

(1997) 11 KAR CK 0034

In the Karnataka High Court

Case No : Writ Petition No"s. 16292 to 16295 of 1990

Dubeer and Co.

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 24-11-1997

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Karnataka Tax on Entry of Goods Act, 1979 — Section 2 (5), 28 A

Citation : (1998) ILR (Kar) 866

Hon'ble Judges : P. Vishwanatha Shetty, J

Bench : Single Bench

Advocate : R.V. Prasad and K. Hema Kumar for S. G. Shivaram, for the Appellant; Shivayogiswamy, High Court Government Pleader, for the Respondent

Judgement

P. Vishwanatha Shetty, J.—The petitioner, in these petitions, is a registered dealer under the provisions of the Karnataka Entry Tax Act, 1979 (hereinafter referred to as "the Act").

2. In these petitions, it has called in question the correctness of the order of assessment dated April 1, 1982 to March 31, 1983, April 1, 1983 to September 30, 1983, October 1, 1983 to September 30, 1984 and October 1, 1984 to September 30, 1985, copies of which have been produced as annexures A to D respectively, passed by the assessing authority and the order dated April 8, 1988, a copy of which has been produced as annexure E, passed by the Deputy Commissioner for Commercial Taxes, i.e., the first appellate authority, rejecting the appeals filed by the petitioner against the orders of assessment and also the order dated March 19, 1990, a copy of which has been produced as annexure F, passed by the Karnataka Appellate Tribunal at Bangalore (hereinafter referred to as "the Tribunal") confirming the orders of assessment, annexures A to D and the order, annexure E, made in the appeals by the first appellate authority.

2A. A few facts, which have a bearing for the disposal of these petitions, may be set out as under :

The petitioner is admittedly a dealer in industrial machinery and its parts. It further claims that it is also a dealer in electrical motor and grinding mills and also a distributor for Kirloskar lathe machines. The assessing authority, in annexures A to D, for the assessment years April 1, 1982 to March 31, 1983, April 1, 1983 to September 30, 1983, October 1, 1983 to September 30, 1984 and October 1, 1984 to September 30, 1985 assessed the petitioner for payment of entry tax in respect of lathe machines, grinding mills and electrically operated motors on the ground that the petitioner purchased the said items of machineries and had brought it within the local area as provided u/s 3 of the Act. The said order of assessment were unsuccessfully challenged in appeal before the Deputy Commissioner for Commercial Taxes, the first appellate authority, and also before the Tribunal, the second appellate authority. Aggrieved by the said orders, these petitions are presented.

3. Sri R. V. Prasad, learned counsel for the petitioner, made three submissions challenging the correctness of the orders impugned. Firstly, he submitted that the lathe machines, in respect of which the petitioner has been assessed for payment of entry tax, were not brought within the local area and as such, the finding recorded by the authorities in the orders impugned making the petitioner liable to pay entry tax u/s 3(1) of the Act, is totally erroneous in law. In this connection, he referred to me the provisions contained in section 3(1) and 3(2) of the Act. He further submitted that the petitioner has not caused entry of the lathe machines into any local area and he directly sold it to various other customers, who directly took delivery of the said goods from the manufacturers. Secondly, he submitted that the grinding mills are not industrial machineries within the meaning of item 7 of the Schedule given to the Act. The learned counsel pointed out that the grinding mills in which the petitioner has dealt with, are not industrial machineries, but are machineries used for conversion of wheat or gram into wheat products, such as, suji, atta, maida, and they are normally used by the housewives and they are not used as industrial machinery. In support of this submission, he referred to me the decision of this Court in the case of Mysore Sales Corporation v. Assistant Commissioner of Entry Tax [1990] 78 STC 185 MYS which has been affirmed by the Division Bench in Assistant Commissioner of Entry Tax v. Mysore Sales Corporation [1992] 84 STC 461 (Ker). Finally, he submitted that the electrically operated motors also cannot be treated as part of industrial machineries in respect of which levy can be imposed under item 7 of the Schedule given to the Act. According to the learned counsel, electrically operated motors are electrical goods within the meaning of entry 13 given to the Schedule to the Act, which was in the statute book till March 31, 1993. Elaborating this submission, Shri Prasad submitted that though in the notification, the petitioner was made liable for payment of entry tax for the period from April 1, 1982 to March 31, 1983 by means of notification bearing No. FD 76 CET 84 (I) dated November 13, 1984, the levy of tax on electrical goods including the electrically operated motors, etc., as set out in item 13 of the notification bearing No. FD 76 CET 84 (I) dated November 13, 1984, came to be

superseded and levy was removed with effect from April 1, 1983 to October 23, 1984. He further pointed out that by virtue of notification bearing FD No. 73 dated November 13, 1984, the petitioner was assessed for payment of entry tax on electrical motors at one per cent; and therefore, the learned counsel would submit that the electrical motors dealt with by the petitioner, is not liable for payment of entry tax after April 1, 1983. For all these, he reiterates that the electrical motors, in which the petitioner was dealing, cannot be considered as an industrial machinery.

4. Shri Shivayogiswamy, learned Government Pleader, while seriously countering the submissions of the learned counsel for the petitioner, submitted that the orders impugned do not suffer from any infirmity much less an infirmity which calls for interference by this Court in exercise of its jurisdiction either under article 226 or under article 227 of the Constitution of India. He submitted that the finding recorded by the three authorities are purely questions of fact, which are not liable to be reversed by this Court in exercise of its jurisdiction under article 227 of the Constitution of India.

5. Before dealing with each of the contentions advanced by the learned counsel for the petitioner, it is useful to refer to some of the provisions of the Act, which have a bearing to decide the contentions urged in these petitions.

(a) Sub-section (5) of section 2 of the Act defines "local area" as hereunder :

"Local area" means an area within the limits of a city under the Karnataka Municipal Corporations Act, 1976 (Karnataka Act 14 of 1977), a municipality under the Karnataka Municipalities Act, 1964 (Karnataka Act 22 of 1964), a Notified Area Committee, a Town Board, a Sanitary Board or a Cantonment Board constituted or continued under any law for the time being in force and a Mandal under the Karnataka Zilla Parishads, Taluka Panchayat Samithis, Mandal Panchayats and Nyaya Panchayats Act, 1983 (Karnataka Act 20 of 1985) and panchayat area under the Karnataka Panchayat Raj Act, 1993 (Karnataka Act 14 of 1993)."

(b) Sub-sections (1) and (2) of section 3 of the Act, prior to the amendment by means of Act 15 of 1992, read as hereunder :

"(1) There shall be levied and collected a tax on entry of the scheduled goods into a local area for consumption, use or sale therein at such rate not exceeding two per cent ad valorem and from such date as may be specified, whether prospectively or retrospectively by the State Government and different dates and different rates may be specified for different local areas.

(2) The tax levied under this Act in respect of the entry of any scheduled goods into a local area shall be payable by the registered dealer or the dealer liable to get himself registered who brings or causes to be brought into the local area such goods, whether on his own account or on the account of his principal or takes delivery or is entitled to take delivery of such goods on such entry."

(c) Sub-sections (1) and (2) of section 28A of the Act read as follows :

"28-A. Burden of proof. - (1) For purposes of assessment of tax under this Act, the burden of proving that goods brought into or caused to be brought into a local area or taken delivery of by a dealer, is not liable to tax under this Act shall be on such dealer.

(2) Notwithstanding anything contained in this Act or any other law, where any dealer or person prefers claim under sub-section (3) of section 3 that he is not liable to pay tax under this Act in respect of any goods on which tax is leviable, such dealer or person shall be deemed to be the dealer or person liable to tax under this Act, unless he proves that in respect of such goods tax under this Act has already been paid or has become payable or that tax under the Karnataka Tax on Luxuries Act, 1979 (Karnataka Act 22 of 1979) has already been paid or has become payable, as the case may be."

6. In so far as the contention of Sri Prasad that the lathe machines, in respect of which the petitioner has been assessed for payment of entry tax, were not brought within the local area is concerned, it is relevant to point out that the assessing authority as well as the first appellate authority and the second appellate authority, i.e., the Tribunal, in the light of the contentions raised by the petitioner, after verification of the documents produced by the petitioner, have held that lathe machines were despatched in the name of the petitioner-firm and sold to them and, therefore, it is clear that the goods have entered into the limits of local areas of Hubli, Mysore, Shimoga on account of and in the name of the assessee-firm. In this connection, it is relevant to refer to the observations made by the Tribunal in its order, annexure F, at paragraph 7, which read as under :

"If the facts in the appellant's case are considered in view of the above stated provisions, we feel that the action of the assessing authority in bringing the turnover which were not declared by the appellant to tax is in accordance with the above provisions. The perusal of the records discloses that the appellant procured orders from his prospective customers and in turn placed the orders on M/s. Batliboi Engineers Pvt. Ltd., to supply the above lathes. M/s. Batliboi Engineers Pvt. Ltd., in turn place orders on M/s. Mysore Kirloskar Ltd., Harihar, for supply of the lathes. After the manufacture of lathes, M/s. Mysore Kirloskar Ltd., Harihar, raised the invoice in the name of M/s. Batliboi Engineers Pvt. Ltd., for having sold the above goods. While doing so, the Mysore Kirloskar, Harihar, booked the above lathes from Harihar itself and according to terms and conditions mentioned in the GC notes of the transporter, etc., the goods were stated to have been delivered at Harihar itself. The same has been transported through transporters to the appellant's purchaser's place. M/s. Batliboi Engineers Pvt. Ltd., in turn raised the bill in favour of the appellant and even in the said bills, it is shown that the goods are delivered locally. In view of this, it is clear that the goods have come into the possession of the appellant at Harihar itself and are transported at the appellant's risks to the ultimate destination and in many of the invoices, GC notes, it is shown that the goods are to be delivered

at the door of the customers that is to say the goods will be in the custody of the appellant from the time of delivery to the transporters godown for transportation at Harihar till the delivery of the same at the door of the purchaser. When this is so, it is the appellant or on behalf of the appellant, the transporters caused the entry of the scheduled goods into the concerned local area."

Further, the Tribunal also has, after referring to section 28A of the Act where the burden is placed on the assessee to show that any transaction of a dealer in any of the scheduled goods, is not liable to tax, is on him, has held that the petitioner has failed to discharge the said burden. I do not find any error in the said finding recorded by all the three authorities, referred to above.

6a. However, it is the contention of Sri Prasad that sub-sections (1) and (2) of section 3 must be read together and if it is so read, the tax is levied under the Act in respect of the entry of any scheduled goods into a local area and is made payable by the registered dealer or the dealer liable to get himself registered, who brings or caused to be brought into local area, whether on his account or on account of his principal, etc., provided that the scheduled goods are brought into the local area for consumption, use or sale therein. In other words, it is his submission that since the goods in question, even assuming are caused to be brought into the local area by the petitioner, unless it is shown that they were brought into the local area for the purpose of consumption, use or sale therein, it is not permissible to assess the petitioner for payment of entry tax solely on the ground that the petitioner caused the entry of the scheduled goods into the local area. In support of this submission, Sri Prasad relied upon the decision of this Court in *Siddhagiri v. Entry Tax Officer* [1993] 89 STC 221 SC, and also the decision of the Supreme Court in *Entry Tax Officer, Bangalore Vs. Chandanmal Champalal and Co. Etc. Etc.*, wherein this Court and the Supreme Court, while considering the words "sale therein" have taken the view that goods must be brought into the local area for the purpose of sale within the local area, to be liable for levy of entry tax. Therefore, Sri Prasad would submit that even assuming that the petitioner has caused the entry of the goods into the local area, since the goods were purchased by the petitioner for the purpose of sale to his other customers, the tax cannot be levied on the petitioner. I am unable to accept this submission of the learned counsel for the petitioner.

7. It is no doubt true that in the case of *Siddhagiri* [1993] 89 STC 221 and in the case of *Entry Tax Officer, Bangalore Vs. Chandanmal Champalal and Co. Etc. Etc.*, this Court and the Supreme Court have taken the view that unless the goods are brought and sold, within the local area, the entry tax is not leviable. But, in the instant case, on the basis of the material on record, the three authorities, referred to above, have held that the petitioner has caused the entries of the scheduled goods into the concerned local area. The only objection raised by the petitioner pursuant to the proposition notice issued to the petitioner is that the lathe machines were directly delivered to the concerned party by the principal, i.e., Mysore Kirloskar, and it is not the case of the petitioner that the

entry of the goods was not caused by it for the purpose of the sale to others. If the objections raised by the petitioner before the assessing authority is considered along with the requirement of law that the burden u/s 28A of the Act is placed on the petitioner-assesses to show that the transaction is not liable to tax and the petitioner has failed to discharge the said burden. I do not find any merit in the submission of the learned counsel for the petitioner that the entry of the goods was not caused into the local area by the petitioner either for consumption, use or sale therein, i.e., for sale within the concerned local area. Therefore, the first contention of the learned counsel for the petitioner is rejected.

8. In so far as the second contention of the petitioner that the grinding mills are not industrial machineries is concerned, I must state that I am also unable to accept the submission of Sri Prasad though he took considerable pains to show that grinding mills are not industrial machineries.

8A. Item 8 of the Schedule given to the Act provides for levy of tax on "industrial machinery". Though during the assessment years in question, industrial machinery for the purpose of item 7 to the Schedule has not been either defined or explained, by means of amendment by Karnataka Act 18 of 1989, in Explanation III, "industrial machinery" has been defined as follows :

"Explanation III. - "Industrial machinery" for the purpose of entry 7 of the Schedule shall mean such machinery which are generally used by an industrial unit whether or not such unit is a factory as defined under the Factories Act, 1948, for manufacturing or processing of goods and includes earth moving machinery and such other machinery used for mining, building, construction (including laying of roads), fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning or any movable or immovable property."

From a reading of the explanation culled out above, it is clear that "industrial machinery" for the purpose of Explanation III includes such machineries which are generally used by an industrial unit whether or not such unit is a factory as defined under the Factories Act for manufacture or processing of goods, etc. Therefore, the question required to be considered is as to whether the grinding mills are "industrial machinery" or not. It cannot be disputed; and it is also not the case of the petitioner that the grinding mills are not used for the purpose of processing of goods. The only objection raised by the petitioner to avoid its liability to pay entry tax on grinding mills in the objections filed to the proposition notice used to the petitioner, is that the grinding mills do not manufacture anything, but they only process raw materials, i.e., corn product by the customers, and no product is manufactured. It is useful to extract the objections raised by the petitioner, which is culled out by the assessing authority in the order of assessment, which reads as follows :

"As regards the grinding mills, we beg to state that the flour mills, grinding mills, accessories and parts thereof are not industrial machinery. Flour mills do not

manufacture anything but they only process. Raw material, i.e., corn is brought by the customers only. No product is manufactured. No raw material is used by the owner. Hence, they are not "industrial machinery". Therefore we object to the levy of tax on the purchase of flour mills, grinding mills and their parts."

9. Therefore, it is clear that it is not the case of the petitioner in the petitions filed that the flour mills or grinding mills are not generally used in an industrial unit. The substance of the objection was that the flour mills and grinding mills do not manufacture anything and, therefore, they are not "industrial machineries". All the three authorities have negated that said plea and have taken the view that the flour mills or grinding mills are "industrial machineries". Though the explanation defines what is meant by an industrial machinery, the same can be taken only as guidance for the purpose of understanding as what is meant by an industrial machinery during the relevant period of assessment as the same came into force subsequent to the assessment year. The industrial unit one must understand as to how it is understood in a common parlance and in business world, in the absence of any definition provided. Therefore, the question is whether the grinding mills are generally used by an industrial unit or not. The establishment of the business for the purpose of processing corn or conversion of wheat or gram into wheat products, such as suji, atta, maida, etc., as claimed by the petitioner in para 7 of these petitions, can be understood as establishment of an industrial unit. However, the size or magnitude of the industrial unit may vary from person to person depending upon the financial capabilities of the person who establishes the unit. But, merely because it is a small unit, it cannot be understood or held that it is not an industrial unit. Any machinery, which is capable of being used as an industrial machinery, in my view, must be understood and held to be an industrial machinery. The petitioner except asserting in its objections filed before the assessing authority that flour mills and grinding mills are not industrial machinery, has not stated the basis for its plea that they are not industrial machineries. The only basis for the said plea was that in the flour mills, nothing is manufactured. Even for the sake of argument that what is produced in the grinding mills/flour mills cannot be understood as manufacture and it has to be understood only as a process, in my view, still the flour mills and grinding mills have to be held as industrial machineries. Further, the petitioner has failed to discharge the burden on him to show that the flour mills and grinding mills are not industrial machineries by placing necessary material or evidence. The burden is on it. It has failed to discharge the said burden. Under these circumstances, if, as stated earlier, all the three authorities held that the flour mills and grinding mills are industrial machineries, it is not permissible for me in exercise of my jurisdiction under article 227 for the Constitution of India, to take a different view. Whether the flour mills or the grinding mills are industrial machineries or not, is purely a question of fact recorded by the authorities, referred to above, in the light of the plea taken by the petitioner and also on the basis of the material on record.

10. In view of my above conclusion, I am of the view that the decisions of this

Court in the case of Mysore Sales Corporation [1990] 78 STC 185 Mys relied upon by the learned counsel for the petitioner, which is affirmed in appeal by the Division Bench in Assistant Commissioner of Entry Tax [1992] 84 STC 461 (Kar), are of no assistance to the petitioner. It was a case where the question came up for consideration was as to whether the sewing machine is an industrial machinery or not. While considering the said question, this Court took the view that merely because the sewing machines are used in garment factories, it cannot be held that they are industrial machineries. Further, in the case of Mysore Sales Corporation [1990] 78 STC 185 Mys, this Court has observed that industrial machinery is understood in common parlance as any contrivance run by mechanical process or automation used in an industry or a factory where manufacture or processing of goods takes place. It is further pointed out in the said decision that the very expression "industrial machinery" connotes that primary use of the machinery in industries and in factories. This Court also has observed therein that the later amendment to a statute may be taken as a guide in the interpretation of the provisions as they stood before the amendment. Therefore, it cannot be disputed, and it is also not in dispute that grinding mill or flour mill is a machinery which is run by mechanical process. Under these circumstances, if the meaning attached to the expression "industrial machinery" given in Explanation III is taken into consideration, the grinding mill can be considered as an industrial machinery, which is capable of being used in an industrial unit. In my view, the principal laid down in the said decision cannot be made applicable to take the view that the flour mills and grinding mills are not industrial machineries.

11. Finally, Sri Prasad submitted that the assessment of electrically operated motors on the basis that they are industrial machineries and parts and accessories thereof, is totally erroneous in law. According to him, the electrically operated motors cannot be treated as a part of industrial machinery in respect of which levy can be imposed under item 7 of the Schedule given to the Act. The learned counsel pointed out that the electrically operated motors are electrical goods within the meaning of entry 13 given to the Schedule to the Act, which was in the statute book till March 31, 1983 and since subsequent to March 31, 1983, the levy of tax on electrically operated motors has been removed, it is not permissible for the authorities to treat the electrically operated motors as industrial motors and on that basis, impose tax on the electrically operated motors. Therefore, he submitted that the assessment made against the petitioner in so far as electrically operated motors are concerned, is also liable to be quashed. In this connection, he drew my attention to the Notification No. FD 14 CET 82 dated April 2, 1982, wherein "industrial machinery and parts and accessories thereof" and "electrical goods that is to say, electrically operated motors, etc.," are separately shown as items of articles in respect of which tax can be imposed. He also drew my attention to the Notification No. FD 118 CET 83 dated March 31, 1983, which came to be issued in supersession of the earlier notification dated April 2, 1982, wherein the position as in the Notification dated

April 2, 1982 continued where "industrial machinery and parts and accessories thereof" were listed at item 7 and "electrically operated goods, that is to say, electrically operated motors, etc.," are listed at item 12. He further brought to my notice Notification No. FD 76 CET 84(I) dated November 13, 1984, which came to be issued superseding Notification No. FD 118 CET 83 dated March 31, 1983 and notified that with effect from the 1st day of April, 1982, the tax would be levied and collected under the Act at the rates specified in column (3) of the Table on the entry of the scheduled goods, etc.; and submitted that in the said notification also, the industrial machinery and parts and accessories thereof are separately shown as items in respect of which tax can be levied at the rates specified therein. Further, relying upon Notification No. FD 76 CET 84(II) dated November 13, 1984, issued by the Government superseding Notification No. FD 76 CET 84(I) dated November 13, 1984, issued on the same day, i.e., on the 13th of November, 1984, wherein "industrial machinery and parts and accessories thereof" are retained at item 5 and "electrical goods that is to say, electrically operated motors, etc." which were separately shown as item subject to levy of tax, came to be removed. He submitted that with effect from April 1, 1983, as notified in the said notification, the electrical goods, that is to say, electrically operated motors, etc., are not shown as item in respect of which tax can be levied. Therefore, he would submit that since the electrical goods including electrically operated motors, etc., were throughout treated as a separate item of levy than "industrial machinery and parts and accessories thereof", it is not permissible for the authorities after the deletion of the electrical goods including the electrically operated motors, etc., to treat industrial machinery and parts and accessories thereof as a separate item of levy and levy tax.

12. I am unable to persuade myself to accept the submission of the learned counsel. It is no doubt true as pointed out by the learned counsel that till the amendment of the Schedule given to the Act, by means of Notification No. FD 76 CET 84(II) dated November 13, 1984, "industrial machinery and parts and accessories thereof" and "electrical goods, that is to say, electrically operated motors, etc.," were treated as separate items of levy and separate percentage of tax was made leviable and with effect from April 1, 1983, levy of tax on electrically operated goods is removed. By that only, the petitioner cannot avoid its liability to pay tax on electrically operated motors. If the type and the nature of electrically operated motors, which are the subject-matter of dispute in these petitions is such, it can be treated as an item which falls within the meaning of industrial machinery and parts and accessories thereof; the said goods are liable for payment of tax as industrial machinery and parts and accessories thereof. Therefore, the real question that requires to be considered is as to whether the electrically operated motors in respect of which the petitioner was a dealer, can be treated as "industrial machinery and parts and accessories thereof" within the meaning of item 7 of the Schedule given to the Act.

13. The only contention advanced by the learned counsel for the petitioner or the

stand taken in the statement of objections before the assessing authority, is that the electrically operated motors were sold as electrical goods, but not as machinery parts; and as such, they are not liable to tax as industrial machinery and parts and accessories thereof. The Assessing Authority, after considering the plea of the petitioner that the electrically operated motors sold by the petitioners are not industrial machineries, has held that it is an industrial machinery. It has considered the working capacity of the electrically operated motors sold by the petitioner. It has also taken into consideration that the electrically operated motors sold by the petitioner were of more than 15 h.p. engine and, therefore, it must be understood as being part of industrial machinery. The said view of the assessing authority was affirmed by the first appellate Authority and by the Tribunal, which is the second appellate Authority. The Tribunal, in the course of his order, has observed as follows :

"Although, it is true that the electrical motors when sold as such are electrical goods but when they are sold to an industrial unit to be used as part of the industrial machines, they too become parts of industrial machineries as mentioned in the relevant Schedules of the KTEG Act. In the instant case, the assessing authority has given clear findings both in the pre-assessment notice as well as in the assessment order that the appellant has sold electrical motors of more than 15 h.p. and has sold the same to industrial units. The appellant has not produced any documentary proof to the contrary."

As observed by me earlier, in view of section 28A of the Act, the burden is on the petitioner to show that the electrically operated motor is not an industrial machinery. The petitioner has failed to discharge the said burden. Under these circumstances, if the three authorities, referred to above, after considering the objections of the petitioner and after taking relevant matters into consideration, have found that the electrically operated motors in question are industrial motors, I do not find any justification to interfere with the said finding in exercise of my jurisdiction either under article 226 or under article 227 of the Constitution. The finding recorded by the authorities are purely questions of fact.

14. In view of my above conclusion, I do not find any merit in these petitions and, therefore, they are liable to be rejected.

15. Accordingly, the petitions are rejected. Rule issued is discharged. No costs.

16. Petitions dismissed.