
(2016) 07 KL CK 0081

In the High Court Of Kerala

Case No : W.A. Nos. 2246, 2249 and 2253 of 2006. (Against the judgement in O.P. 14989 of 2001 dated 14.11.2006)

Gupta Enterprises

APPELLANT

Vs

Commercial Tax Officer

RESPONDENT

Date of Decision : 29-07-2016

Acts Referred:

Central Sales Tax Act, 1956 — Section 5(3)

Citation : (2016) 4 KerLJ 191 : (2016) 3 KLT 121

Hon'ble Judges : Mr. P.R. Raman and Mr. K.P. Balachandran, JJ.

Bench : Division Bench

Advocate : Sri. Antony Dominic and Sri. Anil D. Nair, Advocates, for the Appellant; Sri Georgekutty Mathew, Govt.Pleader, for the Respondent

Final Decision : Dismissed

Judgement

P.R. Ramachandra Menon, J.—Whether the "penultimate sale" of sandal wood by the Forest Department prior to the export of sandal wood flakes, chips/dust by the appellant (after conversion, making it an exportable commodity in view of the fact that sandal wood is a restricted item, which cannot, as such, be exported) will come within the purview of Section 5(3) of the CST Act to get exemption from the payment of tax, is the common issue involved in these cases. Will the distinction drawn by the Constitution Bench of the Apex Court in State of Karnataka v. Azad Coach Builders Private Limited and another, (2010) 9 SCC 524 (Paragraph 27 and 28) in respect of the "Same Goods Theory" come to the rescue of the appellant in the given set of facts and circumstances, is the further point to be analysed.

2. W.A.No.2253 of 2006 is treated as the lead case.

3. Heard Mr. K. Kumar, the learned counsel appearing for the appellant and Mr. S. Sudhish Kumar, Sr. Government Pleader (Taxes) appearing for the State/Department at length.

4. Appellant is a dealer having obtained registration both under the KGST and the CST Acts, who has also obtained export licence, based on which, he is engaged in the export of different sandal wood items, to satisfy the requirements of foreign buyers. The third respondent/Forest Department issued Ext.P1 notification for sale of "sandal wood", subject to the specific terms and conditions as set forth in Ext.P2. The petitioner participated in the auction and came to be the successful bidder, upon which, the auction was confirmed on his name, as per Ext.P3 proceedings dated 06.01.2005, showing the particulars as to the amount to be satisfied, including the sale tax payable @ 12% in conformity with Ext.P1 Notification/Ext.P2 conditions.

5. On receipt of Ext.P3, the petitioner submitted Ext.P4 request, seeking to release the goods on furnishing Bank guarantee, and claimed that the total turn over was exempted from sales tax under Section 5(3) of the CST Act. This was not acceded to by the Department as borne by Ext.P5 reply dated 25.01.2005. The position was sought to be substantiated by the petitioner by making a reference to the export order and such other particulars, copies of which are produced and marked as Exts.P6 and P7. It was also pointed out that on an earlier instance, the petitioner was permitted to have the goods released on furnishing Bank guarantee and that the assessment proceedings have been finalised for the years 1992-93 to 1994- 95 as borne by Exts.P9 to P11 orders, without any tax liability. It was in the said circumstance, that the petitioner chose to move this Court by filing O.P.No.14989 of 2001, and W.P.(C)Nos.6210 and 31709 of 2005 and based on the interim orders passed by this Court, the goods have been released on furnishing "Bank Guarantee.

6. As evident from the prayers in the writ petition, the main relief sought for was to direct the concerned respondent to release the goods purchased vide Ext.P3, without collecting sales tax, based on the claim for exemption under Section 5(3) of the CST Act. The claim was resisted by the Department/State, mainly pointing out that the petitioner was not entitled to have the benefit of Section 5(3) of the CST Act. It was contended that the Forest Department, who had effected the sale, was never told at any point of time that the purchase of sandal wood was for export, pursuant to an order placed by a foreign buyer and that it was to give effect to such export obligation. It was further pointed out that the goods sold to the assessee was only "sandal wood"; whereas the goods exported pursuant to the export order were "sandal wood dust, flakes/chips" and hence that, there was no identity in the goods. It is further pointed out that the terms and conditions of sale were clearly stipulated in Exts.P1 notification /P2 conditions and it was with "open eyes", that the petitioner had participated in the sale and hence, he cannot turn round and contend that tax is not payable to the State.

7. During the course of hearing before the learned single Judge, relevant judicial precedents were cited from both the sides. Reliance was sought to be placed on the verdict passed by a Division Bench of the Madras High Court (W.A.Nos.94 to 96 of 2000) in respect of the case projected by the appellant/petitioner whereas

the law declared by the Supreme Court in *Sterling Foods v. State of Karnataka*, (1986) 3 SCC 469 and *Vijayalaxmi Cashew Co. v. CTO*, (1996) 1 SCC 468 were pressed into service from the part of the Department. After hearing both the sides, the learned Single Judge declined interference and the writ petition was dismissed, which was the subject matter of challenge in W.A.No.2253 of 2006. During the course of hearing before the Division Bench, it was pointed out that the decision rendered in *Sterling Foods*" case and *Vijayalaxmi Cashews*" case were doubted by the Apex Court in *State of Karnataka v. Azad Coach Builders (P). Ltd.*, (2006) 3 SCC 338 and that the matter was referred to a larger Bench. The Bench observed that, until a final decision was rendered by the Apex Court, pursuant to the Reference order in [(2006) 3 SCC 338], the decision in *Sterling*"s case and *Vijayalaxmi Cashews*" case would govern the field, as the binding precedents under Article 141 of the Constitution of India. It was accordingly, that the contentions raised by the appellant were turned down, affirming the verdict passed by the learned single Judge, in turn, dismissing the appeal as per the judgment dated 07.12.2006.

8. On being aggrieved of the turn of events, the matter was taken up by the appellant before the Apex Court by filing Civil Appeal No.2116/2007 and connected cases. As per the verdict passed by the Constitution Bench of the Supreme Court reported in (2010) 9 SCC 524 (cited supra), answering the reference pursuant to the order passed in *Azad Coach Builders*" case, (2006) 3 SCC 338 it was held that the Same Goods Theory, as such, may not be applicable under all circumstances and that the assessee in the said case was entitled to get the benefit of exemption under Section 5(3) of the CST Act. After hearing the Civil Appeals, the Apex Court observed that the matter required to be considered by a Division Bench of this Court, in the light of the observations of the Apex Court in "paragraphs 27 and 28" of the Constitution Bench decision and accordingly, the common verdict passed by this Court on 07.12.2006 was set aside and the matter was remanded for fresh consideration. It is accordingly, that these appeals have been listed before the Court and have been heard in detail.

9. "Sandalwood", admittedly is a restricted item and the same cannot be exported, except in the prescribed manner and form as permitted by the Director General of Foreign Trade. There is also no dispute to the fact that the commodity notified to be sold by the Forest Department as per Ext.P1 notification was sandalwood, which was purchased by the petitioner, as the successful bidder. The export order obtained by the petitioner and the export effected was in respect of the sandalwood dust, chips/flakes alone. The contention of the Department/State is that both are entirely different commodities and were having different uses, which could never be regarded as the same goods, to have extended the benefit of Section 5(3) of the CST Act. It is also pointed out that, after purchase of Sandalwood, it has undergone serious changes, by way of chipping and processing, whereby it was converted to flakes, chips etc of the requisite size; thus losing the identity of the original commodity. The un-exportable commodity

of "sandalwood" was processed and converted to an exportable commodity (chips, flakes/dust) and it was thereafter, that the same was exported. The said process definitely involves a "manufacturing process" and as such, the "end product" exported is entirely different from the product, which was procured/purchased from the Forest Department. This being the position, it stands outside the purview of the situation envisaged under Section 5(3) of the CST Act and hence no relief is liable to be extended.

10. Section 5(3) of the C.S.T. Act reads as follows:

"5. When is a sale or purchase of goods said to take place in the course of import or export - (1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.

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(3) Notwithstanding anything contained in sub-section (1), the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export, if such last sale or purchase took place after, and was for the purpose of complying with, the agreement or order for or in relation to such export."

11. Scope of the above provision had come up for consideration before the Apex Court right from its inception at different points of time, ultimately laying the position at rest by virtue of the Constitution Bench decision in (2010)9 SCC 524 (cited supra). The opening paragraph of the said decision itself shows that the question considered therein was whether an assessee (local manufacturer) is eligible to get exemption under sub-section (3) of Section 5 of the Central Sales Tax Act, 1956, if the penultimate sale effected in favour of the exporter is inextricably connected with the export of goods outside the territory of India. Evolution of law was discussed in detail by the Bench. Since the issue is to be re-considered with reference to the observations in "paragraphs 27 and 28" of the verdict in [(2010)9 SCC 524] (cited supra), it is necessary to make a reference to the context of legislation, the line of decisions as to the scope of the provision, the circumstance which necessitated the reference and the answer given by the Constitution Bench in this regard, though the discussion herein could be limited to the minimum/necessary extent.

12. As observed by the Supreme Court, the penultimate sale before the export was actually taxable prior to insertion of sub-section (3) to Section 5 of the CST Act. The position in this regard was made clear by the Apex Court as per the decision in (1975) 2 SCC 47, Mohd. Serajuddin v. State of Orissa to the effect that the sale, which was not liable to tax under the State Sales Tax Act was only the actual sale by the exporter, and that the benefit of export sale did not extend to the penultimate sale to the Indian Exporter for the purpose of export. It was

to overcome the said difficulty, that the Act was amended, introducing sub-section (3) to Section 5, with intent to promote export, to the requisite extent. The scope of the amending Act was considered by the Apex Court in *Consolidated Coffee Ltd. v. Coffee Board*, (1980) 3 SCC 358. Though there was a challenge against the vires of the provisions, it was held as unsustainable and sub-section (3) of Section 5 was held as intra vires to Article 286(2) of the Constitution. The Bench also observed that, merely for the reason that the notification for sale had insisted the liability to payment of tax, that by itself could not be a ground to deny the benefit, if it was otherwise liable to be exempted in terms of Section 5(3). Later, in *Sterling Foods v. State of Karnataka*, (1986) 3 SCC 469, a question was raised as to whether the assessee was entitled to exemption from tax under Section 5(3) of the CST Act in respect of purchase of shrimps, prawns and lobsters and the goods exported. A "three member Bench" of the Apex Court held that the goods sought to be exported and those procured for the purpose of export outside the territory of India must be the same. The position was reiterated in *Vijayalaxmi Cashews*" case (cited supra); where the question considered was whether the cashew kernels exported could be reckoned as the same goods, as the raw cashew nuts were purchased for preparing the kernels to be exported and in turn to have the benefit of exemption from tax under section 5(3) of the Act. After an in-depth analysis, the Apex Court observed that, it could not be said that the raw cashew nuts purchased in the penultimate sale were the same goods(cashew nut kernels) which were sold to the exporter and as such, tax liability could not be avoided. These two decisions have been relied on more by the learned single Judge to decline the relief. In view of the remand ordered by the Supreme Court with reference to the Constitution Bench decision in [(2010) 9 SCC 524], the point to be considered is whether a different view could be taken in the light of the observations in paragraph 26 and 27 of the aforesaid verdict.

13. The Apex Court, after a detailed scrutiny of the relevant provisions of law and the various judgments passed at different points of time, summarised the principles emerging from the situation as given in paragraph 26, which is reproduced below:

"When we analyse all these decisions in the light of the Statement of Objects and Reasons of the Amending Act 103 of 1976 and on the interpretation placed on Section 5 (3) of the CST Act, the following principles emerge :

- To constitute a sale in the course of export there must be an intention on the part of both the buyer and the seller to export;
- There must be obligation to export, and there must be an actual export.
- The obligation may arise by reason of statute, contract between the parties, or from mutual understanding or agreement between them, or even from the nature of the transaction which links the sale to export.
- To occasion export there must exist such a bond between the contract of sale

and the actual exportation, that each link is inextricably connected with the one immediately preceding it, without which a transaction sale cannot be called a sale in the course of export of goods out of the territory of India."

Paragraph 27 (corrected vide Official Corrigendum No.F.3/Ed.B.J/120/2010 dated 25.10.2010) reads as follows:

"27. The phrase "sale in the course of export" comprises in itself three essentials : (i) that there must be a sale: (ii) that goods must actually be exported and (iii) that the sale must be a part and parcel of the export. The word "occasion" is used as a verb and means "to cause" or "to be the immediate cause of. Therefore, the words "occasioning the export" mean the factors, which were immediate course of export. The words "to comply with the agreement or order" mean all transactions which are inextricably linked with the agreement or order occasioning that export. The expression "in relation to" are words of comprehensiveness, which might both have a direct significance as well as an indirect significance, depending on the context in which it is used and they are not words of restrictive content and ought not be so construed. Therefore, the test to be applied is, whether there is an in-severable link between the local sale or purchase on export and if it is clear that the local sale or purchase between the parties is inextricably linked with the export of the goods, then a claim under Section 5 (3) for exemption from State Sales Tax is justified, in which case, the same goods theory has no application."

14. The Apex Court made it clear that the test to be applied is, to see whether there is an inseverable link between the local sale or purchase and export and if it is found that it is inextricably linked together, then a claim under Section 5(3) for exemption from State sales tax would be justified and under such circumstance, the "same goods theory" will be having no application. The said declaration of law was applied to the given set of facts and circumstances in the case considered by the Supreme Court, as discernible from paragraph 28, which is extracted below:

"28. The facts of this case clearly reveal that the transaction between the assessee and the exporter is inextricably connected with the export of the goods to Sri Lanka. The communication between the foreign buyer and the exporter reveals that the foreign buyer wanted the bus bodies to be manufactured by the assessee under the specifications stipulated by the foreign buyer. The bus bodies constructed and manufactured by the assessee could not be of any use in the local market, but were specifically manufactured to suit the specifications and requirements of the foreign buyer. In the Purchase Order placed on the assessee by the exporter, it is specifically indicated that the bus bodies have to be manufactured in accordance with the specifications provided by the foreign buyer, failure to do so might result in cancellation of the export order. The assessee in this case has succeeded in showing that the sale of bus bodies have occasioned the export of goods. When the transaction between the assessee and the exporter and the transaction between the exporter and foreign buyer are

inextricably connected with each other, in our view, the "same goods" theory has no application.."

15. The Bench observed that the assessee Azad Coach Builders Pvt. Ltd manufactured the bus bodies and fitted them to chassis supplied by the exporter (Tata) and that such bodies manufactured were in accordance with the specifications provided by the foreign buyer, which could not have been used in the local market, by virtue of the situations/requirements in the country to which it was to be exported (Sri Lanka) and the different situation prevailing in India. The Bench observed that the assessee had succeeded in the said case, to substantiate that sale of the bus bodies had occasioned the export of goods. It was accordingly that a positive declaration was made that transaction between the assessee and the exporter was inextricably connected with the export of the goods to Sri Lanka. When the transaction between the assessee and the exporter and the transaction between the exporter and foreign buyer were inextricably connected with each other, the "same goods theory" had no application.

16. It is also relevant to note that the Apex Court has alerted all concerned that the burden is entirely on the assessee to establish the link in transactions relating to sale or purchase of goods and the export; that the penultimate sale is inextricably connected with the export of goods by the exporter to the foreign buyer. It is worthwhile to note that a submission was made by the learned counsel appearing for the 2nd respondent in the said case, that any penultimate sale made in furtherance of export, irrespective of the nature of goods, would also be covered, but the Bench observed that it was too tall a proposition to be accepted. The Bench made it clear that, it all depends on the question as to whether the sale or purchase was "inextricably connected" with the export of goods and not a remote connection as tried to be projected by the counsel. In the words of Supreme Court, the connection between the penultimate sale and the export of goods should not be casual, accidental or fortuitous, but real, intimate and interlinked; which depends upon the nature of the agreement the exporter has with the foreign buyer and the local manufacturer, the integrated nature of the transactions and the nexus between the penultimate sale and the export sale.

17. Testing the given facts and circumstances in the instant case, in the light of the test/law laid down by the Constitution Bench of the Apex Court as above, as to the scope of Section 5 (3) of the CST Act, this Court finds that the appellants have not substantiated the position to tilt the balance in their favour. The commodity admittedly notified by the Forest Department was "Sandalwood" and the appellants had purchased the timber subject to Exts.P1/P2 notification/conditions. There is also no dispute that the "sandalwood" is a restricted commodity which, as such cannot be exported. So much so, there was no need, necessity or occasion for the Forest Department to presume or believe that the purchase was in connection with the export. No plea or case was registered or any material was produced at the time of auction or at the time of confirmation

of the sale as per Ext.P3 by the appellants, before the Forest Department, to the effect that the purchase was pursuant to an export order and that the same was in obligation to effect such export. There is substantial change in the commodity, on converting the timber to dust/flakes/chips of the requisite sizes. "Sandalwood" was exigible to tax at the rate of 12%. It is true that Section 5(3) of the C.S.T. Act was introduced for promoting export. But, in so far as "Sandalwood" is a restricted item, it could not have been exported as such and hence sale of such sandalwood to the assessee could not have been regarded as an instance involving sale of the same commodity coming within the term "such goods" as used in the provision, i.e. Section 5(3) of the Act, to claim the benefit of exemption. This Court finds that the declaration of law made by the Constitution Bench in *State of Karnataka v. Azad Coach Builders (P) Ltd.*, (2010) 9 SCC 524 and the observations in paragraph 27 and 28 do not come to the rescue of the appellants.

18. Appeals fail and they are dismissed accordingly.