HIGH COURT OF MADHYA PRADESH, BENCH AT INDORE

Writ Petition No.15645/2019

Kabeer Reality Private Limited v/s The Union of India & Others

Indore, dated 17.10.2019

Shri Anuj Bhargava, learned counsel for the petitioner.

Shri Prasanna Prasad, learned counsel for respondent Nos.1 and 2.

Ms. Pallavi Khare, learned counsel for respondent No.4.

Arguments heard.

Reserved for order.

(S.C. SHARMA)
J U D G E

(SHAILENDRA SHUKLA)
J U D G E

Indore, dated 21.11.2019

Order passed separately. Signed and dated.

(S.C. SHARMA)
J U D G E

(SHAILENDRA SHUKLA)
J U D G E

Ravi

HIGH COURT OF MADHYA PRADESH : BENCHAT INDORE

DIVISION BENCH: **HON'BLE MR. JUSTICE S. C. SHARMA &**
HON'BLE MR. JUSTICE SHAILENDRA SHUKLA

Writ Petition No.15645/2019

Kabeer Reality Private Limited

v/s

The Union of India & Others

* * * * *

O R D E R

Reserved on 17.10.2019

(S. C. SHARMA)
J U D G E

For consideration of

Hon'ble Mr. Justice Shailendra Shukla

(SHAILENDRA SHUKLA)
J U D G E
___/11/2019

Post for **___/11/2019**

(S. C. SHARMA)
J U D G E

__/11/2019

HIGH COURT OF MADHYA PRADESH: BENCH AT INDORE
DIVISION BENCH : HON'BLE SHRI JUSTICE S.C. SHARMA &
HON'BLE SHRI JUSTICE SHAILENDRA SHUKLA

Writ Petition No.15645/2019

Kabeer Reality Private Limited

v/s

The Union of India & Others

Shri Anuj Bhargava, learned counsel for the petitioner.
Shri Prasanna Prasad, learned counsel for respondent Nos.1 and 2.
Ms. Pallavi Khare, learned counsel for respondent No.4.

O R D E R
(Delivered on this 21st day of November, 2019)

Per : S.C. Sharma, J:

The petitioner before this, Court Kabeer Reality Private Limited is a company registered under the Companies Act, 1956, has filed this present petition being aggrieved by the order / notice dated 08.07.2019 passed by the Deputy Commissioner, CGST & Central Excise, Division – V, Indore, by which the respondent No.2 has issued a notice to the tenants of the petitioner for initiating recovery against them.

02. It has been stated by the petitioner that the petitioner / Company is owner of a commercial building situated at 2, Kibe Compound, Chawani, Indore and the petitioner / Company is

having various tenants in respect of the building in question. It has been further stated that the petitioner / Company is registered under the provisions of the Central Goods & Service Tax Act, 2017 (hereinafter referred as the Act of 2017) and is a taxable person under the Act of 2017. The petitioner / Company is carrying on business of renting immovable property and also provides allied services.

03. The petitioner / Company has further stated that earlier also, an order was passed in respect of recovery of service tax, dues on 03.10.2018, by respondent No.2 directing the tenants to deposit the rent with the State Exchequer, however, after recovery of entire dues along with penalty, the notice was withdrawn on 09.07.2019.

04. The petitioner / Company has further stated that respondent No.1 has again issued a notice to the tenants of the petitioner / Company under Section 79 (1)(c) of the Act of 2017 initiating recovery against them in respect of a sum of Rs.44,43,804/- on account of tax, cess, interest etc. payable under the provisions of Section 79 of the Act of 2017. The petitioner / Company has submitted a reply on 15.07.2019 and it's grievance is that the notice / order dated 08.07.2019 is *per se* illegal and has been

issued contrary to the statutory provisions as contained under the Act of 2017.

05. The petitioner / Company has raised various grounds before this Court and it has been stated that respondent No.2 has not followed the prescribed procedure relating to demand and recovery, as provided under the Act of 2017. It has also been contended that without determination of tax payable by taxable person, no recovery could have been initiated under Section 79 (1)(c) of the Act of 2017.

06. It has also been argued that in absence of determination of tax under Section 73 of the Act of 2017, no recovery can be made against the petitioner, as no notice of demand was ever issued to the petitioner / Company.

07. The petitioner has also stated that the action of respondents is contrary to the statutory provision as contained under Section 79 of the Act of 2017, hence the impugned order deserves to be quashed.

08. Other grounds have also been raised by the petitioner / Company stating that as no opportunity of hearing was provided to the petitioner before passing the impugned order / notice, the rent cannot be adjusted towards tax dues and a prayer has been

made for quashment of the impugned order / notice dated 08.07.2019.

09. The petitioner has prayed for the following reliefs :-

7.1 Issue appropriate writ, direction or order, to quash notices dated 08.07.2019 (Annexure-P/1), issued by the respondent No.2;

7.2 Issue appropriate writ, direction or order, to quash recovery proceedings initiated against the Petitioner.

7.3 Issue appropriate writ, direction or order, directing the respondent No.2 to act in accordance with the provisions of Ch. XV of CGST Act, 2017, before initiating recovery against the Petitioner or a third person; and

7.4 Issue any other writ, direction, or order, which this Hon'ble Court deems fit in the facts and circumstances of the case.

10. A reply has been filed in the matter and the respondents have stated that the petitioner / Company is not entitled for any relief of whatsoever kind, as the respondents have taken action strictly in consonance with the Act of 2017. The respondents have stated that Section 78 and 79 empower the respondents to initiate the recovery of the government dues.

11. The Range Officer, vide letter dated 19.07.2018, has

requested the petitioner to file GST Return and to deposit the GST dues with Government Exchequer and the total tax liability worked out was Rs.44,43,804/- + interest upto 02/2019 amounting to Rs.5,70,546/-. As the tax dues was not paid and no reply was filed, the Department has left with no other option except to recover the GST arrears under Section 79 of the Act of 2017.

12. It has been further stated that the petitioner failed to file mandatory GSTR-1 for the period w.e.f. 07/2017 to 03/2018 and for the period w.e.f. 06/2018 to 07/2019. It has also been stated that no GSTR-3B has been filed from the beginning of the GST regime i.e. w.e.f. 07/2017 to 07/2019. The respondents have stated that the petitioner / Company is a willful defaulter, and therefore, the provision of the Act of 2017 were made applicable, as provided under Section 79, the recovery has been initiated.

13. It has been reiterated that the Range Officer, CGST and Central Excise, Range – V, Division – 5, Indore vide letter dated 19.07.2018 has requested the petitioner to file GSTR-3B and to deposit the dues, but no reply was filed by the petitioner / Company to the aforesaid letter. The respondents have stated that the petitioner should have deposited the GST along with interest

for the period w.e.f. April, 2018 to May, 2019, as the tax liability was worked out by himself (self assessed) shown as GSTR-1, failing which, the action was initiated by the Department to recover the dues under Section 79 (1)(c) of the Act of 2017.

14. The respondents have also filed a detailed para-wise reply to the writ petition and it has been stated that the petitioner, on the basis of invoices issued to their clients, has filed GSTR-1 Return for the period w.e.f. April, 2018 to May, 2019. The petitioner has issued invoices to their clients and self assessment of the GST liability was done by filing the statutory GSTR-1 Return under Section 39 of the Act of 2017.

15. The respondents have also stated that the petitioner is under an obligation to file GSTR-3B and it is also under an obligation to pay GST. The respondents have stated that as the petitioner has failed to file GSTR-3B for the period w.e.f. 07/2017 to 07/2019 and has also failed to deposit the self assessed legitimate tax to the government account, the Department was left with no other choice except to invoke the provisions of Section 79 (1)(c) of the Act of 2017.

16. It has also been stated that the Superintendent vide letter dated 19.03.2018 informed the petitioner regarding non-payment

of Service Tax for the period w.e.f. 10/2013 to 06/2017 and requested the petitioner to deposit the Service Tax amounting to Rs. 57,55,821/- and the petitioner, vide letter dated 21.03.2018 admitted the Service Tax liability to the tune of Rs.49,69,978/- for the period w.e.f. 04/2015 to 06/2017 and submitted that balance dues for the earlier period has been deposited and also made a request not to initiate recovery proceedings, as their request application to pay the Service Tax in installment is pending before the Commissioner. The petitioner was allowed to pay the dues in 12 equal installments vide order dated 28.05.2018 and the petitioner paid only Rs.5,00,000/- vide *Challan* dated 08.08.2018 and Rs.3,00,000/- vide *Challan* dated 18.10.2018 and in those circumstances, as the petitioner has failed to comply with the conditions on which the permission was given for paying arrears in 12 equal installments, the Department was left with no other option but to invoke the recovery provision as contained under Section 87 (b) of the Service Tax Act, 1994 against the petitioner and their tenants, meaning thereby, the amount of Service Tax was ultimately recovered only after invoking the provision as contained under Section 87 (4) of the Service Tax Act, 1994. This itself established that the petitioner is a chronic

defaulter.

17. The respondents have further stated that they have issued notice under Section 79 (1)(c) of the Act of 2017 to four tenants only and petitioner instead of depositing GST dues, served a legal notice to the Department, which was properly replied by the Department on 30.07.2019.

18. The respondents have further stated that the petitioner, right from the day one, has not filed a single GSTR-3B Return nor GSTR-1 for the period w.e.f. 07/2017 to 03/2018 (has filed GSTR-1 only for the period 04/2018 to 05/2019), and therefore, the respondents were left with no other choice except to recover the amount of GST by invoking Section 79 (1)(c) of the Act of 2017.

19. It has also been argued by learned counsel for the Excise Department that the petitioner's main object of filing the present writ petition is to frustrate the recovery of dues payable to the Government. He has also stated, while arguing the matter, that the petitioner / Company is a defaulter in respect of financial transaction and the property of the petitioner / Company is likely to be subjected for recovery of dues under the provision of Securitization and Reconstruction of Financial Assets and

Enforcement of Security Interest Act, 2000. The sole object of the present writ petition is to avoid the payment of government dues as in case, there is an adjudication under the SARFAESI Act or any order is passed by the Debt Recovery Tribunal, the dues of the Bank will have first charge in the matter and Government will not be able to recover the amount. The present writ petition is nothing but an attempt to delay the recovery of government dues so that the Bank starts action in the matter for recovery of its dues and the dues of the Bank will have a precedence over the dues of the Union of India.

20. A rejoinder has been filed in the matter and it has been stated in the rejoinder that CGSTR-1 cannot be termed or classified as self assessed liability, it is only a declaration made for the limited purpose as prescribed under Section 37 of the Act of 2017 regarding details of outward supply and in absence of Return filed under Section 39, no recovery proceedings could have been initiated without following the procedure set out in Section 73 and 74 of the Act of 2017.

21. It has been stated that there is total violation of procedure as prescribed under Section 73 and 74 of the Act of 2017 and the question of alternative remedy in light of the judgment delivered

in the case of ***The Commissioner of Income Tax v/s Chhabil Das Agrawal*** *reported* ***in 2014 (1) SC 603*** does not arise.

22. The petitioner has also stated that earlier provision of provisional registration was issued under the GST registration and the petitioner was not able to file GST Return. The petitioner / Company was informed that its GST registration has been cancelled and in those circumstances, the petitioner / Company was not able to file its return.

23. Additional reply has also been filed in the matter by respondent No.2 and it has been stated that the petitioner has issued invoices to its clients and filed a GSTR-1 Return for the period w.e.f. April, 2018 to May, 2019 and self assessed GST liability by filing statutory GSTR-1 Return under Section 37 of the Act of 2017. The respondents have stated that it does not mean that the petitioner is not required to file GSTR-3B and no GST is to be paid on self assessed transaction value shown in GSTR-1.

24. The respondents have stated that the moment the clients have been issued invoices for providing taxable services and charged the GST also, the tenants are entitled to avail the ITC under Section 2 (62) of the Act of 2017 and in the present

circumstances, in which the petitioner failed to deposit the GST for the period w.e.f. April, 2018 to May, 2019, the credit availed by the tenant on the basis of invoices issued by the petitioner also became invalid / ineligible despite no fault on their part.

25. The respondents have also stated in the additional reply that since the petitioner was failed to file GSTR-3B for the period w.e.f. 07/2017 to 05/2019 and failed to deposit the self assessed legitimate tax to the government account, the Department was left with no other choice except to invoke the provision of Section 79 (1)(c) of the Act of 2017. The respondents have stated that they have erroneously mentioned Section 79 instead of Section 37 of the Act of 2017, however, mere quoting of wrong provision of law is not going to make any difference and a prayer has been made for dismissal of the writ petition.

26. Heard learned counsel for the parties at length and perused the record. The matter is being disposed of at motion hearing stage itself with the consent of the parties.

27. In the present case, the undisputed facts reveal that the petitioner is aggrieved by the demand order / notice dated 08.07.2019 issued by the Deputy Commissioner, CGST & Central Excise, Division – V, Indore. The relevant statutory

provisions of law, which are necessary for adjudicating the controversy involved in the present case reads as under :-

> **"Section 37 of the Act of 2017**
> *Furnishing details of outward supply.*
> (1) Every registered person, other than an Input Service Distributor, a non-resident taxable person and a person paying tax under the provisions of section 10 or section 51 or section 52, shall furnish, electronically, in such form and manner as may be prescribed, the details of outward supplies of goods or services or both effected during a tax period on or before the tenth day of the month succeeding the said tax period and such details shall be communicated to the recipient of the said supplies within such time and in such manner as may be prescribed:
>
> Provided that the registered person shall not be allowed to furnish the details of outward supplies during the period from the eleventh day to the fifteenth day of the month succeeding the tax period:
>
> Provided further that the Commissioner may, for reasons to be recorded in writing, by notification, extend the time limit for furnishing such details for such class of taxable persons as may be specified therein:
>
> Provided also that any extension of time limit notified by the Commissioner of State tax or Commissioner of Union territory tax shall be deemed to be notified by the Commissioner.
>
> (2) Every registered person who has been communicated the details under sub-section (*3*) of section 38 or the details pertaining to inward supplies of Input Service Distributor under sub-section (*4*) of section 38, shall either accept or reject the details so communicated, on or before the seventeenth day, but not before the fifteenth day, of the month succeeding the tax period and the details furnished by him under sub-section (*1*) shall stand amended accordingly.
>
> (3) Any registered person, who has furnished the details under sub-section (*1*) for any tax period and which have remained unmatched under section 42 or section 43, shall, upon discovery of any error or omission therein, rectify such error or omission in such manner as may be prescribed, and shall pay the tax and interest, if any, in case there is a short payment of tax on account of such error or omission, in the return to be furnished for such tax period:
>
> Provided that no rectification of error or omission in respect of the details furnished under sub-section (*1*) shall be allowed after furnishing of the return under section 39 for the month of September following the end of the financial year to

which such details pertain, or furnishing of the relevant annual return, whichever is earlier.

Explanation.—For the purposes of this Chapter, the expression "details of outward supplies" shall include details of invoices, debit notes, credit notes and revised invoices issued in relation to outward supplies made during any tax period.

Section 79 (1)(c) of the Act of 2017

(*c*)(*i*) the proper officer may, by a notice in writing, require any other person from whom money is due or may become due to such person or who holds or may subsequently hold money for or on account of such person, to pay to the Government either forthwith upon the money becoming due or being held, or within the time specified in the notice not being before the money becomes due or is held, so much of the money as is sufficient to pay the amount due from such person or the whole of the money when it is equal to or less than that amount;

(ii) every person to whom the notice is issued under sub-clause (*i*) shall be bound to comply with such notice, and in particular, where any such notice is issued to a post office, banking company or an insurer, it shall not be necessary to produce any pass book, deposit receipt, policy or any other document for the purpose of any entry, endorsement or the like being made before payment is made, notwithstanding any rule, practice or requirement to the contrary;

(iii) in case the person to whom a notice under sub-clause (*i*) has been issued, fails to make the payment in pursuance thereof to the Government, he shall be deemed to be a defaulter in respect of the amount specified in the notice and all the consequences of this Act or the rules made thereunder shall follow;

(iv) the officer issuing a notice under sub-clause (*i*) may, at any time, amend or revoke such notice or extend the time for making any payment in pursuance of the notice;

(v) any person making any payment in compliance with a notice issued under sub-clause (*i*) shall be deemed to have made the payment under the authority of the person in default and such payment being credited to the Government shall be deemed to constitute a good and sufficient discharge of the liability of such person to the person in default to the extent of the amount specified in the receipt;

(vi) any person discharging any liability to the person in default after service on him of the notice issued under sub-clause (*i*) shall be personally liable to the Government to the extent of the liability discharged or to the extent of the liability of the person in default for tax, interest and penalty, whichever is less;

(vii) where a person on whom a notice is served under sub-clause (*i*) proves to the satisfaction of the officer issuing the notice that the money demanded or any part thereof was not due to the person in default or that he did not hold any money for or on account of the person in default, at the time the notice was served on him, nor is the money demanded or any part thereof, likely to become due to the said person or be held for or on account of such person, nothing contained in this section shall be deemed to require the person on whom the notice has been served to pay to the Government any such money or part thereof;

Rule 61 Sub-rule (3) of the GST Rules;

Every registered person furnishing the return under sub-rule (1) shall, subject to the provisions of section 49, discharge his liability towards tax, interest, penalty, fees or any other amount payable under the Act or the provisions of this Chapter by debiting the electronic cash ledger or electronic credit ledger and include the details in **Part B** of the return in **FORM GSTR-3**."

28. The undisputed facts also reveal that the petitioner has filed GSTR-1 Return under Section 37 of the Act of 2017, however, the petitioner has not filed GSTR-3B Returns, which are to be paid on GST portal based on self assessed transaction value shown in GSTR-1 Returns by the petitioner. There are twin effect of such non-filing of GSTR-3B Return, first is that no revenue is actually transferred to the Government and on the other hand, the persons / tenants, to whom the petitioner has issued invoices, would avail GST credit. GSTR-1 Returns are being filed in accordance with Rule 59 (1) of GST Rules and GSTR-3B Returns are being filed in accordance with Rule 61 sub-rule 3 of the GST Rules.

29. The tax liability of the petitioner has been summarized by the Department in tabular form and the same reads as under:-

Month of liability	Due date of payment	Interest calculated from	Net amount (CGST – SGST) payable	
			Taxable Value	Amount of GST Payable
April, 2018	20.05.2018	21.05.2018	1840492	331288
May, 2018	20.06.2018	21.06.2018	2014979	362696
June, 2018	20.07.2018	21.07.2018	2009214	361658
July, 2018	20.08.2018	21.08.2018	2018714	363368
August, 2018	20.09.2018	21.09.2018	1930703	347526
September, 2018	20.10.2018	21.10.2018	1912665	344280
October, 2018	20.11.2018	21.11.2018	2006918	361246
November, 2018	20.12.2018	21.12.2018	2298147	413666
December, 2018	20.01.2019	21.01.2019	1899906	341984
January, 2019	20.02.2019	21.02.2019	1899772	341958
February, 2019	20.03.2019	21.03.2019	1908818	343588
			21740328	**3913258**

Balance amount		Amt. deposited	Date of Deposited	Total Days	Interest @ 24%	Progressive interest
GST Paid	GST not paid					
Nil	331288	0	0	375	81687	81687
Nil	693984	0	0	344	82039	163726
Nil	1055642	0	0	314	74670	238396
Nil	1419010	0	0	283	67616	306013
Nil	1756536	0	0	252	57585	363597
Nil	2110816	0	0	222	50225	413853
Nil	2472062	0	0	191	45369	459221
Nil	2885728	0	0	161	43792	503013
Nil	3227712	0	0	130	29233	532246
Nil	3569670	0	0	99	22260	554506
Nil	3913258	0	0	71	16040	570546

30. The petitioner has certainly not paid the GST. It is noteworthy to mention that GSTR-1 is declaration of tax liability and GSTR-3B is evidence of actual payment. The petitioner has stated that GSTR-1 cannot be termed or classified as self assessed liability, it is only a declaration made for limited purpose. The

said issued stands concluded on account of notification dated 09.10.2019 bearing No.49/2019, wherein an amendment has been made in Rule 61 of the GST Rules with retrospective effect and filing of GSTR-3B has been made compulsory. The operative portion of the notification dated 09.10.2019 reads as under:-

> "4. In the said Rules, in rule 61,-
> (a) for sub-rule (5), the following sub-rule shall be sustituted, with effect from the Ist July, 2017 namely:-
> (5) Where the time limit for furnishing of details in FORM GSTR-1 under section 37 and in FORM GSTR-2 under section 38 has been extended and the circumstances so warrant, the Commissioner may, by notification, [specify the manner and conditions subject to which the]38 return shall be furnished in FORM GSTR-3B electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner.
> Provided that where a return in FORM GSTR-3B is required to be furnished by a person referred to in sub-rule (1) then such person shall not be required to furnish the return in FORM GSTR-3.
> (b) sub-rule (6) shall be omitted with effect from the 1st July, 2017.
> Thus, the issue stands concluded and it was mandatory to file GSTR-3B Returns. Photocopy of the gazette notification is enclosed herewith."

31. The aforesaid statutory provision of law makes it very clear that it was mandatory for the petitioner to file GSTR-3B Return. Not only this, bare perusal of the statutory provision as contained under Section 79 of the Act of 2017 and procedure adopted by the respondents reveal that the procedure contemplated under Chapter 15 of the Act of 2017 has been followed as Section 79 (1)(c) falls in Chapter 15 of the Act of 2017 and the same has

rightly been invoked.

32. Notices were issued to the tenants, however, notice sent to the petitioner was received unserved and the amount is payable by the petitioner to the Government under the provision of Act of 2017 and respondents have rightly proceeded ahead in the matter by taking appropriate steps for recovering the government dues. The petitioner has contended that in absence of tax determination under Section 73, no recovery could have been ordered in the manner and method it has been done in the present case.

33. This Court is of the considered opinion that the tax determination has already been done in the present case, as the petitioner itself has quantified its tax liability under the GSTR-1 Returns. The petitioner's contention that in absence of determination of tax under Section 73 no recovery can be made, is unfounded and in fact Section 73 has got no application in the facts and circumstances of the present case.

34. It has also been contended by the petitioner that the order / notice dated 08.07.2019 is violative of Section 78 of the Act of 2017. The petitioner's contention is certainly erroneous, as there is no dispute about the quantum of tax liability, action is not being taken in furtherance of any order (adjudicating order).

Revenue is simply pressing upon for actual payment as being declared by the petitioner itself under GSTR-1. The petitioner has to pay the tax liability assessed by himself by filing appropriate form / *challan*, which he has not complied with, and thus, the claim of the petitioner that Section 79 of the Act of 2017 can be invoked only after Section 78 of the Act of 2017, is erroneous.

35. In the present case, there is no necessity to determine the taxable person, as the liability has been self assessed by the petitioner itself. So far as the determination of taxable person in the present case is concerned, the case of revenue rests on the GSTR declaration made by the petitioner itself, and therefore, there was no need of determination of taxable person. Since the liability has already been quantified by the petitioner itself, only attempts are being made for recovering revenue dues under Section 79 (1)(c) of the Act of 2017. It was the petitioner itself, who did not receive the notice issued by the Department, and now, at this juncture cannot blame the Department.

36. The petitioner appears to be a chronic defaulter. Earlier also on 17.03.2018, the petitioner has requested the Commissioner for grant of installment, the same document is also on record and the the respondents have rightly issued notice by taking shelter of

Section 79 (1)(c) of the Act of 2017 to the tenants of the petitioner.

37. In the considered opinion of this Court, the tax is being recovered from the petitioner after following due process of law. The petitioner cannot escape his liability of payment of GST under Act of 2017, especially when he has filed GSTR-1 and has quantified the tax payable by him while submitting the GSTR-1. This Court does not find any reason to interfere with the action taken by the respondents / Department in the matter.

Accordingly, the present Writ Petition stands dismissed.

Certified copy, as per rules.

(S.C. SHARMA)
J U D G E

(SHAILENDRA SHUKLA)
J U D G E

Ravi

Digitally signed by Ravi Prakash
Date: 2019.11.29 15:59:21 +05'30'