

(1985) 01 KAR CK 0022

In the Karnataka High Court

Case No : Writ Petition No's. 8348, 11452 to 11457 and 17117 of 1984

B. Basavalingappa and Others

APPELLANT

Vs

The State of Karnataka and Others

RESPONDENT

Date of Decision : 11-01-1985

Acts Referred:

Constitution of India, 1950 — Article 14, 19 (1), 19 (1) (g), 246
Karnataka Sales Tax Act, 1957 — Section 1 (2), 11, 11 (1), 2 (1), 5 (5)

Citation : (1985) ILR (Kar) 773 : (1985) 1 KarLJ 400 : (1985) 59 STC 1

Hon'ble Judges : N.R. Kudoor, J; K.S. Puttaswamy, J

Bench : Division Bench

Advocate : H. Subramanya Jois, B.V. Katageri and B.P. Gandhi, for the Appellant; S. Rajendra Babu, Government Advocate, for the Respondent

Judgement

Puttaswamy, J.—On a reference made by one of us (Puttaswamy, J.) these cases have been posted before us for disposal.

2. As the petitioners in these cases have challenged one and the same provision, we propose to dispose of them by a common order.

3. All the petitioners, except the petitioner in Writ Petition No. 17117 of 1984 claim that they are engaged in the business of commission agents or "dallals" before one or the other Agricultural Market Committee constituted and functioning under the Karnataka Agricultural Produce Marketing Regulation Act of 1968 ("APMC Act") by obtaining licences from the concerned Committee. They claim that their aforesaid business activity only brings the buyer and seller together and they are not dealers under the Karnataka Sales Tax Act of 1957 (Karnataka Act No. 25 of 1957) ("the Act").

4. The petitioner in Writ Petition No. 17117 of 1984 which is a registered partnership firm of partners, is also a registered dealer under the Act on the file of the Assistant Commissioner of Commercial Taxes (Assessments), Belgaum ("ACCT") which acts as a commission agent for resident and non-resident

principals dealing principally in tamal patra, cocum, shikkakai, etc. In his proposition Notice No. 5010201-0 dated 23rd June, 1984 (annexure A) the ACCT has called upon this petitioner to show case for its non-payment of turnover tax levied by section 6B of the Act for the periods set out therein.

5. All the petitioners have challenged the validity of section 11 of the Act substituted by the Karnataka Sales Tax (Second Amendment) Act, 1983 (Karnataka Act 23 of 1983) ("Amending Act") that came into force on 18th November, 1983 on which day it was first published in the Karnataka Gazette (Extraordinary) [vide section 1(2) of the amending Act and section 5(3) of the Karnataka General Clauses Act of 1899]. In addition to this challenge, the petitioner in Writ Petition No. 17117 of 1984 has also challenged the proposition notice issued by the ACCT on the basis of the said amendment.

6-1. All the petitioners have urged that section 11 substituted by the Amending Act was beyond the legislative competence of the State Legislature and is, therefore, liable to be struck down.

6-2. The petitioners in Writ Petitions Nos. 11452 to 11457 of 1984 have urged that the said provision violates section 64-A of the Sale of Goods Act, 1930 and section 182 of the Contract Act enacted by the Parliament. They have also urged that the same was violative of article 19(1)(g) of the Constitution. At the hearing, these petitions have also urged that the provision was violative of article 14 of the Constitution.

6-3. The petitioner in Writ Petition No. 17117 of 1984 has urged that the tax levied in the impugned provision was a tax on income and was not a tax on purchases or sales and therefore, a colourable piece of legislation liable to be struck down on that ground.

7. The respondents have registered these writ petitions.

8. Sriyuths H. Subramanya Jois, B. V. Katageri and B. P. Gandhi, learned counsel for the petitioners, have contended that section 11 of the Act was beyond the legislative competence of the State Legislature and was invalid.

9. Sri S. Rajendra Babu, learned Government Advocate appearing for the respondents, has urged that section 11 of the Act was within the legislative competence of the State Legislature.

10. Before examining the contentions touching on the validity of section 11 of the Act, it is necessary to ascertain its true scope and ambit bearing the well-settled rules of construction, some of which, if not all, have been noticed and re-stated by a Full Bench of this Court in C. Arunachalam v. Commissioner of Income Tax ILR (1948) Kant 1387 (para 11).

11. Section 11 of the Act as it stood before its substitution by the amending Act reads thus :

"11. Licensing of agents. - Every person who for an agreed commission or

brokerage buys or sells on behalf of known principals specified in his accounts in respect of each transaction shall obtain a licence from the assessing authority concerned on payment of such fee not exceeding fifty rupees as may be prescribed in that behalf :

Provided that -

(i) in the case of an agent who carried on such business in the State of Mysore on behalf of the principal who is a resident of the State of Mysore, the agent shall be assessed to the tax or taxes leviable under this Act in respect of the transaction. Without prejudice to his other rights to recover from his principal the tax or taxes paid by him on behalf of the principal such agent may retain out of any moneys payable to the principal by the agent, a sum equal to the amount of the tax assessed on or paid by the agent. The principal on whose behalf the agent has paid the tax as aforesaid shall not again be taxed in respect of the same transaction but the burden of proving that the tax in respect of the transaction has been paid by the agent shall be on such principal;

(ii) the commission or brokerage agreed upon and specified in the accounts represents the entire remuneration payable to the agent, apart from the tax paid by him on behalf of the principal and the legitimate incidental charges actually incurred by him and specified in the accounts in respect of insurance, transport, loading and unloading, godown rent, interest, correspondence, telegram, the use of the telephone and the like."

The Statement of Objects and Reasons, appended to the Karnataka Sales Tax (Second Amendment) Bill of 1983 (L.A. Bill No. 29 of 1983) introduced in the Legislative Assembly on 22nd September, 1983 that ultimately became the amending Act, so far as section 11 with which alone we are concerned, states thus :

"STATEMENT OF OBJECTS AND REASONS

Under the existing provisions of the Bill agent is taxed as qua agent and not as a dealer. The agent's liability is, therefore, co-extensive with that of his principal and if the principal cannot be taxed in respect of a transaction his agent also cannot be taxed. It is proposed to modify the applicability of law of agency to the assessments under the Bill by providing that the turnover effected by the agents, who is also a dealer under the Bill, shall be deemed to be his own turnover for the purposes of levying tax."

This Bill passed by the State Legislature, received the assent of the Government, on 7th November, 1983 and was first published in the Karnataka Gazette (Extraordinary) on 18th November, 1983.

12. Section 11 substituted by the amending Act reads thus :

"11. Agents liable to pay tax. - (1) Notwithstanding anything contained in any law for the time being in force including this Act, every person who for an agreed

commission or brokerage buys or sells on behalf of any principal who is a resident of the State of Karnataka shall, subject to the provisions of sub-section (5) of section 6B be assessed to tax or taxes under this Act at the rate or rates leviable thereunder in respect of such purchase or sale notwithstanding that such principal is not a dealer or that the turnover of sale or purchase relating to such principal is less than the minimum specified in sub-section (5) of section 5 or section 6B :

Provided that the principal shall not be assessed to tax on his turnover in respect of which, the agent is liable to tax or taxes under sub-section (1) and the burden of proving that the turnover has been effected through an agent liable to tax under the said sub-section, shall be on such principal.

(2) Notwithstanding anything contained in sub-section (1), in respect of goods taxable at the point of purchase by the last dealer in the State liable to tax under this Act, the agent (other than the agent of a non-resident principal) purchasing such goods shall not be assessed to tax but the principal who has effected such purchases through the agent shall be assessed to tax as if he is the last dealer in the State.

(3) Without prejudice to his other rights, the agent who is assessed under sub-section (1), may retain out of the moneys payable to his principal other than a principal who is an agriculturist a sum equal to the amount of tax assessed on or paid by the agent."

While the original section 11 required the agents only to obtain licences under the Act without making them liable for payment of taxes, the new section expressly makes them liable for payment of taxes under the Act. The change made against agents is clear and unequivocal.

13. An agent is a dealer within the meaning of that term occurring in section 2(1) (k) of the Act. The petitioners have not rightly challenged the validity of section 2(1)(k) of the Act.

14. A heading of a section gives clue in understanding that section, though it cannot control the plain language of the section itself. The heading of section 11 itself states that agent are liable to pay taxes under the Act.

15. Sub-section (1) of section 11 opens with a non obstante clause. A non obstante clause is generally employed to give overriding effect to the specific provision made in the provision itself. The opening part of sub-section (1) declares that the provision made therein shall have effect notwithstanding any contrary provision in any other law or the very Act itself. Under sub-section (1) any one who for an agreed commission or brokerage buys or sells on behalf of a resident principal of the State subject to sub-section (5) of section 5 and section 6B of the Act, is liable to pay taxes at the stipulated rates on the purchases or sales effected by him notwithstanding that the resident principal was exempted from payment of taxes u/s 5(5) and section 6B of the Act. The agent qua as

agent, is liable to pay taxes on sales and purchases at the stipulated rates irrespective of the liability or otherwise of the resident principal, if any, to pay taxes on such purchases or sales thereon, which however, is subject to sub-section (5) of section 5 and section 6B of the Act. The liability or otherwise of the agent depends on his total turnover as agent irrespective of the turnover of his principal on whose behalf he acts. But, that is however subject to the exemptions, if any, that can be claimed by him under sub-section (5) of section 5 and section 6B of the Act. The agent can claim exemptions on the ground (that) his turnover u/s 5(5) and 6B of the Act do not exceed the limits stipulated therein and not otherwise.

16. The proviso to sub-section (1) of section 11 exempts the resident principal from payment of taxes on the very transaction on which his agent had been made liable to pay taxes. But, the burden of proving the same was on the resident principal.

17. Sub-section (2) of section 11 really carves out an exception to section 11(1) of the Act and regulates the very last purchases in the State by the agents on behalf of resident and non-resident principals. In the former, the resident principal of the State is liable to pay taxes under the Act, however, exempting his agent from liability on the same. But, in the case of the latter, the agent is liable and is not allowed such exemptions.

18. Sub-section (3) of section 11 empowers an agent who is made liable to pay taxes under sub-section (1) of that section to retain so much of amounts paid or payable as taxes from out of the money payable by him to his principal other than a principal who is an agriculturist. The opening words "without prejudice to his other rights" occurring in sub-section (3) of section 11 necessarily mean the rights of an agent under other laws which necessarily include common law also. In the case of an agriculturist principal, the agent is not authorised by that very provision to retain so much of the amounts paid or payable by him as taxes. But, this does not necessarily mean that the other rights of the agent under other laws are in any way affected. We need hardly elaborate on all of them. But, it is obvious that this salutary provision had been made to safeguard the interests of unwary agriculturists who are generally exploited by every one in the Indian society and the commission agents in particular. With this analysis of this provision, we now proceed to examine the contentions urged for the petitioners.

19. The general rules for interpretation of entries found in the Seventh Schedule to the Constitution are now well-settled by a large number of rulings of the Supreme Court, Federal Court and Privy Council and some of them that are deductible from the decided cases need only be noticed.

20. The power to legislate is given by article 246 and other articles of the Constitution. The various entries in the three lists are not "power" of legislation, but are only "fields" of legislation. The entries in the lists are of an enabling character. The language of these entries should be given the widest scope of

their meaning is fairly capable because they set up a machinery of Government. Each general word should, accordingly be held, to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it.

21. The entries in the legislative lists are divided into two groups - one relating to the power to tax and the other relating to the power of general legislation relating to specified subjects. Taxation is considered as a distinct matter for purposes of legislation. The power to tax comprehends in itself the power to make all effective provisions for realisation of taxes imposed.

22. Entry No. 54 of List II (State List) of the Seventh Schedule to the Constitution, corresponding to entry No. 48 of the Provincial List II of the Seventh Schedule to the Government of India Act to 1935 reads thus :

"Taxes on the sale of purchase of goods other than newspapers."

Even the scope of this entry has been set at rest by the Supreme Court in a large number of cases and all of them have been reviewed and restated in *Vishnu Agencies (Pvt.) Ltd. Vs. Commercial Tax Officer and Others*, in which Chandrachud, J. (as His Lordship then was), speaking for 6 other learned Judges, without however overruling the construction placed on that entry in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, but expressly overruling the majority opinion in *New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar*, expressed thus :

"It is, however, unnecessary in these appeals to investigate the matter any further because, the position which emerges after putting on the words of entry 48 the same meaning which those words bear in the Sale of Goods Act, 1930 is that, in order to constitute a sale, it is necessary that there should be an agreement between the parties. In other words, the effect of the construction which the Court put on the words of entry 48 in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, is that a sale is necessarily a consensual transaction and if the parties have no volition or option to bargain, there can be no sale. For the person purposes, this view may be assumed to reflect the correct legal position but even so, the transaction which are, the subject-matter of these appeals will amount to sales."

Beg. C.J., while concurring with the other learned Judges that compulsory or statutory sales were sales exigible to sales tax, however, considered it unnecessary to overrule the majority opinion in *New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar*, and left open the same.

23. The term "dealer" exhaustively defined in section 2(1)(k) of the Act shows that he is a person engaged in the act of buying or selling or both. A commission agent engaged in the sale or purchase or in the taxable even under the Act, is a "dealer" within the meaning of that term occurring in the Act. Earlier, we have noticed that the petitioners had not challenged section 2(1)(k) of the Act. From this it necessarily follows that the challenge of the petitioners that section 11 of

the Act was beyond the legislative competence of the State, has hardly any merit.

24. Even otherwise, whether the activity of a commission agent qua as agent was or was not buying or selling is no longer *res integra*.

25. In *Kandula Radhakrishna Rao and Others Vs. The Province of Madras and Another*, a Full Bench of the Madras High Court examined the activities of a commission agent, his true legal position and his liability to pay taxes as a dealer under the Madras General Sales Tax Act of 1939. Rajamannar, C.J., speaking for the Full Bench expressed thus :

"In the case of a commission agent, the accepted mercantile practice is that he has control over or possession of the goods and he has the authority from the owner of the goods to pass the property in and title to the goods. If this is so, undoubtedly when a commission agent sells goods belonging to his principal with the authority and consent and without disclosing to the buyer the name of the owner, there is certainly a transfer of property in the goods from the commission agent to the buyer. A business which consists in such transactions can properly be described as a business of selling goods. A similar position would arise even in the case of a commission agent buying for an undisclosed principal. A commission agent doing this kind of business would, in my opinion, fall within the definition of dealer in the Sales Tax Act. Neither the definition of dealer nor of sale contemplates as a necessary condition, that the goods sold should belong to the person selling or buying. There can be a sale or purchase on behalf of another."

In *Bagalkot Cement Company Limited v. State of Mysore* [1970] 25 STC 520 a Division Bench of this Court examined the claim of Bagalkot Cement Company which acted as a commission agent for payment of taxes under the Act itself. Therein this Court accepted the above enunciation of the Full Bench of the Madras High Court and rejected its claim for non-payment of taxes and that decision was affirmed by the Supreme Court since reported in *Bagal Kot Cement Co. Vs. State of Mysore*, In affirming the decision of this Court, the Supreme Court expressly approved the above statement of law made by the Full Bench of the Madras High Court. From this what emerges is that a commission agent engages himself in sale or purchase, buying or selling or in the taxable event contemplated in entry No. 54 and therefore, the State Legislature was undoubtedly competent to legislate section 11 of the Act.

26. Section 11 of the Act has been enacted to prevent evasion of taxes under the Act. In a limited way, it is a machinery provision. The power to tax contemplates in itself (power) to make all effective machinery provisions. In this view also, the State was competent to enact section 11 of the Act.

27. We are of the view that the decision of the former High Court of Mysore in *R. Nanjiah, In re* [1954] 5 STC 443 relied on by Sri Katageri to contend to the contrary does not really bear on the point as the same was based on the language of the too simple an enactment called "The Mysore Sales Tax Act of

1948" and its provisions that stood then and does not assist the petitioners. We will also assume that the same bears on the point. But, then that ruling which is not in accord with the law declared by the Supreme Court and this Court notice by us earlier, with respect, cannot be followed by us.

28. On the above discussion, we hold that there is no merit in this contention of the petitioners and we reject the same.

29. On our above conclusions, it also follows that the contention of the petitioner in Writ Petition No. 17117 of 1984 that section 11 of the Act really taxes his income and not purchases and sales and is, therefore, a colourable legislation cannot be upheld. What is taxed is not the income of a commission agent but the sales or purchases effected by him qua as agent. Hence, the doctrine of colourable legislation, the true scope of which has been explained by the Supreme Court in K.C. Gajapati Narayan Deo and Others Vs. The State of Orissa, has no application at all. We see no merit in this contention and reject the same.

30. Sri Katageri has urged that the section was violative of article 14 of the Constitution.

31. As noticed earlier, the petitioners in Writ Petitions Nos. 11452 to 11457 of 1984 have not even urged that the provision was violative of article 14 of the Constitution. In justification of that ground urged at the hearing, they have not even set out the facts and circumstances that are necessary to examine the same. On this short ground, we must reject the challenge based on article 14 of the Constitution. But, still we will assume that necessary facts have been pleaded and a specific ground has even been urged and examined the same on merits also.

32. The commission agents with their special characteristics in their trade and business, who belong to a separate class have been treated uniformly. On the twin principles of classification and more so to a taxation measure exhaustively explained by the Supreme Court in The Twyford Tea Co. Ltd. and Another Vs. The State of Kerala and Another, and R. K. Garg v. Union of India AIR 1981 SC 2138 the challenge of the petitioners based on article 14 of the Constitution has no merit and we reject the same.

33. Learned counsel for the petitioners have contended that the provision was violative of article 19(1)(g) of the Constitution.

34. Article 19(1)(g) of the Constitution does not guarantee immunity from taxation. The right of the petitioners to carry on their business is not in any way affected by the provisions. We see no merit in this contention of the petitioners and reject the same.

35. Sri Katageri has lastly contended that section 11 of the Act destroys the principles of agency recognised by the Contract Act and the Sale of Goods Act and was in conflict with parliamentary legislation.

36. Earlier, we have noticed the true scope and ambit of section 11 of the Act and the true role of a commission agent. From what we have said earlier, it is clear that section 11 does not destroy the principle of agency and the same is not in conflict with any parliamentary legislation. We see no merit in this contention of the petitioners and reject the same.

37. In his proposition notice issued to the petitioner in Writ Petition No. 17117 of 1984 the ACCT had stated that the petitioner was liable to pay turnover tax from 7th November, 1983 on which day the Amending Act received the assent of the Government. The Act does not come into force on the very day it receives the assent of the Governor unless the same is also published on that day. The Amending Act was first published on 18th November, 1983 and therefore, as provided in section 5(3) of the General Clauses Act, section 11 of the Amending Act came into force only on 18th November, 1983 and not on 7th November, 1983 as tentatively expressed by the ACCT. We have no doubt, that in making his final order and issuing a demand notice the ACCT will so regulate the same. But, if the ACCT has already made his order and issued his demand, then also it would be proper for him to suitably regulate this aspect, without unnecessarily driving the petitioner in another proceeding to that extent. We hope and trust that all other authorities under the Act also will so regulate this aspect.

38. As all the contentions urged for the petitioners fail, these writ petitions are liable to be dismissed. We, therefore, dismiss these writ petitions and discharge the rule issued in all these cases. But, in the circumstances of the cases, we direct the parties to bear their own costs.