

(2007) 04 MAD CK 0104

In the Madras High Court

Case No : Writ Petitions No's. 33455 and 35665 of 2005

K.M. Corporation

APPELLANT

Vs

The State of Tamil Nadu

RESPONDENT

Date of Decision : 03-04-2007

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 21, 265, 323A
Land Acquisition Act, 1896 — Section 23A
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 17, 17(2)
Tamil Nadu General Sales Tax Act, 1959 — Section 12, 31, 31(1), 31A, 31A(1)

Citation : (2008) 11 VST 782

Hon'ble Judges : K. Raviraja Pandian, J

Bench : Single Bench

Advocate : V. Srikanth, for the Appellant; A. Shanmugasundaram, Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

K. Raviraja Pandian, J.—By consent both the writ petitions are taken up together for disposal, as the prayer in these two writ petitions is one and the same seeking for a declaration that the words "provided further no appeal filed by any person objecting to an order passed (a) under Sub-section (3) of Section 31, shall be entertained unless it is accompanied by satisfactory proof for payment of the tax as ordered by the Appellate Assistant Commissioner" in Section 4 of the TNGST (4th Amendment) Act, 1999 Act 14 of 1999 to be violative of the fundamental right to carry on business and trade, right to life and personal liberty and due process of law guaranteed under Article 19(1)(g), Article 21 and 265 of the Constitution of India and therefore unconstitutional. The argument advanced are made common for both the writ petitions.

2. The petitioners filed OPs 499 and 450 of 2003 before the Tamil Nadu Taxation Special Tribunal challenging the above said provision and on abolition of the Tribunal those OPs were transferred and are numbered as writ petitions and

taken up for disposal.

3. Before stating the facts, a small prelude as stated in the affidavit, having a bearing on the case has to be stated. It is averred in the affidavit that the Tamil Nadu Taxation Special Tribunal heard original petitions challenging the validity of the provisions of the TNGST (4th Amendment) Act, 1999, (Act 14 of 1999) providing for pre-deposit of 25% in the case of first appeal and for pre deposit of the entire 75% of the remaining disputed amount, in the case of second appeal and upheld the validity of the provisions in the decision reported in (2000) 119 STC 591 in the case of Hugs Advertising Industries v. CTO, Vadapalani Circle, Chennai. In spite of that the petitioners ventured to file the above OPs before the same Tribunal seeking to declare the above said provision as unconstitutional on the ground that when the Hugs case was argued no argument was advanced as to the constitutional validity, but argument was confined to the date from which the provision of TNGST (4th Amendment) Act would become effective. In order to emphasise that point, the petitioners extracted certain portion of the order of the Tribunal, which reads as follows:

The one and only issue in all these petitions relates to the validity of Tamil Nadu Act 14 of 1999. Even here it has to be mentioned that at the time of arguments, no serious attempts were made to invalidate the amendment because there are number of decisions upholding the imposition of condition for entertaining appeals. The main arguments centered over the issue of retrospective operation of the Act and the transaction in respect of Act will apply.

4. The first of the two sentences of the Tribunal's judgment in Hugs case referred to above is to the effect that the main challenge before it was validity of TNGST (4th amendment) Act 14 of 1999. The prayer in the OP 1157 and 1158 of 1999 and 1336 to 1339 of 1999 was to declare Tamil Nadu Act 14 of 1999 as unconstitutional and ultra vires. The other OPs were also to the same effect. Thus, it is clear that though the prayer was made to the challenge of the entirety of the Act 14 of 1999 no counsel ventured to test the constitutional validity of the said Act, because of the reason, as stated by the Tribunal, that there are number of decisions upholding the pre-condition imposed for entertaining the appeal.

5. When the above statement of law was pointed out to the learned Counsel Mr. Srikanth, he very politely submitted that he is confident of convincing the Court to sustain his arguments and requested the Court to hear him in full. Though this sort of piece-meal attack of particular legislation has not been approved by Courts, (vide Mahesh Kumar Saharia Vs. State of Nagaland and Others, ; Mohd. Ayub Khan Vs. Commissioner of Police, Madras and Another, ; and T. Govindaraja Mudaliar Vs. The State of Tamil Nadu and Others, in line with the often quoted statement, justice not only be done but appears to have been done, I heard the counsel in full.

6. Mr. Sreekanth, learned Counsel for the petitioners assailed the above said provision on the following grounds:

(i) The condition imposed by the Amending Act for filing first appeal and second appeal is onerous in nature and the imposition of onerous condition is impermissible in law, in the sense that it infringes the fundamental right of the petitioners to carry on business and trade. On that ground the Act has to be struck down as unconstitutional. For that purpose he relied on the decision of the Supreme Court in the case of Seth Nand Lal and Another Vs. State of Haryana and Others, . The second point on which the impugned piece of amendment has been assailed is that the amendment is bad in law as it interferes with the exercise of judicial function of the authorities concerned. To support the above contention he relied on the Division bench judgment of this Court in the case of Rajasherriff v. Government of Tamilnadu 2001 4 CTC 577 and thirdly despite the restriction imposed by the amendment, the appellate authorities under the Act are having an ancillary and incidental power to waive the payment of tax as incorporated by way of amendment in order to maintain the appeals. To sustain this point counsel relied on the following judgments:

(i) I.T.O v. Mohd. Kunhi AIR 1969 SC 430;

(ii) C.C.E. v. Kumar Cotton Mills Pvt. Ltd. 2005 (180) ELT 434

(iii) Collector of Customs, Madras Vs. Madras Electro Castings P. Ltd., .

7. On the other hand, learned Government Pleader appearing for the respondents submitted that it is not open to the petitioners to challenge the Act, which has already been upheld by the Special Tribunal constituted under Article 323A of the Constitution of India which was performing the supplemental role of High Court as held by the Supreme Court in the case of L. Chandra Kumar Vs. Union of India and others, . Having filed the OPs challenging the validity and refraining from arguing on the point of validity and allowing the Tribunal to uphold the Act, the petitioners now cannot re-agitate the issue once again.

8. Apart from that, he argued that similar restriction imposed in taxing enactment has been upheld by other Courts and the Supreme Court as well. Hence, the writ petitions virtually deserve no consideration from this Court. In order to sustain the enactment he relied upon the decision of the Supreme Court in the case of Hari Krishna Bhargav Vs. union of india (UOI) and Another, and Shyam Kishore and others Vs. Municipal Corporation of Delhi and another, .

9. Heard the learned Counsel on either side and perused the materials on record. Before advertng to the arguments, it is better to extract the Amendment which goes as follows:

The Tamil Nadu Act 14 of 1999 which comes into effect from June 14, 1999 has introduced amendments to Sections 31, 31-A and 36 of the Tamil Nadu General Sales Tax Act, 1959. In Sub-section (1) of the second proviso to Section 31 the following words are added:

and twenty five per cent of the difference of the tax assessed by the assessing authority and the tax admitted by the appellant

Similarly, in Sub-section (1) of the second proviso to Section 31-A the following words are added:

and twenty five per cent of the difference of the tax assessed by the assessing authority and the tax admitted by the appellant

In Section 36 a new proviso is added as follows:

Provided further that no appeal filed by any person objecting to an order passed --

(a) under Sub-section (3) of Section 31 or under Sub-section (3) of Section 31-A shall be entertained unless it is accompanied by satisfactory proof of the payment of the tax as ordered by the Appellate Assistant Commissioner or by the Appellate Deputy Commissioner, as the case may be;

(b) under Sub-section (1) of Section 32, unless it is accompanied by satisfactory proof of the payment of the tax admitted by the appellant to be due or of such instalments thereof as might have become payable, as the case may be, and twenty-five per cent of the different of the tax ordered by the Deputy Commissioner u/s 32 and the tax admitted by the appellant

10. The Supreme Court in the case of *Nandlal* cited supra considered similar provision of Haryana Ceiling of Land Holdings Act, 1972 (Act 26 of 1972). Section 18(7) of the Act was challenged as unconstitutional on the ground that the said provision imposes a condition of making a deposit of a sum equal to 30 times of the land holding tax payable in respect of the disputed area before any appeal or revision is entertained by the appellate or revisional authority. It was contended that Section 18(1) of the originally enacted Act in 1972 gave an unconditional right of appeal, but by Sub-section 7, which was inserted by Act 40 of 1976 a fetter was put on the unrestricted right which was unconstitutional inasmuch as the condition of pre deposit of tax was so onerous and rendered the appeal remedy illusory. Rejecting the contention the Supreme Court held as follows:

It is well settled by several decisions of this Court that the right of appeal is a creature of a statute and there is no reason why the legislature while granting the right cannot impose conditions for the exercise of such right so long as the conditions are not so onerous as to amount to unreasonable restrictions rendering the right almost illusory (vide : the latest decision in *The Anant Mills Co. Ltd. Vs. State of Gujarat and Others*, . Counsel for the appellants, however, urged that the conditions imposed should be regarded as unreasonably onerous especially when no discretion has been left with the appellate or revisional authority to relax or waive the condition or grant exemption in respect thereof in fit and proper cases and, therefore, the fetter imposed must be regarded as unconstitutional and struck down. It is not possible to accept this contention for more than one reason. In the first place, the object of imposing the condition is obviously to prevent frivolous appeals and revision that impede the implementation of the ceiling policy; secondly, having regard to Sub-sections (8)

and (9) it is clear that the cash deposit or bank guarantee is not by way of any exaction but in the nature of securing mesne profits from the person who is ultimately found to be in unlawful possession of the land; thirdly, the deposit or the guarantee is correlated to the landholdings tax (30 times the tax) which, we are informed, varies in the State of Haryana around a paltry amount of Rs 8 per acre annually; fourthly, the deposit to be made or bank guarantee to be furnished is confined to the landholdings tax payable in respect of the disputed area i.e. the area or part thereof which is declared surplus after leaving the permissible area to the appellant or petitioner. Having regard to those aspects, particularly the meagre rate of the annual land-tax payable, the fetter imposed on the right of appeal/revision, even in the absence of a provision conferring discretion on the appellate/revisional authority to relax or waive the condition, cannot be regarded as onerous or unreasonable. The challenge to Section 18(7) must, therefore, fail.

11. Counsel taking cue from the above statement contended that condition of making 25% of admitted tax at the first appellate stage and the remaining 75% of tax at the second appeal is so onerous and render the appeal remedy illusory. But in the later part of the said judgment, the Supreme Court has pointedly rejected the said contention by holding the fetter imposed on the right of appeal/revision even in the absence of a provision conferring discretion on the authority to relax or waive the condition cannot be regarded as onerous or unreasonable.

12. Further the issue has been subsequently settled in the cases of *The Gujarat Agro Industries Co. Ltd. Vs. The Municipal Corporation of the City of Ahmedabad and Others* Etc. Etc., , in which after referring to all the earlier decisions, on this point such as *Shyam Kishore and others Vs. Municipal Corporation of Delhi* and another, , *Vijay Prakash D. Mehta and Another Vs. Collector of Customs (Preventive), Bombay*, , *Chatter Singh Baid and Others Vs. Corporation of Calcutta and Others*, , *Elora Construction Company Vs. The Municipal Corporation of Gr. Bombay and Others*, , *The Anant Mills Co. Ltd. Vs. State of Gujarat and Others*, , and *Smt. Ganga Bai Vs. Vijay Kumar and Others*, at paragraph 8 to 10 held as follows:

8. By the amending Act 1 of 1979 discretion of the court in granting interim relief has now been limited to the extent of 25% of the tax required to be deposited. It is, therefore, contended that the earlier decision of this Court in *Anant Mills* case, may not have full application. We, however, do not think that such a contention can be raised in view of the law laid down by this Court in *Anant Mills* case. This Court said that right of appeal is the creature of a statute and it is for the legislature to decide whether the right of appeal should be unconditionally given to an aggrieved party or it should be conditionally given. Right of appeal which is a statutory right can be conditional or qualified. It cannot be said that such a law would be violative of Article 14 of the Constitution. If the statute does not create any right of appeal, no appeal can be filed. There is a clear distinction between a suit and an appeal. While every person has an inherent right to bring a suit of a

civil nature unless the suit is barred by statute, however, in regard to an appeal, the position is quite opposite. The right to appeal inheres in no one and, therefore, for maintainability of an appeal there must be authority of law. When such a law authorises filing of appeal, it can impose conditions as well (see Smt. Ganga Bai Vs. Vijay Kumar and Others, .

9. In Elora Construction Company Vs. The Municipal Corporation of Gr. Bombay and Others, , the question before the Bombay High Court was as to the validity of Section 217 of the Bombay Municipal Corporation Act, 1888. This section provided for filing of appeal against any rateable value or tax fixed or charged under that Act but no such appeal could be entertained unless:

217. (2)(d) in the case of an appeal against a tax, or in the case of an appeal made against a rateable value the amount of the disputed tax claimed from the appellant, or the amount of the tax chargeable on the basis of the disputed rateable value, up to the date of filing of the appeal, has been deposited by the appellant with the Commissioner.

It will be seen that Clause (d) aforesaid was in similar terms as Clause (e) of Section 406(2) as it originally existed. The Bombay High Court upheld the constitutional validity of Section 217 of the Bombay Municipal Corporation Act. The Calcutta High Court in Chatter Singh Baid and Others Vs. Corporation of Calcutta and Others, , also took the same view. There it was Sub-section (3-A) of Section 183 of the Calcutta Municipal Act, 1951 which provided:

No appeal under this section shall be entertained unless the consolidated rate payable up to the date of presentation of the appeal on the valuation determined

(a) by an order u/s 182, in the case of an appeal to the Court of Small Causes,

(b) by the decision of the Court of Small Causes, in the case of an appeal to the High Court, has been deposited in the municipal office and such consolidated rate is continued to be deposited until the appeal is finally decided.

Similar provisions existed in the Delhi Municipal Corporation Act, 1957. There it is Section 170 which is as under:

170. Conditions of right to appeal. No appeal shall be heard or determined u/s 169 unless

(a) the appeal is, in the case of a property tax, brought within thirty days next after the date of authentication of the assessment list u/s 124 (exclusive of the time requisite for obtaining a copy of the relevant entries therein) or, as the case may be, within thirty days of the date on which an amendment is finally made u/s 126, and, in the case of any other tax, within thirty days next after the date of the receipt of the notice of assessment or of alteration of assessment or, if no notice has been given, within thirty days after the date of the presentation of the first bill or, as the case may be, the first notice of demand in respect thereof:

Provided that an appeal may be admitted after the expiration of the period

prescribed therefore by this section if the appellant satisfies the court that he had sufficient cause for not preferring the appeal within that period; (b) the amount, if any, in dispute in the appeal has been deposited by the appellant in the office of the Corporation.

A Full Bench of the Delhi High Court, by a majority, upheld the constitutional validity of the aforesaid provision though there was also challenge to the same based on Article 14 of the Constitution. Appeal against the judgment of the Delhi High Court was taken to this Court which upheld the view of the Delhi High Court. The decision of this Court is reported as *Shyam Kishore and others Vs. Municipal Corporation of Delhi and another*, . This Court relied on its earlier decisions in *Ganga Bai case* and *Anant Mills case*. Reference was also made to another decision of this Court in *Vijay Prakash D. Mehta and Another Vs. Collector of Customs (Preventive), Bombay*, , where Justice Sabyasachi Mukharji, J., speaking for the Court, said: (SCC p. 406, para 9)

9. Right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant.

10. It is not necessary for us to refer to other decisions asserting the same principle time and again. When the statement of law is so clear, we find no difficulty in upholding the vires of Clause (e) of Sub-section (2) of Section 406 read with the proviso thereto. Any challenge to its constitutional validity on the ground that onerous conditions have been imposed and right to appeal has become illusory must be negated.

13. The Patna High Court had an occasion to consider a *pari materia* provision, Section 45(3) of the Bihar Finance Act, which provides for deposit of 20% of the assessed tax before admission of appeal in the case of *Tata Iron and Steel Company Ltd. v. State of Bihar* 114 STC 434. The said provision was challenged. One of the grounds taken was that the condition so imposed is so onerous as to amount to unreasonable restriction rendering the right of appeal almost illusory infringing the petitioner's right guaranteed under Article 19(1)(g). The Court rejected the said ground as it had no force, as the right of appeal is a creature of a statute with legal sanctity inasmuch as a citizen has been conferred with a right to carry on a trade of his choice. But to carry on a trade of his choice does not extend any immunity from taxation. Therefore, the right of appeal being a creature of the statute without which the aggrieved trader cannot be entitled to vindicate his grievances, so when conferring or granting this right to the aggrieved trader to file an appeal, a condition as enumerated under Sub-section (3) of Section 45 of the Act can be imposed while regulating the appeal. The Patna High Court also followed the judgments of *Shyam Kishore and others Vs. Municipal Corporation of Delhi and another*, ; *Elora Construction Company v. Municipal Corporation of Greater Bombay* [1980 AIR 162 Bom (Bom)]; *Chatter Singh Baid and Others Vs. Corporation of Calcutta and Others*, ; *The Anant Mills*

Co. Ltd. Vs. State of Gujarat and Others, Seth Nand Lal v. State of Haryana [1980] Supp SCC 574 St. Mary's School and others etc. Vs. Cantonment Board, Meerut and others, .

14. The reliance placed on the case of Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., , by the petitioner is a misplaced one. The entire provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 are procedural in nature in crystallisation of assets and bring the secured assets for auction for realisation of debts, except Section 17. The Supreme Court has, while considering Section 17, after referring to Seth Nandlal's case and Anant Mills Co. Ltd., case referred to supra, opined that the facts of the case in Mardia Chemicals are just otherwise than the facts of the above referred to cases and explained that the provision of Section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is akin to that of a suit in a Court of the first instance and even in a suit, it is permissible in the given facts and circumstances and under the provision of the law to attach the property before a decree is passed and appoint a receiver and to make a provision by way of interim measure in respect of the property in suit. Section 17 cannot be regarded as appeal though it is named as such, but it is a dispute at the first instance. After so holding the apex Court opined that Sub-section (2) of Section 17 is bad on the ground that it imposed condition of depositing 75% of the amount in dispute, while approaching the adjudicating authority of the first instance, not in appeal (ii) there is no determination of the amount due as yet (iii) the secured assets or its management with transferable interest is already taken over and under control of the secured creditor (iv) no special reason for double security in respect of an amount yet to be determined and settled (v) 75% of the amount claimed by no means would be a meager amount (vi) it will leave the borrower in a position where it would not be possible for him to raise any funds to make deposit of 75% of the undetermined demand. As observed by the Supreme Court, the SERFASI Act cannot be compared to the TNGST Act.

15. It is also needless to state that assessment of tax cannot be regarded as adversarial in nature, but only assessing the correct amount of tax as returned by the assessee in their returns as per the statutory provisions of the Act.

16. The State Legislature has given statement of objects and reasons for the above said amendment to the following effect:

Huge amount of sales tax levied have been disputed by the assessee under the Tamil Nadu General Sales Tax Act, 1959 (Tamil Nadu Act of 1959) and are locked up in litigations before various appellate forums under the said Act.

2. In order to avoid accumulation of huge amount from being locked up in such litigations, the Government have decided to amend Sections 31, 31-A, and 36 of the said Act so as to make the appellants to pay in addition to the admitted tax. 25% of the difference of tax assessed by the authority concerned and the tax

admitted by the appellant at the first stage of appeal and payment of tax as ordered by the Appellate Assistant Commissioner or Appellate Deputy Commissioner at the second stage of appeal compulsory for entertaining such appeal.

3. The Bill seeks to give effect to the above decision.

17. Section 12 provides for assessment after the completion of the assessment year. All necessary safeguards such as issuance of summons prior to assessment for production of accounts, issuance of pre-assessment notice intimating the proposal of assessment, calling for objections, if any, to the proposal, and if necessary in a given circumstance giving personal hearing are all built in the statute itself. Only after following the above procedures assessment would be made. Hence, the assessment made upon following the above procedural safeguards could be regarded as akin or similar to the adjudicated decree passed in a suit.

18. Thereupon Section 31 provides for an appeal to the Appellate Assistant Commissioner with the condition of pre deposit of 25% of admitted tax. Likewise Section 36 provided for payment of tax as ordered by the first appellate authority at the second stage of appeal.

19. Section 24 of the Act provides for refund of the excess tax by the assessee and it further provides for payment of interest at 9% if the refund is made after 90 days. In view of the above procedural safeguards and in the light of the catena of decisions of the Supreme Court referred above, the first contention has to be rejected.

20. The second contention that the impugned provision interferes with the quasi judicial function cannot be accepted in view of the categorical exposition of law as laid down by the Supreme Court in the case referred to above. The division bench decision relied on by the learned Counsel for the petitioners to support the contention is totally extraneous to the facts of the present case. That was a case in which Section 23A of the Land Acquisition Act, 1896 as amended by Land Acquisition (Tamil Nadu Amendment) Act, 1996 was questioned as unconstitutional. The said provision imposed restriction on the withdrawal of compensation to the effect that the amount of compensation awarded by any Court under the Land Acquisition Act shall be deposited in that Court and the Court shall not allow the person to withdraw the amount till the final disposal of the matter in a higher forum. By means of a proviso the restriction has been mellow down that if the Court considered that it is absolutely necessary to allow the person to withdraw the amount of compensation, the Court may allow him to withdraw only the amount awarded by the Collector. That provision came to be considered by the Division Bench.

21. The said provision has been struck down by the Division bench following the Supreme Court decision in the case of State of Tamil Nadu and Others Vs. Ananthi Ammal and Others, wherein the court stressed the need for providing

timely compensation in the words of the Supreme Court:

The owner of the land or other person interested therein is required to be paid compensation in lieu of land forthwith to re-establish himself whether in a new residence or another piece of agricultural land or otherwise.

In that case the Supreme Court struck down the Tamil Nadu Acquisition of Land for Harijan Welfare Schemes Act, 1978, which provide for payment of tax in equal annual instalment not exceeding five where the amount of compensation exceeded Rs. 2,000/-. The Court further found on facts -

In the vast majority of cases referred to the reference Court it is found that the compensation awarded by the Collector is inadequate, and does not represent the true market value. Invariably, the reference Court enhanced the amounts of the compensation. Such awards are appealed against some times by the claimants who seek further enhancement, but more often by the State which objects to the extent of enhancement.

22. In that situation of the case, section provides for restriction for payment of compensation awarded has been held to be interfering with the power of the High Court. That decision, by any stretch of imagination, cannot be regarded as a comparable provision to the case on hand. Hence, this contention also is liable to be rejected.

23. In respect of the last of the contentions that despite the restriction imposed in the substantive provision for maintaining an appeal or second appeal, the authorities are having incidental or ancillary power to pass orders of waiver of the pre condition, I am of the view that this argument is misconceived and misplaced in view of the discussion made in the earlier points. Reliance was made by the learned Counsel on the decisions of the Supreme Court in the cases of *I.T.O v. Mohd. Kunhi* AIR 1969 SC 430; *Collector of Customs, Madras Vs. Madras Electro Castings P. Ltd.*, and *C.C.E. v. Kumar Cotton Mills Pvt. Ltd.* 2005 180 ELT 434. These decisions explain the incidental and ancillary power of the appellate authority when the appeal was entertained and pending consideration in the absence of any specific provision for grant of any ancillary and incidental relief. There cannot be any second opinion about the proposition which explains the concept of incidental and ancillary power of the appellate authority when the appeal is pending, but those decisions, I am afraid, in no way support the contention of the petitioners that even before the substantive appeal is filed and entertained, that ancillary power of the appellate authority could be exercised in order to waive or reduce the amount statutorily directed to be paid for maintaining or entertaining an appeal. Of-course, the authorities are having incidental and ancillary powers pending appeal before them. Thus, this contention has no legs to stand.

24. In view of the discussion made in the foregoing paragraphs, the writ petitions fail and are dismissed. No costs.