

(1993) 08 KL CK 0048
In the High Court Of Kerala
Case No : O.P. No. 2709/86

Jacob Kurian

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 25-08-1993

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 11A(1), 21, 23(3), 61, 61(1)
Revenue Recovery Act, 1890 — Section 7

Citation : (1993) 08 KL CK 0048

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

Bench : Division Bench

Advocate : Arikkat Vijayan Menon, for the Appellant; T. Karunakaran Nambiar, Special Government Pleader for Taxes, for the Respondent

Final Decision : Allowed

Judgement

P. Krishnamoorthy, J.—The question that arises for consideration in this original petition is as to whether an Assessee under the General Sales Tax Act, 1125 is liable to pay penal interest u/s 23(3) of the Kerala General Sales Tax Act, 1963 (hereinafter referred to as "the K.G.S.T. Act, 1963") which came into force on 1st April 1963, for the arrears of sales tax due from him for the period when the former Act was in force.

2. Petitioner is the son of late Sri A.C. Jacob who was an Assessee to sales tax on the file of the Sales Tax Officer, Kottayam. For the assessment year 1957-58, the Sales Tax Officer, by Ext. P-1 order dated 31st March 1959, made a best judgment assessment. Against that order the Assessee filed an appeal before the Appellate Assistant Commissioner and by Ext. P-2 order the appellate authority set aside Ext. P-1 assessment order and remanded the matter for fresh assessment after giving an opportunity to the Assessee to produce his books of accounts. Thereafter, the Sales Tax Officer passed Ext. P-3 assessment order dated 16th May 1972. The appeal filed before the Appellate Assistant Commissioner was dismissed by Ext. P-4 order dated 29th November 1972. The

Assessee filed a second appeal before the Sales Tax. Appellate Tribunal and the Tribunal by Ext. P-5 order again remanded the matter to the Sales Tax Officer with certain directions. In the meanwhile, the Assessee died and notices were issued to his legal heirs including the Petitioner. Thereafter, by Ext. P-6 order dated 28th July 1978 the Sales Tax Officer passed the assessment order fixing the taxable turnover at Rs. 4,96,000. The sales tax due thereon was assessed as Rs. 28,190 with surcharge of Rs. 679.75. His appeal against Ext. P-6 order was dismissed by Ext. P-7 order. The second appeal filed before, the Tribunal was also dismissed by Ext. P-8 order dated 11th February 1985. Thereafter the Petitioner filed T.R.C. No. 177 of 1985 before this Court which was also dismissed on 22nd January 1986. Thus, the assessment under Ext. P-6 fixing the tax liability at Rs. 27,190 and surcharge of Rs. 679.75 became final. Thereafter the Petitioner paid an amount of Rs. 9,593 towards the tax due. The balance due from him is Rs. 17,597 towards sales tax and Rs 679.75 towards surcharge. A demand notice (Ext. P-9) u/s 7 of the Revenue Recovery Act, dated 7th December 1985, was served on the Petitioner demanding an amount of Rs. 44,626.55. Over and above the amount of sales tax and surcharge, Ext. P-9 included an amount of Rs. 27,849.80 towards penal interest u/s 23(3) of the K.G.S.T. Act, 1963. Petitioner has challenged Ext. P-9 demand notice contending that he is not liable for payment of penal interest claimed therein as the assessment was for the period when the General Sales Tax Act, 1125 was in force which contained no provision similar to that of Section 23(3) of the K.G.S.T. Act, 1963. The Petitioner has challenged Ext. P-9 demand notice on various grounds.

3. Petitioner has raised various grounds challenging the validity of Ext. P-9 notice. At the time when the matter came up for hearing before us, counsel for the Petitioner raised a contention that he is not liable to pay penal interest u/s 23(3) of the K.G.S.T. Act, 1963 as the assessment was for a period when the 1125 Act was in force. Though this point was not as such raised in the original petition, being a pure question of law and no further investigation of facts is necessary for deciding that question, we allowed the Petitioner to raise that contention. Accordingly counsel for the Petitioner as also the Special Government Pleader for Taxes Sri T. Karunakaran Nambiar were heard on this question as well.

4. The main question that arises for consideration is as to whether for arrears of tax which accrued during the period when the 1125 Act was in force, the sales tax authorities are entitled to recover penal interest as provided for u/s 23(3) of the K.G.S.T. Act, 1963. Admittedly, the assessment year in question is 1957-58 when the General Sales Tax Act, 1125 was in force, though the final assessment order was passed by the Sales Tax Officer only by Ext. P-6 dated 28th July 1978, after the coming into force of the K.G.S.T. Act, 1963. This question will depend upon Section 61 of the K.G.S.T. Act, 1963 which is the repealing provision. Section 61 of the K.G.S.T. Act, 1963 reads as follows:

61. Repeal: (1) The General Sales Tax Act, 1125 (Act XI of 1125) is hereby repealed:

Provided that such repeal shall not affect the previous operation of the said Act or any right, title, obligation or liability already acquired, accrued or incurred thereunder and subject thereto anything done or any action taken including any appointment, notification, notice, order, rule, form, regulation, certificate, licence or peraiit, in the exercise of any power conferred by or under the said Act, shall be deemed to have been done or taken in the exercise of the powers conferred by or under this Act, as if this Act were in force on the date on which such thing was done or action was takeh, and ail arrears of tax and other amounts due at the commencement of this Act may be recovered as if they had accrued under this Act.

(2) Notwithstanding anything contained in Sub-section (1), any application, appeal, revision or other proceeding made or preferred to any officer or authority under the said Act, and pending at the commencement of this Act, shall, after such commencement, be transferred to and difposed of by the officer or authority who would have had jurisdiction to entertain such application, appeal, revision or other proceeding under this Act if it had been in force on the date on Which such application, appeal, revision or other proceeding was made or preferred.

Section 23(3) of the K.G.S.T. Act, 1963 which alone is relevant reads as follows:

(3) If the tax or any other amount assessed or due under this Act is not paid by any dealer or other person within the time prescribed therefore in this Act or in any rule made thereunder and in other cases within the time specified therefore in the notice of demand, or within the time allowed for its payment by the appellate or reVisionaT authority, as the case may be, or if payment is permitted in instalments by any of the authorities empowered in this behalf, any such instalment is not paid within the time specified therefore, the dealer or other person shall pay, by way of penal interest, in the manner prescribed, in addition to the amount due, a sum equal to,

(a) one per cent of such amount for each month or part thereof for the first three months after the date specified for its payment.

(b) two per cent of such amount for each month or part thereof subsequent to the first three months aforesaid.

Sub-section (1) of Section 61 of the K.G.S.T. Act, 1963 repeals the General Sales Tax Act, 1125. The proviso to Section 61(1) lays down that the repeal of the 1125 Act shall not affect the previous operation of the said Act or any right, title, obligation or liability already acquired, accrued or incurred. There is also a further provision that subject thereto, anything done or any action taken including any appointment, notification, notice etc., in the exercise of any power conferred under the repealed Act shall be deemed to have been done or taken in the exercise of the powers conferred under the 1963 Act. There is a further provision in the proviso that all arrears of tax and other amounts due at the commencement of the 1963 Act may be recovered as if they had accrued under

the 1963 Act. It can thus be seen that the proviso consists of three parts. The first part provides that the rights and liabilities which had been acquired or incurred under the repealed Act are saved. The 1125 Act contains specific provisions in regard to what turnover was taxable, how it was to be computed and at what rate the tax was to be charged. From the first part of the proviso it is clear that the rights and liabilities created under the repealed Act are kept intact and no new liability or right was intended to be created by the repealing provision. The right to be assessed under the 1125 Act during the period when that Act was in force is thus saved by the first part of the proviso. In that view of the matter, though the final assessment order was passed only by Ext. P-6 dated 28th July 1978, it was an assessment in accordance with the rights and liabilities of the Petitioner under the repealed Act. The right, or to be precise, the Immunity from paying penal interest on arrears of sales tax itself, is a right which had accrued to the Assessee for the period when the repealed Act was in force which is saved by the first part of the proviso.

5. The second part of the proviso provides that subject thereto, anything done or any action taken including any appointment, notification, notice, order, rule, etc., in exercise of the power under the repealed Act shall be deemed to have been done or taken in the exercise of the powers conferred under the 1963 Act. This provision only relates to the procedure to be adopted in passing an assessment order of any other orders on matters which are pending consideration when the 1963 Act came into force and to facilitate recovery of arrears of tax under the provisions of the 1963 Act. This does not affect the rights or liabilities accrued or incurred under the 1125 Act. The rights and liabilities will continue to be under the 1125 Act for the period during which it was in force. By the second part of the proviso it cannot be said nor was it intended by the legislature that any new right or liability is to be accrued or incurred by an Assessee. It is not the intention of the legislature that the substantive right or liability of the Assessee is to be altered in accordance with the provisions of the K.G.S.T. Act, 1963 for the period when the 1125 Act was in force. If it were otherwise, it will lead to an anomalous situation that even arrears of tax due as on 1st April 1963 under assessment orders under the 1125 Act which had become final before that date will carry penal interest as provided for in Section 23(3) of the K.G.S.T. Act, 1963, This cannot be and is not the intention of the legislature. We are clear in our mind that the second part of the proviso deals only with procedural matters relating to assessment and Ors. matters, and does not affect the substantive right or liability of the parties under the 1125 Act.

6. The third part of the proviso to the effect that "and all arrears of tax and other amounts due at the commencement of this Act may be recovered as if they had accrued under this Act" deals only with the mode of recovery of arrears of tax and does not affect the substantive rights or liabilities accrued or incurred under the 1125 Act. On the above interpretation we have no hesitation to hold that an Assessee is not liable to pay penal interest u/s 23(3) of the K.G.S.T. Act, 1963 for arrears of sales tax due for any period when the 1125 Act was in force.

7. A similar section contained in the Madhya Pradesh General Sales Tax Act, 1959 had come up for consideration before the Supreme Court in *Sales Tax Officer, Circle-I, Jabalpur Vs. Hanuman Prasad*, . In that case the Assessee was liable to sales tax under the Central Provinces and Berar Sales Tax Act, 1947 for the period 3rd November, 1956 to 23rd October, 1957 by an order dated 23rd May, 1959. In the meantime, on 1st April, 1959 the Madhya Pradesh General Sales Tax Act, 1959 came into force. On 23rd October, 1962 the Sales Tax Officer discovered that part of the turnover of the Assessee for the period mentioned above had escaped assessment and issued a notice u/s 19(1) of the new Act. The Assessee raised a preliminary objection that his assessment having been made under the repealed Act, under which the limitation of a period of three years was prescribed by Section 11A for assessment of escaped turnover, the assessment could not be reopened. The Sales Tax Officer, relying on Section 19(1) of the new Act which prescribed a period of five calendar years for reopening an assessment, rejected the objection of the Assessee. In considering that question their Lordships of the Supreme Court considered Section 52 of the Madhya Pradesh General Sales Tax Act which is similar to that of Section 61 of the K.G.S.T. Act, 1963. Construing that section their Lordships observed as follows:

It was u/s 52 of the new Act that the repealed Act was repealed, and that section itself, under the proviso laid down that such repeal shall not affect the previous operation of the said Act or any right, title, obligation or liability already acquired, accrued or incurred thereunder. There was also the further, addition that subject thereto, anything done or any action taken (including any appointment, notification, notice, order, rule, form, regulation, certificate or licence) in the exercise of any power conferred by or under the said Act shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken in exercise of the powers conferred by or under this Act, as if this Act were in force on the date on which such thing was done or action was taken. In view of this proviso, it has to be held that when this new Act came into force on 1st April, 1959, all rights, title, obligation or liability already acquired, accrued or incurred under the repealed Act by the Respondents remained unaffected and intact. The rights and liabilities, which had been acquired or incurred under the repealed Act, included the right or liability to be assessed in accordance with the provisions of the repealed Act in respect of turnover of sales effected during the time when that Act was in force.

It was further held:

Section 11A(1) of the repealed Act itself created a right in favour of the Respondent not to be assessed in respect of turnover that was underassessed or had escaped assessment after the expiry of the period prescribed in that Sub-section. The proviso to Section 52 of the new Act preserved this right of the Respondent, and on this ground also, the Sales Tax Officer was not competent to issue the notice for reassessment after that period of limitation had expired.

Accordingly their Lordships of the Supreme Court held that for a re-assessment it is the provision contained in Section 11A(1) of the repealed Act that is applicable and not the extended period of five years provided for u/s 19(1) of the 1959 Act. This decision was followed by their Lordships of the Supreme Court in *The Commissioner of Sales Tax, Madhya Pradesh Vs. Amarnath Ajit Kumar of Bhind, Madhya Pradesh*, and their Lordships quoted with approval the passage in *Sales Tax Officer, Circle-I, Jabalpur Vs. Hanuman Prasad*, which we have quoted above.

8. It is true that in the second part of the proviso to Section 52 of the *Madhya Pradesh Sales Tax Act, 1959* with which their Lordships of the Supreme Court were concerned, there is a clause "in so far as it is not inconsistent with the provisions of this Act" which is absent in the proviso to Section 61 of the *K.G.S.T. Act, 1963*. But it is to be noted that in *Sales Tax Officer, Circle-I, Jabalpur Vs. Hanuman Prasad*, and *The Commissioner of Sales Tax, Madhya Pradesh Vs. Amarnath Ajit Kumar of Bhind, Madhya Pradesh*, their Lordships came to the conclusion that the provisions of the repealed Act are applicable to assessments in regard to the period when the repealed Act was in operation basing on the interpretation of the first part of the proviso. In *The Commissioner of Sales Tax, Madhya Pradesh Vs. Amarnath Ajit Kumar of Bhind, Madhya Pradesh*, the additional words contained in the proviso to Section 52 mentioned above were also relied on as an additional ground for taking the view that the provisions of the repealed Act will apply for the assessment years when that Act was in force. The absence of the above words in the proviso to Section 61 of the *K.G.S.T. Act, 1963* will not make any difference as we have already held that that part deals only with the procedural aspects and does not affect the substantive rights or liabilities accrued or incurred under the repealed Act. Thus, we are clearly of the opinion that the absence of the above words in the proviso to Section 61 will not make any difference and that the rights and liabilities have to be determined solely in accordance with the provisions of the 1125 Act.

9. Counsel for the revenue relied on the decision of a learned Single Judge of this Court in *State of Kerala v. Pareed Pillai* 183 S.T.C. 377 in support of his contention that the provision contained in Section 23(3) of the *K.G.S.T. Act, 1963* will apply to assessments under the 1125 Act. In that case a firm of which the Respondent therein was a partner was assessed to tax under the *General Sales Tax Act, 1125* for the years 1958-59 to 1962-63, during which period the 1125 Act was in force. In 1963 some properties belonging to the Respondent who was one of the partners of the firm were attached in proceedings under the *Revenue Recovery Act* for recovery of sales tax due from the firm for the said assessment periods. In 1978 a notice for the sale of the properties was issued and the Respondent filed a suit for injunction restraining the proceedings for recovery of tax from him. The *General Sales Tax Act, 1125* did not contain any provision for proceeding against the assets of the partners for the liability of the firm. But Section 21 of the 1963 Act provided as follows:

21. Liability of firms.- (1) Where any firm is liable to pay any tax, fee or other

amount under this Act, the firm and each of the partners of the firm shall be jointly and severally liable for such payment.

(2) Where a partner of a firm liable to pay any tax, fee or other amount under this Act retires, he shall, notwithstanding any contract to the contrary, be liable to pay the tax, fee or other amount remaining unpaid at the time of his retirement and any tax, fee or other amount due upto the date of retirement, though unassessed.

The question that arose was as to whether by virtue of the provision contained in Section 21 of the 1963 Act, the partner of the firm can be proceeded against. It is in that context that this Court considered the proviso to Section 61 of the K.G.S.T. Act, 1963. This Court relied on the third part of the proviso and held that the procedure provided in the 1963 Act will apply to recovery of arrears of tax due at the commencement of the K.G.S.T. Act, 1963. It is on that basis that this Court held that Section 21 of the K.G.S.T. Act, 1963 can be invoked for realising the arrears of tax due from a firm at the commencement of the 1963 Act. Paragraphs 36, 37, 39 and 43 would indicate that this Court proceeded on the basis that the proceeding against one of the partners is only one of the modes of recovery and accordingly the third part of the proviso is applicable. This Court did not rely on the first or second part of the proviso to come to the conclusion that Section 21 of the K.G.S.T. Act, 1963 is applicable. In that view of the matter, that decision cannot have any application to the facts of this case.

10. In view of what is stated above, we hold that Section 23(3) of the K.G.S.T. Act, 1963 cannot have any application for any arrears of tax due for the period when the General Sales Tax Act, 1125 was in force. The provisions of Section 61 of the K.G.S.T. Act, 1963 preserve the rights and liabilities accrued or incurred under the 1125 Act and the new liability created u/s 23(3) of the 1963 Act cannot have any application for the arrears of sales tax due for the period when the 1125 Act was in force.

11. As we have held that Section 23(3) of the 1963 Act cannot have any application for the assessment year in question, it is not necessary for us to consider the other grounds raised by the Petitioner in this original petition and they are left open.

12. In the result, we allow this original petition and quash Ext. P-9 notice to the extent of the demand of Rs. 27,849.80 towards penal interest made therein. The department will be free to enforce Ext. P-9 in regard to the balance amount due from the Petitioner, if not already paid. There will be no order as to costs.