(1994) 05 KL CK 0004

In the High Court Of Kerala

Case No : O.P. No. 4221 of 1991-C

Keyemyes Trading Agency APPELLANT

Vs

State of Kerala and Others RESPONDENT

Date of Decision : 24-05-1994

Acts Referred:

Constitution of India, 1950 — Article 14
Income Tax Act, 1961 — Section 147
Kerala General Sales Tax Act, 1963 — Section 19B, 19C

Citation : (1994) 05 KL CK 0004

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

Bench : Single Bench

Advocate : P.V. Rama Wariyar and T.R. Ravi, for the Appellant; S. Vijayan Nair, Sr. Government Pleader for Respondents 1 and 2 and T.M. Sreedharan, for 3rd respondent, for the Respondent

Judgement

T.L. Viswanatha Iyer, J.—The Petitioner is a dealer registered under the Kerala General Sales Tax Act, 1963 (the K.G.S.T. Act, in brief). It is being proceeded against u/s 19C of the said Act on the ground that it had, during the assessment year 1983-84, done business in the name of one B.T. Mammoo, (who has been impleaded as the third Respondent), that the said Mammoo was only a benamidar for the Petitioner and that both the Petitioner and the said Mammoo are jointly and severally liable for payment of the tax u/s 19C of the K.G.S.T. Act. The notice Ext. P-2 dated 15th February 1991 was accordingly issued to the Petitioner calling upon it and the third Respondent to show cause why they should not be so made liable u/s 19C. The Petitioner submitted its objections Ext. P-3 and filed this writ petition challenging the constitutional validity of Section 19C.

2. The Petitioner had earlier been assessed to tax for the year 1983-84, both under the K.G.S.T. Act and the Central Sales Tax Act, 1956 on a turnover of Rs. 2,97,580 and "rupees nil respectively. These assessments were reopened subsequently as a result of enquiries which revealed that the Petitioner had done

business in the name of a benamidar M/s Century Corporation at Kannur, of the third Respondent; and fresh assessments completed on turnover of Rs. 1,51,57,520 and Rs. 1,86,66,260 respectively under the two Acts. These revised assessments were set aside in appeal by the Deputy Commissioner (Appeals) with direction to re-do the assessments after giving the Petitioner a reasonable opportunity to prove its case and to rebut the evidence relied on by the revenue. Though" the order was only one of remand and nothing had been foreclosed or concluded against it by the appellate order, the-Petitioner took the matter in appeal before the Appellate Tribunal apparently seeking a decision on the merits;the revenue cross appealed with the contention that the Petitioner had been afforded reasonable opportunities at the time the revised orders of assessment were passed and therefore there was no justification for the remand to afford a further opportunity to the Petitioner. The Tribunal however "refused to be drawn into the controversy and confirmed the order of remand, merely clarifying that it was an open remand with liberty to the Petitioner to raise all its contentions before the assessing authority. A copy of the order of the Tribunal is Ext. P-1. It was while the matter was thus pending fresh assessment that the notice Ext. P-2 was issued u/s 19C of the K.G.S.T. Act and the Petitioner replied by Ext. P-3.

3. Though the Petitioner has raised various contentious in the writ petition on the merits of the case, I am not adjudicating on the same as they are points which could be raised before the statutory authority and adjudged by him. It is not for this Court to interpose a decision when the matter is pending consideration before that authority. A decision on the merits was, in fact, very seriously opposed by the Learned Government Pleader. Sri S. Vijayan Nair, according to whom there was large sales tax evasion involved in this case; It was his submission that despite the'' pompous business name of the third Respondent, he was only a petty benamidar of the Petitioner and the whole thing was only a shrewd attempt to defeat the State of its dues. I leave all these matters for decision of the authorities as matters on which this Court should not speak at this stage of notice to show cause. I am therefore confining my consideration strictly to the constitutional points raised about the validity of Section 19C. Section 19C reads:

19C. Protective assessment-Notwithstanding anything io the contrary contained in any judgment, decree, order, direction or decision of any Court, Tribunal or other Authority, where the assessing authority has reason to believe that any person is, or was carrying on business in the name of, or in association with any other person, either directly, or indirectly, whether as agent, employee, manager, power of attorney holder, guarantor or in any other capacity, such person and the person in whose name the registration certificate, if any, is taken, shall jointly and severally, be liable for the payment of the taxes, penalty or other amount due under this Act which shall be assessed, levied and recovered from all or any of such person or persons'' as if such person or persons are dealers:

Provided that before taking action under this section, the persons concerned shall be given a reasonable opportunity of being heard.

4. This'' is stated to be beyond the competence of the State Legislature, being outside the purview of Entry 54 of List II to the Seventh Schedule to the Constitution. I am unable, to agree. The said entry enables the States to levy taxes on the sale or purchase of goods, other than newspapers. The'' power to levy. tax necessarily carries with it the power to provide for all those matters ., which are necessary for the effective implementation of the levy and to prevent evasion of tax. Punjab Distilling Industries Ltd. v. Commissioner of Income Tax AIR 1965 S.C. 1862, The Commissioner of Commercial Taxes and Others etc. Vs. R.S. Jhaver and Others etc., , Ganga Sugar Corporation Ltd. and Others Vs. State of Uttar Pradesh and Others, . One of the objects of Section 19C is to prevent evasion of tax by dealers indulging in dealings in benami names i.e. transacting in the names of their nominees, henchmen or Ors. , who may be man of straw, from whom no amount could be recovered. Section 19C is intended to strike at such transactions by making the real dealer liable for the tax along with the ostensible dealer. The legislature has to match its wits with such measures to counter the devises adopted by unscrupulous dealers to avoid payment of the tax lawfully due to the State. Section 19C is intended to achieve this object.

5. As a matter of fact, there is nothing really obnoxious in the provision. A benami transaction is in reality and in law a transaction by the real dealer through the medium of Anr. . As the real person who has effected sales, he is liable to pay the tax on those sales. What Section 19C does is only to recognise and fasten the liability which otherwise lay on him, along with the person registered as the dealer under the K.G.S.T. Act, in whose name the sales are effected. The provision is intended to safeguard the interests of the revenue and to cast the liability on the person who is really liable for the tax.

6. I may note here that as a measure of protective assessment, as the heading of the section indicates, the section is well within the powers of the State Legislature. The devise of a protective assessment is well known in the law of taxation as a legislative practice adopted when there is possibility of douht as to who is liable for the tax. The Supreme Court had in fact upheld the validity of parallel proceedings against different persons at the same time, when, there is a doubt as to which among the two is liable to be assessed. Income Tax Officer v. Bachu Lal Kapoor 1967 (1) S.C. W.R. 14 Section 19C is only a statutory authorisation for such assessments. But as stated earlier, what the section really does is only to provide for assessment of the real dealer along with the ostensible dealer and that certainly is something which is within the scope of the taxing power under Entry 54 of the State list.

7. I do not therefore find any substance in the plea that the section is beyond the competence of the State legislature.

8. There was a further plea, too puerile to need reiteration (but required to be

dealt with because it was argued) that a plea of benami sale is not entertainable because of the provisions contained in the Benami Transactions (Prohibition) Act, (45 of 1988). The benami transaction which is prohibited by this Act is any transaction in which property is transferred to one person for a consideration paid or provided by Anr. person. That is not the case here where the case is of one person carrying on a business, or effecting sales, in the name of Anr. . This Act has therefore no application- to cases like the one before me.

9. There was a subsidiary contention that Section 19C confers an unbridled unguided power to make an assessment. It is stated that the power conferred by the section could be invoked if the assessing authority has reason to believe the existence of certain facts as mentioned therein. Counsel would compare it with Section 19B which speaks of the satisfaction of the assessing authority and which was salvaged for that reason in the decision in T.A.C.A. Association v. State of Kerala 1988 (1) KLT 596.

10. I do not find any substance in this contention either. Guidelines for the exercise of the power are found in the section itself, namely that the assessing authority should have reason to believe that any person is or was carrying on business in the name of or in association with any other person either directly or indirectly. The language of the section is clear without any vagueness or ambiguity in it. It is clear enough as to the circumstances in which it applies. The intent of the section is obvious that the State should be able to recover the tax from'' the person really effecting the sale. The expression "reason'' to believe" is a well known term in the law of taxation (vide Section 147 of the Income Tax Act, 1961) and in administrative law and has rfever been understood as an'' expression of nebulous content, afflicted with the vice of arbitrariness. I hold that Section 19C does not confer any arbitrary or unguided power, making it offensive of Article 14 of the Constitution of India.

11. I have no doubt that this writ petition is but Anr. attempt of the Petitioner to protract the assessment proceedings, the other one being the futile, unnecessary appeal which it filed before the Appellate Tribunal against what evidently was an open remand after setting aside the assessment made on it, without deciding or concluding any point in controversy. I do not find any merit in this writ petition. It is accordingly dismissed.

