(2000) 01 KL CK 0004

In the High Court Of Kerala

Case No : W.A. No. 2539 of 1999 in O.P. No. 28782 of 1999

Ajantha Colour Lab APPELLANT

Vs

Additional Sales Tax Officer-III and Another RESPONDENT

Date of Decision : 27-01-2000

Acts Referred:
Central Sales Tax Act, 1956 — Section 7(4)

Citation : (2000) 118 STC 1

Hon'ble Judges : S. Sankarasubban, J;Ar. Lakshmanan, J

Bench : Division Bench

Advocate : K.I. Mayankutty Mather, Jijimol J. Vadakken and S. Amina, for the Appellant; R.K. Muraleedharan, Additional Government Pleader (Taxes), for the Respondent

Final Decision : Allowed

Judgement

A.R. Lakshmanan, J.—The petitioner in the original petition is the appellant in this appeal. The appeal is directed against the judgment dated November 18, 1999 in O.P. No. 28782 of 1999.

2. The appellant is a registered dealer, registered both under the Kerala General Sales Tax Act (for short, "the KGST Act") and the Central Sales Tax Act (for short, "the CST Act") on the files of the Additional Sales Tax Officer-Ill, IInd Circle, Kozhikode. The appellant is engaged in the business of photography, photo-processing and purchase and sale of photographic materials. According to the appellant, the photo-processing work undertaken by them is in the nature of job-work and consequently to that extent inexigible to tax. The appellant with a view to expand his business decided to purchase a more sophisticated film processor with its accessories and a printer processor from Kemlogic Labcare Pvt. Ltd., Bombay (both made in Japan with trademark "Noritsu"). In order to bring these machineries from Bombay to Kerala by way of an inter-State movement with concessional rate of tax, the appellant made an application before the first respondent to amend the CST registration certificate in its name to include the

aforesaid items as well in the certificate. The first respondent rejected the said request to amend the CST registration certificate stating that "processing of colour photographs will come under works contract and hence CST registration certificate cannot be amended including machineries and accessories" by proceedings dated October 1, 1999. According to the appellant, the reason stated in the impugned order discloses non-application of the mind by the officer concerned to the relevant provisions under the CST Act and the Rules. Even assuming that the photo-processing in the appellant''s lab amounts to works contract, still the action of the first respondent as evidenced by exhibit P3 is patently illegal and against the judicial pronouncements on the issue. A case identical to this, which arose for consideration before a Pull Bench of the Orissa High Court, reported in Kalinga Builders (P) Ltd. v. Commissioner of Commercial Taxes [1999] 115 STC 81, was also relied on by the appellant for the proposition that a dealer executing works contract as well as entitled to seek insertion of additional items in his certificate of registration. The order rejecting the request to amend the CST registration certificate u/s 7(4) of the CST Act is not specifically made appealable u/s 34 of the KGST Act. Even the extension of the provisions contained in the KGST Act with reference to certain matters covered under the CST Act, but there is no specific reference about Section 7(4) as an appealable order.

3. It is urged that the learned single Judge who heard the original petition without comprehending the grievance of the appellant simply relegated the appellant to challenge the impugned order in appeal before the appellate authority by judgment dated November 18, 1999. Since the maintainability of the appeal is a doubtful issue, the appellant being much aggrieved by the judgment of the learned single Judge filed the above appeal by contending that the reasons stated in exhibit P3 to reject the request of the appellant to amend the CST registration certificate is unwarranted and unjust and that the reasoning to decline jurisdiction to the appellant is really faulty. According to the learned counsel for the appellant, no appeal would lie against an order u/s 7(4) of the CST Act, which is not specifically made appealable u/s 34 of the KGST Act, nor by the extension contemplated by Section 9 of the CST Act.

4. Along with the original petition, the appellant filed exhibit P1 registration certificate, exhibit P2 application submitted by them before the first respondent, exhibit P3 true copy of the proceedings of the first respondent and exhibit P4 the representation submitted by the appellant before the second respondent, the Deputy Commissioner, Commercial Taxes, Kozhikode. The writ petition was filed with a prayer to quash exhibit P3 and for a mandamus compelling the respondents to issue the appellant with an amended CST registration certificate incorporating the details of the machineries and accessories proposed to be brought from Bombay, The writ petition was dismissed by A.S. Venkatachala Moorthy, J., with the following observation :

"Learned counsel for the petitioner submits that the issue involved in this case is squarely covered by a ruling of Full Bench of the Orissa High Court. It is open to the petitioner to place the ruling before the appellate authority. The appellate authority shall consider the same while deciding the appeal, The appeal will be disposed of within a period of two months from the date of receipt of a copy of this judgment."

5. The writ appeal was admitted by this Bench on November 24, 1999 and the respondents were directed to file a counter affidavit and, accordingly, the Assistant Commissioner (Law), Office of the Deputy Commissioner (Law), Ernakulam filed a counter-affidavit. It is contended that the appellant is entitled to the facility of using "C" forms for the purchase only if he satisfies the condition of Section 8(3) of the CST Act. According to the respondents, the purchase of machinery and other instruments for executing the works forms part of the labour portion in the works contract and, therefore, the request for amendment of the registration certificate was rejected by the respondent. It is their contention that the Full Bench of the Orissa High Court in the decision reported in [1999] 115 STC 81 (sc)[Kalinga Builders (P) Ltd. v. Commissioner of Commercial Taxes, Orissa] considered the question whether the certificate of registration can be amended in works contract for purchase of goods for resale. It is submitted that there is no purchase of goods for resale involved in the present case. It is, therefore, submitted that the order of the learned single Judge docs not require reconsideration and there is no merit in the writ appeal. It is also contended that the appellant''s request for inclusion of machineries and accessories in the CST registration certificate for the purpose of purchasing photo-processing machineries under the cover of form "C" declaration was rejected on the ground that machineries can be included in the certificate of registration for the purpose of Section 8(3) of the CST Act if the dealer purchasing the goods is being intended for resale by him or use by him in the manufacture or processing the goods for resale. It is further stated that the appellant is not purchasing the goods for resale nor he carried out any manufacturing in the photo-processing activities. From the nature of the work carried out by the appellant, they are not making of their own product or produce new materials so as to claim the benefit of "manufacturing".

6. A reply affidavit was filed by the appellant.

7. We have considered the rival submissions made by the respective counsel appearing on either side.

8. Undisputably the appellant is a "dealer" registered under the KGST Act and CST Act and he is entitled to seek such amendment under Sub-section (4) of Section 7 of the CST Act. However, the request was refused as per exhibit P3. The learned single Judge, who disposed of the original petition, has also without going into the merits of the case, directed the appellate authority to consider the same in appeal. According to the learned counsel for the appellant, the amendment of CST registration certificate comes u/s 7(4) of the CST Act and the appeal provision referred to by the learned single Judge is u/s 34 of the KGST

Act, which reads as follows :

"34. Appeals to the Appellate Assistant Commissioner.--(1) Any person objecting to an order affecting him passed by an appropriate authority under Sub-section (6) or Sub-section (7) of Section 14, Sub-section (2) or Sub-section (3) or Sub-section (4) or Sub-section (4A) of Section 17, Sub-section (1) or Sub-section (2) of Section 19, Section 19A, Section 19B, Section 26, Section 29, Section 29A, Section 30 or Section 30A may, within a period of thirty days from the date on which the order was served on him, appeal against such order to the Appellate Assistant Commissioner."

A reading of the above section would show that no appeal is provided against an order like exhibit P3 rejecting an application to amend the CST registration certificate. No appeal is provided under the CST Act also. The reason given by the first respondent was that the amendment cannot be allowed as the processing of color photographs comes under works contract.

9. Section 8 of the CST Act says that every dealer, who in the course of inter-State trade or commerce sells to a registered "dealer" other than the Government goods of the description referred to in Sub-section (3) shall be liable to pay tax under the Act which shall be 4 per cent of the turnover. So, u/s 8(1) of the CST Act, selling dealer of the appellant need pay only 4 per cent of its turnover if he sells to a registered dealer. Sub-section (3) describes the goods with reference to which "C" forms can be issued. These goods are the goods of the class or classes specified in the certificate of registration of the registered dealer purchasing the goods. In other words, goods which are described in the registration certificate, which the appellant intended to sell or use in the manufacture or processing of goods for sale can be purchased by issuing "C" forms.

10. Under the provisions of the CST Act, a dealer has got right to apply for CST registration u/s 7 of the Act. The amendment of the CST registration is covered under Sub-section (4) of Section 7 of the CST Act, which read thus :

"7(4) A certificate of registration granted under this section may--

(a) either on the application of the dealer to whom it has been granted, or where no such application has been made, after due notice to the dealer, be amended by the authority granting it if he is satisfied that by reason of the registered dealer having changed the name, place or nature of his business or the class or classes of goods in which he carries on business or for any other reason the certificate of registration granted to him requires to be amended."

Learned counsel for the appellant submitted that as per Section 7(4), a dealer has got right to apply for CST registration as well as for its amendment, which was rejected on the sole ground that processing of color photograph will come under the works contract. This submission was made as per the judgment reported in Ajantha Colour Laboratory v. State of Kerala (1999) 2 KLT 445

Reported as P.A. Prem Kumar v. Stale of Kerala [2000] 117 STC 76(ker) (Ker). The division Bench, comprising of AR. Lakshmanan and G. Sasidharan, JJ., held that the developing of exposed film brought by customer and taking positive prints from them and supply negatives and the prints in the desired size and taking positive print from negative brought by customer and returning the negatives to the customer amounts to works contract.

11. But, in the instant case, the short question is whether an assessee who executes works contract can ask for insertion of certain items in the certificate of registration issued under the CST Act. In this connection, the learned counsel for the appellant drew our attention to the Constitution (46th Amendment) Act, 1982. Article 466 of the Constitution of India, which deals with definitions, has been amended inserting a new Clause (29A) to Article 466. Clause (29A) states that the expression "tax on the sale or purchase of goods" includes, inter alia, "a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply or purchase of those goods by the person to whom such transfer, delivery or supply is made". It is, therefore, contended by the learned counsel for the appellant that this amendment enlarged the scope of legislative power of the State under entry 54 of List II and on the Parliament under entry 92A of List I. Thus, the expression "tax on the sale or purchase of goods" in entry 54 includes tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract. In view of the above constitutional amendment, the Kerala Legislature has introduced certain amendments in the KGST Act, 1963 as per the provisions contained in the Kerala Finance Act, 1984. Our attention was also drawn to Explanation (3A), which was introduced in the definition clause of the expression "sale". Explanation (3A) [Section 2(xxi)] reads as follows :

"A transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract shall be deemed to be a sale."

It is useful in this context to consider the definition of the word "dealer" as contained in Clause (viii) of Section 2, which was also amended. The said definition runs as follows :

"2(viii) ''dealer'' means any person who carries on the business of buying, selling, supplying or distributing goods, executing works contract, transferring the right to use any goods or supplying by way of or as part of any service, any goods, directly or otherwise, whether for cash or for deferred payment, or for commission, remuneration or other valuable consideration and includes :

......".

In view of the above amendments, a submission was made that a person executing works contract is a "dealer" and transfer of property involved in execution of such works contract is a "sale" coming within the definition clauses contained in the KGST Act, 1963. Thus, it is contended that even if activity carried by the appellant-company is termed as executing works contract as per the decision reported in Ajantha Colour Laboratory v. State of Kerala (1999) 2 KLT 445* it is a "dealer" under the Act and, therefore, entitled to all the rights and benefits available thereunder.

12. In support of the above submission, the learned counsel for the appellant cited few more decisions, which are reported in Salvicate (Bangalore) Private Limited v. Sales Tax Officer, 4th Circle, Kochi [1998] 109 STC 543 (Ker) : 1997 KLJ 677, Larsen & Toubro Limited v. Commercial Tax Officer [1992] 85 STC 422 (Mad), Builders Association of India and Others Vs. Union of India (UOI) and Others, and Kalinga Builders (P) Ltd. v. Commissioner of Commercial Taxes, Orissa [1999] 115 STC 81 (Ori)[FB].

13. In Salvicate (Bangalore) Private Limited v. Sales Tax Officer, 4th Circle, Kochi [1998] 109 STC 543 (Ker) : 1997 KLJ 677, P.A. Mohammed, J., held that a person executing works contract is a "dealer" and the transfer of property involved in execution of such works contract is a sale within their definitions contained in the Act. It is further held that a contractor executing works contract is a "dealer" under the CST Act, entitled to receive "C" forms from the prescribed authority (para 8 of the judgment).

14. In Larsen & Toubro Limited v. Commercial Tax Officer [1992] 85 STC 422 (Mad.), D. Raju, J., in paragraph 11 of the judgment held as follows :

"If therefore under the local sales tax law of the appropriate State, as has been held by the Apex Court in Builders Association of India and Others Vs. Union of India (UOI) and Others, the States are entitled to levy sales tax on the price of goods and materials used in works contracts as if there was a sale of such goods and materials, the dealers like the petitioners become entitled to purchase materials for their use in the execution of the works contracts by the issue of the ''C'' forms, notwithstanding the Central Amendment Act No. 31 of 1958,"

In paragraph 12 of the said judgment, it is held that the petitioners therein are entitled to have themselves registered as dealers u/s 7(2) and consequently are entitled to the supply of "C" forms for use in their purchase of goods in the course of inter-State sale or trade or commerce at the concessional rate.

15. An identical situation, i.e., for amendment of CST registration certificate, came before the Full Bench of the Orissa High Court, comprising of S.N. Phukan, C.J., A. Pasayat and P.K. Tripathy, JJ., in the decision reported in [1999] 115 STC 81(tri)[Kalinga Builders (P) Ltd. v. Commissioner of Commercial Taxes, Orissa]. The Full Bench after examining the case held that a dealer who executes works contract is entitled to seek insertion of items in his certificate of registration under the Orissa Sales Tax Act, 1947 or the Central Sales Tax Act, 1956, entitling him to purchase such goods for resale and also to receive declaration in form 34 under the Orissa Act and forms "C" and "F" under the Central Act, This decision has also quoted with approval in the judgment of our High Court reported in

Salvicate (Bangalore) Private Limited v. Sales Tax Officer, 4th Circle, Kochi [1998] 109 STC 543 (koc): 1997 KLJ 677, and the judgment of D. Raju, J., in Larsen & Toubro Limited v. Commercial Tax Officer [1992] 85 STC 422 (Mad.). The Full Bench of the Orissa High Court had adjudicated two questions :

"(1) Whether an assessee who executes works contract can ask for insertion of certain items in the certificate of registration issued under the Act or the Central Act to purchase the goods for resale ?

(2) Whether it is entitled to receive declaration form XXXIV under the Act, and forms C and F of the Central Act ?"

The Full Bench answered those two question in the affirmative. Arijit Pasayat, J. (as he then was) speaking for the Full Bench held that once the petitioner becomes a registered dealer under the Central Sales Tax Act, he is entitled to get the "C" forms from the prescribed authority and in paragraph 9, the learned Judge has observed that a dealer who executes works contract is entitled to seek insertion of items in his certificate of registration under the Orissa Sales Tax Act, 1947 or the Central Sales Tax Act, 1956 entitling him to purchase such goods for resale, and also to receive declarations in form XXXIV under the Orissa Act and forms C and F under the Central Act.

16. In this case, the appellant is engaged in the business of photography, photo-processing and purchase and sale of photographic materials and they got themselves registered as "dealer" both under the KGST Act and CST Act and with a view to expand their business, intended to purchase a more sophisticated film processor with its accessories and a printer processor from Bombay. Once the appellant is a "dealer" and a company engaged in works contract (photo processing is considered as a works contract as per the judgment in Ajantha Colour Laboratory v. State of Kerala (1999) 2 KLT 445 Reported as P. A. Prem Kumar v. State of Kerala [2000] 117 STC 76 (Ker)., in our opinion, the appellant is entitled to CST registration and seek amendment to the CST registration certificate. The contentions contraraised by the Revenue have no substance or merit.

The writ appeal succeeds. However, we make no order as to costs. The respondents are directed to issue amended CST Registration Certificate within one month from today.

Order on C.M.P. No. 6489 of 1999 in W. A. No. 2539 of 1999 dismissed.

