
(1993) 03 KL CK 0034
In the High Court Of Kerala
Case No : O.P. No. 2058 of 1990-T

Collector of Customs

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 26-03-1993

Acts Referred:

Constitution of India, 1950 — Article 143, 285(1), 289, 289(1)
Customs Act, 1962 — Section 126
Kerala General Sales Tax Act, 1963 — Section 13, 2, 22, 5

Citation : (1993) ECR 383 : (1993) 66 ELT 351 : (1993) 3 ILR (Ker) 653

Hon'ble Judges : T.L. Viswanatha Iyer, J

Bench : Single Bench

Advocate : K.B. Subhagamani, A.C.G.S.C, for the Appellant; T. Karunakaran Nambiar, Special Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

T.L. Viswanatha Iyer, J.—The question for consideration in this case is whether the petitioner, the Collector of Customs Kochi is liable to pay sales tax under the Kerala General Sales-tax Act, 1963 (the KGST Act) in respect of the sales of confiscated and unclaimed goods. The Government of Kerala informed the petitioner of his liability by the letter Ext. P1 dated May 12, 1988 and that led to this writ petition.

2. Petitioner is the Collector of Customs, Kochi who is discharging statutory duties and functions under the Customs Act, 1962. In the course of those duties and function, he comes into possession of goods which are either confiscated ones or those remaining unclaimed. The provisions for confiscation of goods are contained in Chapter XIV of the Customs Act, and Section 126 provides that when any goods are confiscated under the said Act, such goods shall thereupon vest in the Central Government. It is these goods which are confiscated, and goods which come into the possession of the Collector but remain unclaimed or uncleared, that are sold by him from time to time and it is in respect of these

sales that the Kerala State seeks to make the petitioner liable for tax under the KGST Act.

3. According to the petitioner, no sales tax is exigible in respect of these sales effected by the Customs Department of the Government of India, because the sales are effected only in the discharge of the statutory functions imposed by the Customs Act, of preventing smuggling activities and/or attempt at evasion of payment of Customs duties. The Government of India or its officers are not carrying on any business in discharging these functions statutorily imposed on them. The sales are not incidental or ancillary to any business carried on by the Collector of Customs and therefore are not exigible to sales tax. It is also contended that Article 285(1) of the Constitution exempts the sale of the goods in question, which have become government property u/s 126 of the Customs Act, from the levy of tax by the State.

4. The respondents, namely the authorities of the State of Kerala, on the other hand contend that after the addition of Explanation 2 to the definition of dealer in Section 2(viii) of the KGST Act, by the amending Act 3 of 1968, the Central Government and the State Government are deemed to be dealers for the purpose of the Act, irrespective of whether they effected sales in the course of business or not. The Collector is therefore liable to pay sales tax even though he is performing statutory functions under the Customs Act. They also contend that Article 285(1) has no application to sales tax which is an indirect tax levied on the occasion of the sale of goods and not a direct tax on the property of the Union of India. What is exempted by Article 285(1) is only a tax levied on the property as such and not a tax which is related to an event like a sale. The demand for tax is accordingly justified.

5. It will be advantageous at this stage to extract the relevant clauses of the definition of the expressions "business" and "dealer" in the KGST Act, as also Article 285(1) -

"2(vi) "Business" includes :-

(a) any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture, whether or not such trade, commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any profit accrues from such trade, commerce, manufacture, adventure or concern; and

(b) any transaction in connection with, or incidental or ancillary to such trade, commerce, manufacture, adventure or concern:

X X X X X X 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 :-

X X X X X X Explanation. - (2) The Central Government or a State Government, which, whether or not in the course of business, buy, sell, supply or distribute goods, directly or otherwise, for cash or for deferred payment, or for commission, remuneration or the valuable consideration, shall be deemed to be a dealer for the purpose of this Act."

"Article 285 - Exemption of property of the Union from State taxation -

(1) The property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State."

The definition of "dealer" as enacted originally did not contain Explanation 2, which was added by the amending Act 3 of 1968.

6. I may also refer to some other provisions of the KGST Act for purposes of completeness. Section 13 provides for registration of dealers, but Sub-section (4) thereof renders the section inapplicable to any State Government, Central Government or any local authority, so that it is unnecessary for any of these authorities to get themselves registered under the Act. Registration under the Act is important as that alone enables a dealer to collect the tax payable on a sale from the purchaser. Section 22 thus enables a registered dealer to collect the tax payable by him on the sale of any goods from the purchaser, and obliges him to pay over the same to the government. Sub-section (3) of the section in turn prohibits a person other than a registered dealer from collecting any amount by way of tax under the Act but the Central Government, the Government of Kerala or the Government of any other State in India or any local authorities shall in respect of any sale effected by them be entitled to collect by way of tax the amount which a registered dealer effecting such sale would have been entitled to collect by way of tax. It is in the background of these sections that the question has to be decided whether the Collector of Customs acting for the Central Government is a dealer liable to pay tax in respect of the sales effected by him of confiscated/unclaimed articles.

7. Though the matter was argued at length and with verve by Smt. Subhagamani for the petitioner, I do not find much of room for controversy on this point having regard to the fiction created by Explanation 2 to Section 2(viii) and the other provisions of the Act referred to earlier. They are clear and point to the only conclusion that the Central Government and therefore its officers are "dealers", entitled to collect tax and bound to pay it over to the State.

8. The definition of "business" has done away with the element of profit motive in the trading or other activity, so that the question whether such activity is carried on with any profit motive or not is irrelevant in deciding whether it is a business or not. The definition of "dealer" as it stands after the amendment of 1968 deems the Central Government as well as State Government to be dealers for

purposes of the Act. Though ordinarily only a person who carries on the business of buying, selling, etc., will be a dealer, this requirement has been dispensed with in the case of the Central and State Governments who are ipso facto made dealers under the Act. But counsel for the petitioner valiantly maintains that since the Collector is exercising statutory functions under the Customs Act and sells only the goods confiscated or remaining unclaimed with him, he will nevertheless not be a dealer under the Act. Counsel would draw a distinction between activities of the government which involve an element of business, and activities which are in discharge of any statutory provisions. For instance, it is pointed out that when the Railways effect sales of goods, as happened in the cases before Supreme Court in *District Controller of Stores, Northern Railway v. Assistant Commercial Taxation Officer* (1976) 37 STC 423 and *Member, Board of Revenue, West Bengal v. Controller of Stores, Eastern Railway* (1989) 74 STC 5, such sales are incidental or ancillary to the business carried on by the Railways, and therefore exigible to sales-tax. But the same cannot be said of an activity like that undertaken by the Collector of Customs whose primary duty as a statutory functionary is the prevention of smuggling activities and/or evasion of payment of customs duties. I am unable to agree for more than one reason. Explanation 2 to the definition of "dealer" in Section 2(viii) of the KGST Act creates a fiction that the Central and State Governments which buy, sell, supply or distribute goods directly or otherwise and whether or not in the course of business shall be deemed to be dealers for the purposes of the Act. Section 5 imposes the charge on such a dealer to pay tax on the sales effected by him. This fiction has to be given its full effect and we cannot impose limitations or conditions which are not found therein. The fiction has dispensed with the business element in the activity of buying, selling, supplying or distribution of goods indulged in by the Central and State Governments, to make them statutorily dealers under the Act. All that is required is a sale by the Central or a State Government either for cash or for deferred payment or for commission, remuneration or other valuable consideration. The further element which the petitioner seeks to introduce that the sales should be either in the course of business, or be incidental or ancillary to another business activity is foreign to the Explanation and cannot be read into it. If such an ingredient or element is introduced it will be rewriting the section contrary to its very terms, limiting the dealership of the Central and State Governments to a truncated part of their activities related to those which can be termed business activities. I may mention here that this Explanation in the KGST Act is akin to Explanation 2 to the definition of "dealer" in the Central Sales-tax Act, 1956. In the light of the specific fictional inclusion of governments as "dealers" under the Act, it is unnecessary to deal with the decisions in *Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes) Vs. Ruby Rubber Works Ltd.*, and *Deputy Commissioner of Sales-tax (Law) Board of Revenue (Taxes) v. T.V.S. Saw Mills* (1991) 83 STC 368 relied on by the petitioner which deal with the taxability of incidental or ancillary sales. On the other hand, the decision of the West Bengal Taxation Tribunal in *Collector of Customs v. State of West Bengal* (1992) 85 STC

121 is in point. There again the Collector of Customs resisted the attempt of the West Bengal revenue authorities to recover tax on the sales of confiscated and other items by the Customs Department. After referring to the decisions of the Supreme Court in *District Controller of Stores, Northern Railway v. Assistant Commercial Taxation Officer* (1976) 37 S.T.C. 423 and *Member, Board of Revenue v. Controller of Stores, Eastern Railway* (1989) 74 STC 5, the Tribunal held that the Collector was "dealer" as that expression was defined in the Bengal Finance (Sales-tax) Act, 1941 (as in the KGST Act) and that he is a person who carries on the business of selling goods in West Bengal. The fact that he was an officer representing the Central Government did not alter the position and therefore he was liable to pay tax on the sales effected by him.

9. That this is the position, according to me, stands affirmed by the decision of the Supreme Court in *State of Madhya Pradesh and Others Vs. Orient Paper Mills Ltd.*, . That was an appeal from the decision of the High Court of Madhya Pradesh reported in *Orient Paper Mills Ltd. v. State of Madhya Pradesh* (1971) 28 STC 532. The question was whether the State Government selling forest produce could be regarded as carrying on business to make it a dealer under the Madhya Pradesh General Sales-tax Act. The Madhya Pradesh High Court answered the question in the negative and the matter was taken to the Supreme Court. But subsequent to the decision of the High Court, the definition of dealer in the Act was amended with retrospective effect deeming the government as a dealer. The Supreme Court had no doubt in the matter because of the amendment, an evident from paragraph 13 of the judgment, that the fictional definition by itself was sufficient to make Government a dealer. The same view was expressed by the High Court of Madhya Pradesh itself in the subsequent decision in *State of Madhya Pradesh v. Bengal Paper Mills Co. Ltd.* (1979) 44 STC 347 at page 351.

10. An incidental contention was raised that the Collector of Customs may have to pay the surcharge and turnover tax, which cannot be passed on to the purchaser from out of the funds of the Central Government. No demand has yet been made for these amounts; but this possibility cannot, by itself be a ground for holding that the petitioner is not liable to pay sales-tax as a dealer. It is not a requirement of the levy of sales-tax that it should be allowed to be passed on to the customer. It will continue to be a tax on sales under Entry 54 of List II to the Seventh Schedule to the Constitution as the power of the legislature to impose a tax on sales is not conditional on its making a provision for the seller to collect the tax from the purchaser. (Vide *J.K. Jute Mills Co. Ltd. Vs. The State of Uttar Pradesh and Another*, at page 1539). In *Kodar v. State of Kerala* (1974) 34 STC 73 the Supreme Court rejected the contention that the levy of additional tax which could not be passed on to the purchaser was a tax on income with the following observation :-

"The legal incidence of a tax on sale of goods... falls squarely on the dealer. It may be that he can add the tax to the price of the goods sold and thus, pass it on to the purchaser. But it is not necessary that the dealer should be enabled to

pass on the incidence of the tax to the purchaser in order that it might be a tax on sale of goods."

Therefore the contingency of the Central Government having to pay some amount from out of its funds does not make the tax any the less sales-tax so long as it is related to the event of sale.

11. A subsidiary contention was raised that even the definition as it stands is unworkable. I fail to see how the definition is unworkable or insufficient to make Government a dealer under the Act. When a fiction has been created by the Explanation, that has got to be given its full effect. It is not possible to read alleged loopholes in the definition and frustrate the object of the amendment of making the State and Central Governments "dealers" for purposes of the Act.

12. I shall now come to the other point which was highlighted, that no sales-tax can be levied on the petitioner who represents the Central Government because of the exemption contained in Article 285(1) of the Constitution. The petitioner is firmly supported in this plea by the decision of a two member Bench of the Supreme Court in *State of Punjab v. Union of India* (1990) 79 STC 437. That decision is one rendered without any discussion, and therefore the facts leading to the appeal have to be culled from the decision under appeal of the High Court, which is reported as *Union of India v. State of Punjab* (1974) 34 STC 394. The facts were as follows. The Union of India owning the Railways was running departmental catering establishments, purchasing provisions and goods and selling foodstuffs at the canteens. Liability for sales-tax on these sales was resisted with the plea that no tax could be levied in view of Article 285(1) of the Constitution. There were also another plea, which it is not relevant to refer. The High Court of Punjab and Haryana upheld the claim of the Union observing that the goods were purchased by the Railway and were sold by it; the tax was imposed on the sale of goods; at the time of the sale, the goods belonged to the Railway and the tax had to be paid by the Railway, and therefore in view of the provisions of Article 285(1), the sales by the Government were immune from taxation under the State law.

13. This case went up to the Supreme Court in appeal and was dealt with by the two member Bench. The judgment which is very brief dealt with this question in the following words :

"On the second question, there remains little for consideration. There is no dispute that the Union of India is the owner of the Northern Railway Departmental Catering, Railway Station, Pathankot. The goods were purchased by the railways and were sold by the railways. The tax was imposed on the sale of goods. At the time of the sale, the goods belonged to the Railways. In view of the provisions of Article 285(1) of the Constitution, such sales were immune from taxation under the State Law. That was also the view of the High Court."

The view of the High Court was thus upheld. Counsel for the petitioner places strong reliance on this judgment which as I mentioned earlier firmly supports her

contention. But then, counsel for the revenue submits that this is a decision rendered per incuriam, without adverting to, or taking note of the decision of a nine member Constitution Bench In re : Sea Customs Act AIR 1963 SC 1760. That case involved directly the interpretation of Article 289(1) which is *pari materia* with Article 289(1) and is complementary to it by exempting the property of a State from Union taxation. The question referred by the President was whether customs duty could be imposed on the import or export of the property of a State; or excise duty on the production or manufacture of property of a State, used for purposes other than those specified in clause (2) of Article 289. The contention on behalf of the Union was that the immunity from taxation under Article 289(1) extended only to tax on property and not to all taxes; a tax by way of import or export duty was not a tax on property, but one on the fact of importing or exporting the goods into or out of the country. So also excise duty was a tax on production or manufacture and not on property as such. While dealing with this question, the court dealt with the nature of the taxes that were hit by Article 289(1) and 289(1) which were held complementary to each other. Sinha, C.J. (speaking for himself and three other learned Judges) observed that both the Articles were concerned with taxes directly on income or on property and not with taxes which may indirectly affect income or property (vide paragraph 17). The learned Chief Justice then went on to deal with the nature of excise duty and sales-tax in these terms :

"This will show that the taxable event in the case of duties of excise is the manufacture of goods and the duty is not directly on the goods but on the manufacture thereof. We may in this connection contrast sales-tax which is also imposed with reference to goods sold, where the taxable event is the act of sale. Therefore, though both excise duty and sales-tax are levied with reference to goods, the two are very different imposts; in one case the imposition is on the act of manufacture or production while in the other it is on the act of sale. In neither case therefore can it be said that the excise duty or sales tax is a tax directly on the goods for in that event they will really become the same tax. It would thus appear that duties of excise partake of the nature of indirect taxes as known to standard works on economics and are to be distinguished from direct taxes like taxes on property and income."

Rajagopala Ayyangar, J. concurred with the above view in his separate judgment. The other four judges differed. The view of the majority was thus that only direct taxes on income or property were hit by the prohibitions under Articles 285(1) or 289(1) and not indirect taxes like excise duties and sales-tax, the incidence of the latter being on the occasion of sale. This feature of sales-tax as an indirect tax imposed at the time of sale of goods, was recognised in AIR 1939 1 (Federal Court) , and echoed in *Province of Madras v. Bodda Paidanna* AIR 1942 EC. 33 and *S. Kodar Vs. State of Kerala*, stands entrenched as established law by the majority view in the *Sea Customs Act* case. It is the definite view of the majority in the said case that Article 285(1) does not preclude the operation of laws on sales tax as they are not directly related to Union property.

14. This decision of the Constitution Bench though rendered in advisory jurisdiction was not noted by the two member Bench which decided the case *State of Punjab v. Union of India* (1990) 79 STC 437. At any rate, there is no mention therein to the Sea Customs Act case and the dictum therein.

15. The question is can this court prefer the dictum in the Sea Customs Act case to that in the later *State of Punjab* case on the ground that the latter decision is one rendered per incuriam? It is true, as stated by the Supreme Court in *Gupta Sugar Works Vs. State of U.P. and Ors*, that a judgment need not be a digest of cases and that it need not be written like a thesis. But the decision with reference to which these observations were made was one which took a view considered correct by the court, though without reference to some binding precedents. That however, is not the position here, where *State of Punjab* conflicts directly with the Sea Customs Act case, evidently because it was not brought to the notice of the court.

16. A decision rendered per incuriam is one in which a statute or rule having statutory effect is not brought to the notice of the court or the decision is given in ignorance of a decision which is binding on the court. In such a case, the decision incuriam does not have the sway of a binding precedent. (See *Mamleshwar Prasad and Another Vs. Kanhaiya Lal (Dead) through L. Rs.,*). The leading enunciation of this principle is seen in *Royal Court Derby Porcelain Co. v. Raymond Russell* (1949) 2 KB 417 where it was observed :

"As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some feature of the decision or some step in the reasoning on which it is based is found on that account to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam, must in our judgment, consistently with the stare decisis rule which is an essential part of our law, be of the rarest occurrence."

State of Punjab has been decided without much of a discussion. The relevant decision - perhaps the most vital - on the scope of Article 285(1) vis-a-vis sales-tax, namely the Sea Customs Act case was not brought to the notice of the court. According to Salmond (on Jurisprudence 12th Edition, page 152) whenever a relevant prior decision is not cited before the court or mentioned in the judgment, it must be assumed that the court acts in ignorance or forgetfulness of it. Sea Customs Act was a decision rendered by a Constitution Bench, while *State of Punjab v. U.O.I.* (1990) 79 STC 437 is by a two member Bench. The former has therefore to be preferred as per the dictum in *Mattulal Vs. Radhe Lal*, . Moreover, the decision in Sea Customs Act accords with the consistent view taken by the Federal Court and the Supreme Court about the nature of sales-tax, as I have already noted earlier. The fact that the decision in Sea Customs Act was an advisory opinion on a reference under Article 143 of the Constitution does

not whittle down its binding nature as was observed recently in In the matter of In the matter of : CAUVERY WATER DISPUTES TRIBUNAL, :

"It has been held adjudicatively that the advisory opinion is entitled to due weight and respect and normally it will be followed. We feel that the said view which holds in field today may usefully continue to do so till a more opportune time."

Therefore, respectfully I decline to follow State of Punjab. I have already noted that as per the decision in Sea Customs Act sales-tax imposed by the State is not a direct tax on property and therefore not within the exemption provided by Article 285(1). The petitioner Collector of Customs cannot therefore claim immunity from state sales-tax with reference to Article 285(1) of the Constitution of India.

17. The second point vehemently pressed by counsel for the petitioner also therefore fails. There is no question of legislative competence in as much as the tax is imposed on the occasion of sale of the goods by the Collector of Customs. It is not related to the mere seizure or confiscation under the Customs Act, though the sale follows as a consequence thereof. The taxable event is the sale and not the seizure or confiscation and therefore the levy is well within the purview of Entry 54 of List II to the Seventh Schedule to the Constitution.

18. Government Pleader submitted inter alia that the petitioner had been collecting tax on the sales effected by him. Whatever that be the position is that he is a dealer as defined in Section 2(viii) of the KGST Act liable to pay tax on the sales of the confiscated/unclaimed articles.

The original petition is bereft of merit. It is dismissed without however any order as to costs.