
(2003) 03 KL CK 0013
In the High Court Of Kerala
Case No : T.R.C. No. 226 of 1998

Karun Karpets Pvt. Ltd.

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 17-03-2003

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 29, 29(2)

Citation : (2004) 3 KLT 763 : (2004) 137 STC 207

Hon'ble Judges : K. Balakrishnan Nair, J;G. Sivarajan, J

Bench : Division Bench

Advocate : Antony Dominic, for the Appellant; Georgekutty Mathew, Government Pleader, for the Respondent

Judgement

G. Sivarajan, J.—The matter arises under the Kerala General Sales Tax Act, 1963 (for short, "the Act") in relation to proceedings u/s 29A of the Act for the assessment year 1991-92. The petitioner is a private limited company based in New Delhi. It is aggrieved by the order of the Sales Tax Appellate Tribunal, Additional Bench, Kozhikode in T.A. No. 404 of 1997. The Sales Tax Inspector, Walayar inspected lorry bearing Registration No. MWR. 6115 on January 16, 1992 which was carrying machinery and found that the goods under consignment were transported without proper documents required u/s 29(2) of the Act. The goods under transport were consigned by Presswell Industries, Belgaum to Karun Carpets (P) Ltd., C/o. English India Clays Ltd., Thiruvananthapuram. The defect noticed was that "it is declared that the consignee has no sales tax registration number. Hence bona fides of the consignment and thereby attempt of evasion of tax is suspected". The petitioner got the goods released on furnishing security deposit for Rs. 5,31,912 at Walayar. The Sales Tax Inspector thereafter forwarded the files to the Sales Tax Officer (Enquiry) for adjudication. Subsequently, pursuant to the order of the Board of Revenue, the files were forwarded by the Sales Tax Officer (Enquiry), Palakkad to the Sales Tax Officer (Enquiry), Kozhikode, for adjudication as contemplated u/s 29A(4) of the Act. The Sales Tax Officer (Enquiry) by his order dated August 27, 1992 imposed a

penalty of Rs. 5,31,912 on the petitioner and ordered recovery of the penalty by way of adjustment of the security. The petitioner took up the matter in appeal before the Appellate Assistant Commissioner. Agricultural Income Tax and Sales Tax, Kozhikode, who by his order dated November 1, 1997 dismissed the appeal. The further appeal filed before the Tribunal was also dismissed.

2. Sri Jayasankaran Nambiar, learned counsel for the revision petitioner submitted that the transport of the machinery was supported by all statutory documents prescribed and that there was no attempt to evade any tax due to the Kerala Government. The counsel submitted that the English India Clays Ltd., a public limited company engaged in mining and processing of clay having their factory at Thiruvananthapuram in Kerala State placed an order with Presswell Industries, Belgaum in Karnataka State for manufacture and supply of poly propylene filter press and accessories which is used for filtering clay slurry, that since the English India Clays Ltd., required finance for purchase of the said machinery, it approached the petitioner herein for financing the purchase, that accordingly an agreement was entered into between the petitioner and English India Clays Ltd., on August 19, 1991 whereunder the petitioner agreed to purchase the machinery and give licence to English India Clays Ltd., for use in their factory on payment of licence fee of Rs. 70,000 per month for a period of five years, that pursuant to the orders placed by English India Clays Ltd., and the payment made by the petitioner pursuant to agreement between the petitioner and the licensee the machinery was transported from the factory of the manufacturer at Belgaum to the licensee's premises at Thiruvananthapuram, that the goods were transported by the licensee, i.e., English India Clays Ltd., in three lorry loads accompanied by common Bill No. 34 dated January 9, 1992, that the goods transported in three trucks were also accompanied by separate challans issued by the manufacturer and that the two trucks were detained by the sales tax check-post at Feroke and the trailer which took the route National highway through Coimbatore was detained by the sales tax check-post, Walayar. The counsel further submitted that in the enquiry conducted by the Sales Tax Officer (Enquiry), Kozhikode, the petitioner and the English India Clays Ltd., furnished all the documents which would show that the transaction is one of inter-State purchase only. The counsel further submitted that the transport of the machinery was supported by proper documents, that the consignee, the English India Clays Ltd., are registered dealers under the Kerala General Sales Tax Act, that the said consignee had agreed to pay a sum of Rs. 70,000 per mensem as licence fee and since the agreement was entered outside the boundary of the State of Kerala the State has no right to levy sales tax on the transaction. He further submitted that all the authorities have erroneously held that the transaction in question is exigible to tax under the Act and since the transport of the machinery was not supported by proper documents, penalty was rightly imposed. The counsel also relied on the decision of the Supreme Court in 20th Century Finance Corpn. Ltd. and Another Vs. State of Maharashtra, and submitted that since the transaction being one of inter-State sale there is no

question of any attempt of evasion of tax.

3. We have also heard the learned Government Pleader for the respondent. He sought to sustain the orders of the Tribunal and the authorities below. As already noted, the three consignments of machineries sent by Presswell Industries, Belgaum to the petitioner, C/o. M/s. English India Clays Ltd., Thiruvananthapuram, were intercepted at the sales tax check-posts at Feroke and Walayar and the consignments were released on their furnishing security as contemplated u/s 29A(2) of the Act. Thereafter the files were forwarded to the Sales Tax Officer (Enquiry), Kozhikode. The contention taken by the petitioner is that the petitioner is a financier, that under the agreement between the petitioner and English India Clays Ltd., Thiruvananthapuram, for giving machinery on a monthly licence basis the petitioner had ordered the machineries under consignment. The stand of the department is that this is a case where the petitioner had purchased the machineries from M/s. Presswell Industries, Belgaum, by way of inter-State transaction and the petitioner had subsequently delivered the same to English India Clays Ltd., Thiruvananthapuram, under licence arrangement and therefore there are two transactions, one between the petitioner and the consignor and the other between the petitioner and English India Clays Ltd., and the latter is a local sale falling within Section 5(1)(iii) of the Act exigible to tax under the Act and, therefore, the attempt of the petitioner by creating the invoice annexure B was to evade the tax legitimately due to the State.

4. A division Bench of this Court had occasion to deal with almost a similar case in the judgment dated November 22, 2001 in T.R.C. Nos. 318 and 319 of 2000 Since reported in Madras Credit and Investments Ltd. Vs. State of Kerala, . In that case the assessee, a financier engaged in the purchase and delivery of goods under hire-purchase agreement with parties/goods such as equipments, machinery, vehicle, etc.) had purchased goods from outside the State and supplied to the customers in the State. The assessing authority took the view that the assessee is a purchaser and reseller of these items and, therefore, its sales are subject to sales tax in Kerala. The assessee's sales were by way of delivery of possession on execution of hire-purchase agreement, possession of the goods is given to the customer and the customer will continue to use the goods on payment of instalments under the hire-purchase agreement and on payment of the last instalment title will be transferred to the customer. In the event of breach of payment of instalments under the hire-purchase agreement, the assessee is free to takeover possession of the goods and is free to sell the same. The Tribunal, after considering the terms of the hire-purchase agreement and relevant statutory provisions, upheld the order of the assessing authority. In revision by the assessee the division Bench after considering the matter observed thus :

There is no dispute with regard to the nature of transactions that goods are purchased by the assessee, the financier who retains the title over the same,

until the last instalment due under the hire-purchase agreement is paid by the customer. There is also no dispute with regard to the fact that the delivery is given by the outside supplier to the customer in Kerala, obviously through public carriers. The question is whether the transactions of this nature come within the definition of "sale" as contained in Explanation (3) to Section 2(xxi) of the Kerala General Sales Tax Act, 1963 which was introduced in the Act pursuant to the Constitution 46th (Amendment) Act, which provided for, among other things, levy of tax on transaction of hire purchase. The definition of "sale" incorporated in Explanation (3) to Section 2(xxi) is the same as the definition of "sale" contained in article 366(29A)(c) of the Constitution of India. The point of sale contemplated under Explanation (3) to Section 2(xxi) is delivery of goods under hire-purchase. Therefore, the only question is whether delivery of goods by the assessee to the customers is in Kerala to enable the department to levy sales tax on the hire charges in Kerala. From the nature of transaction narrated in the Tribunal's order, we find that there is purchase of goods by the assessee from outside Kerala and delivery of the same to customers in Kerala for use in Kerala under the hire-purchase agreement. However, there is only one delivery by the outside supplier to the customers in Kerala, even though there are two transactions, one is the purchase by the assessee, and the other is the delivery to the customers in Kerala, under the hire-purchase agreements. Since the assessee is the purchaser of the goods and the assessee issued purchase orders to the supplier outside Kerala to deliver the goods to the customer the receipt of goods by the customer is on behalf of the assessee. In fact, the outside supplier has no privity of contract with the customer in Kerala and delivery to the customer is made by outside supplier only under instructions from the assessee in Kerala. Therefore, there are two transactions, one is the purchase by the assessee, and the other is the delivery of the same by the assessee to the customers in Kerala under hire-purchase agreement executed between the assessee and the customer. We are unable to find out any inter-State sale between the outside supplier and the customer in Kerala, because there is no transaction between the supplier and the customer in Kerala. Under the purchase order placed by the assessee with the outside supplier, there is an inter-State purchase, and it is for the outside supplier to give delivery of the goods to the assessee in Kerala. Instead of taking delivery by the assessee itself, the assessee has instructed the supplier to deliver the goods to the customer in Kerala. It makes no difference whether the assessee delivers the goods to the customer directly or arranging delivery by the supplier to the customer. In either case there are two transactions ; one assessee's purchase from outside State and the other assessee's delivery to the customer under hire-purchase agreement. The delivery under the hire-purchase agreement between the assessee and the customer takes place only when the customer appropriates the goods under the hire-purchase agreement after receipt from the outside supplier. In that view of the matter, we are of the opinion that the Tribunal rightly held that the goods are delivered by the assessee in Kerala under the hire-purchase agreement, and therefore the assessee is a seller liable to pay tax under Explanation (3) to

Section 2(xxi) of the Act."

5. With reference to the decisions of the Supreme Court in Builders Association of India and Others Vs. Union of India (UOI) and Others, and in Gannon Dunkerley & Co. v. State of Rajasthan [1993] 88 STC 204 RAJ relied on by the assessee the division Bench observed that the said decisions have application only in respect of first of the two transactions, i.e., purchase of goods by the assessee from the outside State suppliers and, therefore, so far as the supplier's sales to the assessee are concerned, they are inter-State sales falling within Section 3(a) of the Central Sales Tax Act, 1956. The division Bench however observed that the question is with regard to the second transaction between the assessee and the customer in Kerala, which gives rise to the liability for the disputed tax. The division Bench further observed thus :

"We feel, as already observed by us above, there are two transactions, one is the inter-State purchase by the assessee, and the other is the delivery of goods under the hire-purchase agreement by the assessee to the customer in Kerala, which is the deemed sale under Explanation (3) to Section 2(xxi) of the Kerala General Sales Tax Act, 1963. Therefore the decisions referred to above do not affect the assessee's liability for tax in respect of the hire-purchase transaction, which is independent of the inter-State purchase by the assessee."

6. The Supreme Court in 20th Century Finance Corpn. Ltd. and Another Vs. State of Maharashtra, considered the question regarding the exigibility to tax on the transfer of right to use the goods and laid down five propositions which read thus :

"(a) The States in exercise of power under entry 54 of List II read with article 366(29A)(d) are not competent to levy sales tax on the transfer of right to use goods, which is a deemed sale, if such sale takes place outside the State or is a sale in the course of inter-State trade or commerce or is a sale in the course of import or export.

(b) The appropriate Legislature by creating legal fiction can fix situs of sale. In the absence of any such legal fiction the situs of sale in case of the transaction of transfer of right to use any goods would be the place where the property in goods passes, i.e., where the written agreement transferring the right to use is executed.

(c) Where the goods are available for the transfer of right to use the taxable event on the transfer of right to use any goods is on the transfer which results in right to use and the situs of sale would be the place where the contract is executed and not where the goods are located for use.

(d) In cases where goods are not in existence or where there is an oral or implied transfer of the right to use goods, such transactions may be effected by the delivery of the goods. In such cases the taxable event would be on the delivery of goods.

(e) The transaction of transfer of right to use goods cannot be termed as contract of bailment as it is deemed sale within the meaning of legal fiction engrafted in clause (29A)(d) of article 366 of the Constitution wherein the location or delivery of goods to put to use is immaterial."

7. Coming to the facts of the present case the Tribunal has observed as follows :

"The facts of the case are not much disputed. From the records available, like the bill obtained from Presswell Industries, Belgaum, Karnataka, the agreement executed by the appellants with English India Clays Ltd., etc., it is evident that the appellants have purchased the machinery for English India Clays Ltd., making payment of the price. The machinery so purchased has been brought also to English India Clays Ltd., Thiruvananthapuram, as per agreement already executed, for their use on payment of licence fee Rs. 70,000 per mensem. The appellants have no caseS that they have not received the licence fee so agreed to from the English India Clays Ltd., so, it is clear that the appellants are entitled to get Rs. 8,40,000 per year as licence fee for the machinery they purchased and made available for the use of English India Clays Ltd., Thiruvananthapuram. There can be no doubt that such receipts tantamount to taxable turnover at the hands of the appellants as per Section 5(1)(iii) of the Kerala General Sales Tax Act, 1963."

The Tribunal has further observed as follows :

"Their contention that there are no transactions effected within the Kerala State has no force in the light of the agreement and the relevant recitals therein. The agreement itself is seen executed in Kerala. So, as rightly observed by the Enquiry Officer and the first appellate authority, if there had been no interception and detention of goods by the sales tax authorities at check-posts, this transaction would have been un-noticed by the department and that would have ultimately resulted in loss of revenue to the State. It is in the above circumstances that the lower authorities have arrived at the conclusion that without taking the required registration under the Kerala General Sales Tax Act, 1963, the appellants have really attempted to evade payment of tax legitimately due to the Government on this transaction. This view taken by the lower authorities cannot in any way be found unreasonable or unfounded. In the light of the clear documentary evidence available, viz., the sale bill issued from Presswell Industries, Belgaum, the recitals in the agreement entered into between the appellants and English India Clays Ltd., etc., there is clear evidence that the appellants have got taxable transactions within the State of Kerala, and so, their failure to obtain a valid registration under the Kerala General Sales Tax Act, 1963 is with ulterior motive to evade payment of tax due to Government. So, the imposition of penalty in this case is proper and justified and it is confirmed."

Though the counsel had contended that in the transaction between the petitioner and English India Clays Ltd., Thiruvanantha-puram there is no sale exigible to tax

under the Act we find from the agreement entered into between the petitioner and Presswell Industries, Belgaum, and from the agreement entered into between the petitioner and English India Clays Ltd., Thiruvananthapuram, there are two independent transactions : (1) Purchase of machinery by the petitioner from Presswell Industries, Belgaum, by way of inter-State transaction and (2) Supply of machinery by the petitioner to English India Clays Ltd., Thiruvananthapuram. The latter transaction cannot be treated as an inter-State transaction as alleged by the petitioner. Annexure B invoice produced by the petitioner itself shows that the goods reached the premises of English India Clays Ltd., Veli, Thiruvananthapuram, only as the goods of the petitioner. The name of the petitioner is shown as C/o. English India Clays Ltd.. The decisions of the Supreme Court in Builders Association of India and Others Vs. Union of India (UOI) and Others, and Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, mentioned, as observed by the division Bench in the judgment in T.R.C. Nos. 318 and 319 of 2000 will have application only in respect of the first transaction, that is between the petitioner and Presswell Industries, Belgaum. The present case, according to us, is squarely covered by the division Bench decision in T.R.C. Nos. 318 and 319 of 2000.

8. The Tribunal had entered a categorical finding that the contract between the petitioner and English India Clays Ltd., was entered into in Kerala. It was also held that there was no privity of contract between the outside seller and English India Clays Ltd., and that the sellers have delivered the goods to the said party only as per the instructions of the petitioner. It was held that under the purchase order placed by the petitioner with the outside supplier, there is an inter-State purchase, as per which the outside supplier has to deliver the goods to the assessee in Kerala. The invoice (annexure B) issued by the outside supplier also shows that the consignee is the petitioner C/o. English India Clays Ltd. These facts, as found by the Tribunal do not fit in with the principles laid down by the Supreme Court in 20th Century Finance Corpn. Ltd. and Another Vs. State of Maharashtra, mentioned supra. For the application of the propositions laid down by the Supreme Court in the said case there should have been an agreement between the petitioner and the licensee for the inter-State movement of the goods from one State to another as an incident of sale. The findings of the Tribunal as already noted, is otherwise.

9. Thus it is clear that the instant transaction attracts levy of tax under the Act. Admittedly the petitioner is not a registered dealer under the Act. As observed by the authorities and the Tribunal, since the petitioner is not a registered dealer under the Act, but for the interception of the vehicle and the goods and the collection of security deposit, there would have been every possibility of the transaction escaping the levy of tax under the Act. In the above circumstances, the contention of the petitioner that there was no attempt of evasion of tax cannot be accepted.

10. u/s 29A of the Act an Officer mentioned in the said Section can intercept a

vehicle transporting goods either at the check-post or at any other place having jurisdiction and verify as to whether such transport is accompanied by documents specified in Section 29(2) of the Act and if such officer has reason to believe there is evasion or attempt of evasion of tax he can detain the goods and demand security as provided under sub-section (2) thereof for release Since reported in Madras Credit and Investments Ltd. Vs. State of Kerala, . of the goods. There is also provision of sub-section (4) for adjudication of the said question by an authority specified under sub-section (3) thereof. Appeals are also provided.

11. In the instant case all the authorities have found that the petitioner had attempted to evade the tax due to the Government on the transaction with respect to which proceedings are initiated u/s 29A. We have already found that the transaction between the petitioner and English India Clays Ltd., is exigible to tax under the Act. If the goods under transport were not intercepted and security collected the transaction would have escaped assessment since the petitioner is not a registered dealer under the Act. In the circumstances, this arrangement cannot be treated as a bona fide one. The petitioner should have taken out registration and have filed return in respect of the said turnover along with receipt for payment of tax. This has not been done. In this case the Sales Tax Officer (Enquiry) has imposed a penalty of Rs. 5,31,912 and adjusted the same from the bank guarantee furnished before the Sales Tax Inspectors of Walayar and Feroke check-posts. This was confirmed by both the appellate authorities.

12. Considering the facts and circumstances and the legal plea discussed above we are of the view that the imposition of the maximum penalty is not justified. It is not clear from the records as to whether the transaction in question has been subjected to sales tax under the Act. If the transaction has already been subjected to tax under the Act and the same has become final the penalty imposed as per annexure C order will be limited equal to the tax sought to be evaded. On the other hand, if the transaction has not been subjected to tax at the hands of the petitioner the penalty imposed as per annexure C order will be limited to one and a half times the tax sought to be evaded.

13. The Sales Tax Officer (Enquiry) will modify the penalty order with notice and opportunity to the petitioner and the consignee, viz., English India Clays Ltd., Veli, Thiruvananthapuram, in that regard. The petitioner is free to adduce evidence as to whether it was assessed to tax on the transaction in question. The Sales Tax Officer (Enquiry) will also verify as to whether the transaction in question had been subjected to tax under the Act from the concerned assessing authority before passing orders as directed.

The tax revision case is disposed of as above.