

I. Case Reference

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| Case Citation | : (2023) ibclaw.in 927 HC |
| Case Name | : Smt. K. Malathi Vs. State Tax Officer and Ors. |
| Corporate Debtor | : Sri Karunambikai Spinning Mills Pvt. Ltd. |
| Appeal No. | : W.P. Nos. 19728 of 2020 & 484 of 2021 and W.M.P. No. 24375 of 2020 & 565 of 2021 |
| Judgment Date | : 30-Oct-23 |
| Court/Bench | : High Court of Madras |
| Present for Petitioner(s) | : Mr. G.Natarajan |
| Present for Respondent(s) | : Mr. T.N.C. Kaushik, AGP (T) for R1 Mr. A.G. Satyanarayana for R2 |
| Coram | : Mr. Justice Krishnan Ramasamy |
| Original Judgment | : Download |

II. Brief about the decision

Facts of the case

- The National Company Law Tribunal (NCLT), vide its order dated 09.07.2019 order for liquidation against the Corporate Debtor, M/s. Sri Karunambikai Spinning Mills Pvt. Ltd., (SKMPL).
- On 10.06.2020, the State GST Officers visited the factory premises of SKMPL and conducted inspection. Based on the documents seized, a show cause notice dated 15.06.2020 was issued under Section 74 of the CGST & SGST Act, containing various allegations and demand for recovery of input tax credit and demand of tax for the year 2018-19.
- The Official Liquidator has neither filed any reply nor appeared for hearing, which prompted the first respondent to pass impugned orders ex parte, demanding huge taxes, interest and penalties against SKMPL.
- The impugned orders of demand were passed based on the alleged irregularities that had taken place prior to the period of commencement of CIRP against M/s. SKMPL and served on the petitioner.
- The petitioner was the Director of M/s. Sri Karunambikai Spinning Mills Pvt.Ltd., (SKMPL).

Decision of the High Court

- Sections 88(3) of the CGST Act, incorporated the principle of vicarious liability of the Directors of the debtor company. It provides that when any private company is liquidated and any tax, interest or penalty determined under this Act remains un-recovered, then the Directors of such debtor company shall be jointly and severally liable for the payment of such tax, interest or penalty. **(p4)**
- The right course available for the State Tax is to file appropriate claim before the Official Liquidator. In case there are no funds available with the company in liquidation, in which case, it is not possible to recover the sales tax dues from the Company in liquidation, in such circumstances, a new cause of action would arise to recover the sales tax dues from the Ex.-Directors of the Company in liquidation. **(p6)**

- In the present case, the issue of non-availability of the funds with the Official Liquidator for disbursement of the claims, is yet to be decided. Therefore, at present there is no cause of action arose to initiate against the Ex.Directors to recover the sales tax dues payable by the Company in liquidation. **(p6)**
- Therefore, the present action taken by the respondents in passing the impugned orders of demand in the name of M/s.SKMPL, which is in liquidation and serving on the petitioner, is not sustainable. **(p7)**
- Accordingly, the Writ Petitions are **allowed**. The impugned orders, dated 28.09.2020 are **set aside**. The Sales Tax Officers are at liberty to approach the Official Liquidator and in case, the Official Liquidator comes to the conclusion that the company in liquidation has no sufficient funds to settle the sales tax dues payable by the company in liquidation, a new cause of action would arise to invoke Section 88(3) of the CGST Act and in which event, the Sale Tax Officer are at liberty to proceed against the Ex.Directors of the Company in liquidation in accordance with law. No costs. Consequently, connected WMPs are closed. **(p8)**

III. Full text of the judgment

COMMON ORDER

These Writ Petitions have been filed, challenging the impugned orders Nos.33AADCS1886JIZ5/2018-19, dated 28.09.2020 and 33AADCS1886JIZ5/2017-18, dated 28.09.2020 along with summary of Order of even date in Form DRC-07, passed by the first respondent and quash the same as the same being arbitrary, illegal, in violation of principal natural justice and ultra vires the provisions of Section 14, 33(5) and 238 of the IBC and Section 88 of the CGST Act and SGST Act.

2. According to the petitioner, she was the Director of M/s.Sri Karunambigai Spinning Mills Pvt.Ltd., (SKMPL) which has been ordered to be liquidated by the National Company Law Tribunal (NCLT), vide its order dated 09.07.2019 and one Sri A.R.Ramasubramanian Raja, 2nd respondent herein was appointed as the Official Liquidator. On 10.06.2020, the State GST Officers visited the factory premises of SKMPL and conducted inspection and recovered certain documents. Based on the documents seized, a show cause notice dated 15.06.2020 was issued under Section 74 of the CGST & SGST Act, containing various allegations and demand for recovery of input tax credit and demand of tax for the year 2018-19. According to the petitioner, she got legal opinion and came to know that she has no locus standi to represent SKMPL after the order of liquidation passed by NCLT and hence, she has not filed any reply to the show cause notice. Thereafter, the first respondent intimated the same to the Official Liquidator/2nd respondent and also provided an opportunity of hearing. However, the Official Liquidator has neither filed any reply nor appeared for hearing, which prompted the first respondent to pass impugned orders ex parte, demanding huge taxes, interest and penalties against SKMPL. Now the petitioner apprehends that the first respondent may proceed to recover the demand of taxes and penalties, etc., confirmed on SKMPL, from the petitioner. Hence the Writ Petition.

3. The learned counsel for the petitioner, while reiterating the averments made in the affidavit filed in support of the writ petition, would submit that the impugned orders of demand came to be passed in the name of the company in liquidation and the first respondent was aware of the fact that the

company was in liquidation. He pointed out that the petitioner cannot respond to the impugned orders once the Official Liquidator was appointed and unfortunately, the Official Liquidator also failed to appear and file any reply during adjudication of the proceedings by the first respondent and the impugned orders came to be passed ex parte. Therefore, the impugned orders are not sustainable and liable to be set aside.

4. Sections 88(3) of the CGST Act, incorporated the principle of vicarious liability of the Directors of the debtor company. It provides that when any private company is liquidated and any tax, interest or penalty determined under this Act remains un-recovered, then the Directors of such debtor company shall be jointly and severally liable for the payment of such tax, interest or penalty.

5. In the present case, the impugned orders of demand were passed based on the alleged irregularities that had taken place prior to the period of commencement of Corporate Insolvency Resolution process against M/s.SK MPL and served on the petitioner.

6. The right course available for the respondents is to file appropriate claim before the Official Liquidator. In case there are no funds available with the company in liquidation, in which case, it is not possible to recover the sales tax dues from the Company in liquidation, in such circumstances, a new cause of action would arise to recover the sales tax dues from the Ex.Directors of the Company in liquidation. In the present case, the issue of non-availability of the funds with the Official Liquidator for disbursement of the claims, is yet to be decided. Therefore, at present there is no cause of action arose to initiate against the Ex.Directors to recover the sales tax dues payable by the Company in liquidation.

7. Therefore, the present action taken by the respondents in passing the impugned orders of demand in the name of M/s.SK MPL, which is in liquidation and serving on the petitioner, is not sustainable.

8. Accordingly, the Writ Petitions are allowed. The impugned orders, dated 28.09.2020 are set aside. The respondents are at liberty to approach the Official Liquidator and in case, the Official Liquidator comes to the conclusion that the company in liquidation has no sufficient funds to settle the sales tax dues payable by the company in liquidation, a new cause of action would arise to invoke Section 88(3) of the CGST Act and in which event, the respondents are at liberty to proceed against the Ex.Directors of the Company in liquidation in accordance with law. No costs. Consequently, connected WMPs are closed.

30.10.2023

KRISHNAN RAMASAMY, J.

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