering Authority; or that any 'tactics' were adopted, as per the expression employed by the High Court. Every erroneous, illegal or even perverse order/action, by itself, cannot be termed as wanting in good faith or suffering from *malafide*.

14. In the present case, when admittedly the respondent No. 1 itself had applied for registration of the change of place of business nearly 11 months after the alleged event; and at the time of drawing up the assessment orders, the appellant as the Assessing Authority had no other registered address of the respondent No. 1 on record, his actions of passing *ex parte* assessment orders could not have been termed as being deliberate or wanting in good faith, particularly in view of the facts that attempts were indeed made from his office to get the notices served on the respondent No. 1 at its registered address and even at its alleged changed address at Ghaziabad. Even if such attempts, of serving notices, were held to be illegal or irregular by the High Court, its deduction that the impugned actions were deliberate or lacking in good faith is difficult to be endorsed.

14.1. The appellant, while functioning as an Assessing Authority could not have kept the assessment proceedings pending for an indefinite length of time. In this context, the aforementioned facts relating to shortcomings on the part of the respondent No. 1 in first of all not seeking registration of the changed business address for nearly 11 months and then, rejection of its belatedly made prayer by the competent authority (not the appellant) cannot be ignored altogether.

15. What has been observed hereinabove, with necessary variations, would equally apply to the later order dated 04.05.2016 passed by the appellant, in his capacity as the Assessing Authority. Though, in the face of the order dated 29.02.2016, the appellant could have waited for consideration of the application for change of address, as directed by the High Court or could have taken instructions from the Commissioner but, in any case, even such mistakes or errors or omissions on his part cannot be considered as carrying the elements of malice or want of good faith.

16. In our view, for imputing motives and drawing inference about want of good faith in any person, particularly a statutory authority, something more than mere error or fault ought to exist. Nothing concrete is available on record to impute motives in the appellant, even if his actions/omissions while functioning as Assessing Authority otherwise called for disapproval.

17. In the questioned parts of the impugned orders, the High Court seems to have taken rather a sterner view of the matter, which was not required in the given set of facts and circumstances. Noticeably, the appellant was not impleaded personally a party in the first two writ petitions which were decided by the common order dated 29.02.2016. The comments or remarks which were to operate personally against the appellant were not even called for without the appellant having been joined personally a party and having been extended an opportunity of hearing and explanation. In the third writ petition decided by the order dated 02.08.2016, though the appellant was personally joined as a party-respondent, when he had withdrawn the order dated 04.05.2016 immediately after registration of changed address by the registering authority and had tendered an apology before the High Court, in our view, the matter could have been closed at that; and there was no necessity of stretching the matter too far and passing further orders for imposition of costs and for departmental actions with other comments regarding competence of the appellant to discharge quasi-judicial functions[4]. Having said that, we deem it appropriate to close this matter with annulment of strictures and observations against the appellant in both the impugned orders dated 29.02.2016 and 02.08.2016.

4 The mistakes, errors or lapses, of course, need to be dealt with by the persuasive reasoning by the Court and necessary orders are also to be passed as may be required in the given set of circumstances but, it is not necessary to 'crack the whip' on every mistake [*vide* the observations of this Court in V.K. Jain v. High Court of Delhi: (2008) 17 SCC 538].

21. As regards the amount of costs, we appreciate the fair stand taken on behalf of the respondent No. 1. Having regard to the circumstances, we deem it appropriate and hence order that the said amount of Rs. 2,00,000/- shall be deposited by the respondent No. 1 with the Uttar Pradesh State Legal Services Authority.

22. With the requirements aforesaid, the remarks and observations against the appellant in the impugned orders are expunged; and the questioned parts of the impugned orders, as reproduced hereinabove, are annulled and set aside.

23. Needless to observe that any action taken or in contemplation pursuant to the aforesaid parts of the impugned orders are also rendered redundant.

24. The appeals stand allowed to the extent and in the manner indicated above.

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