

(1992) 11 KAR CK 0043
In the Karnataka High Court
Case No : Writ Petition No. 15413 of 1987

K.C. Setty

APPELLANT

Vs

Additional Commercial Tax Officer and others

RESPONDENT

Date of Decision : 19-11-1992

Acts Referred:

Constitution of India, 1950 — Article 286, 366
Karnataka Sales Tax Act, 1957 — Section 12, 2 (1) (t)

Citation : (1993) 1 KarLJ 133 : (1993) 89 STC 535

Hon'ble Judges : R. Ramakrishna, J;K. Shivashankar Bhat, J

Bench : Division Bench

Advocate : B.V. Katageri and S.S. Angadi, for the Appellant; H.L. Dattu, Government Advocate, for the Respondent

Judgement

K. Shivashankar Bhat, J.—The petitioner is a hotelier. A notice u/s 12A of the Karnataka Sales Tax Act, 1957, was issued pertaining to the assessment year 1984-85. Thereafter, an order was made on July 24, 1987, overruling the objections of the assessee. Since the order was sought to be justified by the amendment made to the Constitution by which article 366, clause (29-A) was introduced, the petitioner challenged the same by filing the present writ petition.

2. The petitioner has mainly sought the striking down of clause (29-A) (f) of article 366 of the Constitution. The petitioner has also sought for the quashing of explanation (3-A) to the provisions of section 2(1)(t) of the Karnataka Sales Tax Act, 1957. As a consequence, the petitioner has also sought for the setting aside of the order dated July 24, 1987, made u/s 12A.

3. On merits, the petitioner contended that his objections were not considered by the assessing authority while passing the order.

4. It is too late for the petitioner to contend that the amendment to the Constitution is invalid. If so, automatically explanation (3-A) to section 2(1)(t) also cannot be challenged. The scope of the said explanation will have to be

understood in the light of the amendment made to the Constitution.

5. Faced with this situation, Mr. B. V. Katageri contended that the assessing authority could have confined the tax only in respect of the turnover representing the value of the goods and that the element of service which is inherent in the sale of articles in a hotel should be valued and excluded from the turnover.

6. In support of this contention, a decision of the Supreme Court in Builders Association of India and Others Vs. Union of India (UOI) and Others, was relied upon. The Supreme Court was concerned with sub-clause (b) of clause (29-A) of article 366. According to this "tax on the sale or purchase of goods" includes a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract. Under sub-clause (f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever of goods, being food or any other article for human consumption or any drink (whether or not intoxicating) where such supply or service, is for cash, deferred payment or other valuable consideration, is also included in the concept of "tax on the sale or purchase of goods".

Subject of sub-clause (b) is the tax on the transfer of property in goods.

Subject of sub-clause (f) is the supply of goods, referred therein, the supply being by way of or as part of any service or in any other manner.

While sub-clause (b) was inserted to overcome the difficulty posed by the decision of the Supreme Court in The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., sub-clause (f) was inserted in view of the decision of the Supreme Court in Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi,

In the Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, the Supreme Court held that there was no sale when food and drink were supplied to guests residing in the hotel and the supply of the food, etc., was incidental to the rendering of service. Levy of tax on such a supply is now included in the subject of "sale or purchase of goods" referred in entry 54, List II in Schedule VII to the Constitution.

7. Sub-clause (b) of clause (29-A) introduced into article 366 came up for consideration before the Supreme Court in Builders Association of India and Others Vs. Union of India (UOI) and Others, The Supreme Court in the case of The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., had held that a works contract was an indivisible contract and the turnover of the goods used in the execution of the works contract cannot be taxed as "a tax on sale or purchase of goods". In Builders Association of India and Others Vs. Union of India (UOI) and Others, the Supreme Court observed, at page 396 thus :

"Sub-clause (b) of clause (29-A) states that "tax on the sale or purchase of goods" includes among other things a tax on the transfer of property in the goods (whether as goods or in some other form) involved in the execution of a works contract. It does not say that a tax on the sale or purchase of goods

included a tax on the amount paid for the execution of a works contract. It refers to a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract. The emphasis is on the transfer of property in goods (whether as goods or in some other form). The latter part of clause (29-A) of article 366 of the Constitution makes the position very clear. While referring to the transfer, delivery or supply of any goods that takes place as per sub-clauses (a) to (f) of clause (29-A), the latter part of clause (29-A) says that "such transfer, delivery or supply of any goods" shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made. Hence, a transfer of property in goods under sub-clause (b) of clause (29-A) is deemed to be a sale of the goods involved in the execution of works contract by the person making the transfer and a purchase of those goods by the person to whom such transfer is made. The object of the new definition introduced in clause (29-A) of article 366 of the Constitution is, therefore, to enlarge the scope of "tax on sale or purchase of goods" wherever it occurs in the Constitution so that it may include within its scope the transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-clauses (a) to (f) thereof wherever such transfer, delivery or supply becomes subject to levy of sales tax. So construed the expression "tax on the sale or purchase of goods" in entry 54 of the State List, therefore, includes a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract also. The tax leviable by virtue of sub-clause (b) of clause (29-A) of article 366 of the Constitution thus becomes subject to the same discipline to which any levy under entry 54 of the State List is made subject to under the Constitution."

At page 400, the effect of the amendment was explained thus :

"After the 46th Amendment the works contract which was an indivisible one is by a legal fiction altered into a contract which is divisible into one for sale of goods and the other for supply of labour and services.

After the 46th Amendment, it has become possible for the States to levy sales tax on the value of goods involved in a works contract in the same way in which the sales tax was leviable on the price of the goods and materials supplied in a building contract which had been entered into in two distinct and separate parts as stated above. It could not have been the contention of the Revenue prior to the 46th Amendment that when the goods and materials had been supplied under a distinct and separate contract by the contractor for the purpose of construction of a building the assessment of sales tax could be made ignoring the restrictions and conditions incorporated in article 286 of the Constitution. If that was the position can the States contend after the 46th Amendment under which by a legal fiction the transfer of property in goods involved in a works contract was made liable to payment of sales tax that they are not governed by article 286 while levying sales tax on sale of goods involved in a works contract ? They

cannot do so. When the law creates a legal fiction such fiction should be carried to its logical end. There should not be any hesitation in giving full effect to it. If the power to tax a sale in an ordinary sense is subject to certain conditions and restrictions imposed by the Constitution, the power to tax a transaction which is deemed to be a sale under article 366(29-A) of the Constitution should also be subject to the same restrictions and conditions. Ordinarily unless there is a contract to the contrary in the case of a works contract the property in the goods used in the construction of a building passes to the owner of the land on which the building is constructed, when the goods or materials used are incorporated in the building. The contractor becomes liable to pay the sales tax ordinarily when the goods or materials are so used in the construction of the building and it is not necessary to wait till the final bill is prepared for the entire work."

At page 402, the Supreme Court observed :

"We are surprised at the attitude of the States which have put forward the plea that on the passing of the 46th Amendment the Constitution had conferred on the States a larger freedom than what they had before in regard to their power to levy sales tax entry 54 of the State List. The 46th Amendment does no more than making it possible for the States to levy sales tax on the price of goods and materials used in works contracts as if there was a sale of such goods and materials. We do not accept the argument that sub-clause (b) of article 366(29-A) should be read as being equivalent to a separate entry in List II of the Seventh Schedule to the Constitution enabling the States to levy tax on sales and purchases independent of entry 54 thereof. As the Constitution exists today the power of the States to levy taxes on sales and purchases of goods including the "deemed" sales and purchases of goods under clause (29-A) of article 366 is to be found only in entry 54 and not outside it."

The same reasoning would govern the interpretation of sub-clause (f). Its purpose is to enable the States to collect the tax in respect of the goods which are supplied as part of the services.

8. In the Northern India Caterer's case [1978] 42 STC 386 the nature of services rendered in a restaurant was pointed out by the Supreme Court, at page 390 :

"Like the hotelier, a restaurateur provides many services in addition to the supply of food. He provides furniture and furnishings, linen, crockery and cutlery, and in the eating places of today he may add music and a specially provided area for floor dancing and in some cases a floor show."

It is in these circumstances, the court held that the supply of food and drinks was essentially in the nature of services provided to the customers and therefore cannot be considered as a transaction of sale.

9. Explanation (3-A) to section 2(1)(t) of the Act says that "every transaction of supply by way of or as a part of any service or in any other manner whatsoever,

of goods, being food or any other article for human consumption or any drink (whether or not intoxicating) where such supply or service is for cash, deferred payment or other valuable consideration, shall be deemed to be a sale of those goods by the person making the supply and purchase of those goods by the person to whom such supply is made". The explanation widens the concept of sale by bringing into its fold, supply of goods, under the transaction referred to in the explanation. In other words, the explanation states that every transaction of supply of goods shall be deemed to be a sale provided the transaction pertains to the matters referred in the explanation. Earlier, prior to the amendment to the Constitution, it was held that such supply of goods under such a transaction was not a sale because the dominant object of the transaction was rendering of services in a hotel. The "service" may be way of providing furniture and furnishings, linen, crockery and cutlery and in the eating place, the hotelier may add music or floor dancing, etc., also as part of the services.

Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, was rendered on a review petition seeking the review of the earlier decision. The review petition was dismissed by the Supreme Court. While dismissing the review petition, the scope of the earlier decision was explained. The Supreme Court pointed out that the relevant facts were brought out in the SLP before the Supreme Court and those facts were reproduced at Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, (also reported in Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, Thereafter, the Supreme Court referred to the apprehensions of the States which made them to file the review petitions. The Supreme Court opined that there was no scope for such an apprehension at all.

At Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, the Supreme Court held :

"It appears from the submissions now made that the respondent as well as other States are apprehensive that the benefit of the judgment of this Court will be invoked by restaurant-owners in those cases also where there is a sale of food and title passes to the customers. It seems to us that having regard to the facts upon which our judgment rests - undisputed as they have remained throughout the different stages of the litigation - and the considerations which they attract, no such apprehension can be reasonably entertained. Indeed, we have no hesitation in saying that where food is supplied in an eating-house or restaurant, and it is established upon the facts that the substance of the transaction, evidenced by its dominant object, is a sale of food and the rendering of services is merely incidental, the transaction would undoubtedly be exigible to sales tax."

10. Therefore, even prior to the amendment of the Constitution, the test was the dominant intention and the substance of the transaction, to find out as to whether there was a sale of goods involved in the supply of food or drinks in a hotel. If the substance of the transaction evidenced by its dominant object is the sale of food, then the supply of food certainly would be a sale which can be taxed. That was the position even under the pre-amendment period.

11. The purpose of amending the Constitution by introducing clause (29-A) referred above was to enable the States to levy taxes in respect of the sale of goods involved in a transaction while rendering service. In other words, the purpose was to neutralise the effect of the first judgment rendered in the Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, The amendment was not to further limit the powers of the States. Therefore, it cannot be held that in every case, the supply of food and drinks by a hotelier is outside the purview of the concept of sale. The hotelier had to establish clearly that the dominant object of the transaction was rendering of services. If rendering of services was only incidental to the dominant object of sale of food, then such a sale could have been taxed even according to the decision of the Supreme Court in Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, The object of article 366(29-A)(f), therefore, is to enable the States to levy tax on the supply of goods when such a supply was incidental to the dominant object of rendering services at a hotel. Explanation (3-A) to section 2(1)(t) of the Act also has to be understood in the same manner.

12. In the instant case, the petitioner has nowhere pleaded that the dominant object of the transactions under which food, drinks, etc., were supplied to the customers was rendering of the services referred by the Supreme Court in the two Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, and [1980] 45 STC 212. To seek bifurcation of the turnover into that of (i) supply of eatables and drinks and (ii) rendering of services, the hotelier has to establish the nature of the transactions and the dominant object of the transactions. Only in case the dominant object was rendering of the services, question of applying the ratio to the decision of the Supreme Court in Builders Association of India and Others Vs. Union of India (UOI) and Others, would arise. Employing several suppliers, cleaners and helpers by itself would not prove the dominant object was rendering of services. Even for the preparation and sale of eatables, these employees are necessary.

In these circumstances, it is unnecessary for us to examine the applicability of the ratio in Builders Association of India and Others Vs. Union of India (UOI) and Others, to interpret sub-clause (f) of article 366(29-A) of the Constitution of India.

Writ petition is accordingly dismissed. If there is any other provision of law enabling the petitioner to seek the adjustment of tax paid, it is open to him to resort to the same.

13. Writ petition dismissed.