

(2016) 11 KL CK 0019
In the High Court Of Kerala
Case No : O.P.(Taxes) No. 56 of 2016

M/s Kenton Leisure Services Pvt Ltd.

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 02-11-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2017) 1 KLT 671

Hon'ble Judges : Mr. Thottathil B. Radhakrishnan and Mr. Devan Ramachandran, JJ.

Bench : Division Bench

Advocate : Sri. A. Kumar, Sri. P.J. Anilkumar, Smt G. Mini(1748) and Sri. P.S. Sree Prasad, Advocates, for the Petitioner; Sri. Mohammed Rafiq, Senior Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Thottathil B. Radhakrishnan, J.—Under challenge through this original petition filed invoking Articles 226 and 227 of the Constitution, is a common order issued on four different Tax Appeals decided by the Appellate Tribunal in terms of the provisions of the Kerala Tax on Luxuries Act, 1976, the "Act", for short, pertaining to assessment years 2001-02 to 2008- 09.

2. Heard the learned counsel for the petitioner-assessee and the learned Senior Government Pleader for the Department of Commercial Taxes.

3. The assessment proceedings which were made subject to consideration in the appeals before the Tribunal were for periods that fell within the canopy of penalty orders which were confirmed by this Court under Article 226 of the Constitution through W.P.(C) No.673 of 2012, decided on 07.07.2014 dilating on different issues touching the facts which related to those assessment years. It was held that the petitioner herein was liable to be covered under the provisions of the Act and that it had committed default in not applying for registration. The penalties imposed by the authorities under the Act were sustained. Considering the nature

of activities and transactions of the petitioner as questions of facts and law, the learned single Judge held in that writ petition that the activities of the assessee for the years in question were those that would fall under the provisions of the Act and therefore, the imposition of penalty was in order. However, the learned single Judge trimmed down the penalty imposed to be equal to the tax evaded. In writ appeal, the Division Bench through Ext.P18 judgment, noticed the contents of the decision of the learned single Judge and held that there is no scope for interference with the well considered judgment of the learned single Judge. The Division Bench, however, made it clear that the observations and findings in the judgment would not stand in the way of the appellant (petitioner herein) to raise its contentions before the assessing authority and for that authority to consider the same on merits. Consequential proceedings were left open on conclusion of assessment proceedings.

4. The assessment proceedings went up the hierarchy to the Tribunal and it was held that the decision rendered by this Court through the learned single Judge as per Ext.P17 judgment and by the Division Bench in Ext.P18 essentially concluded the parties on the issue as to coverage under the Act and therefore, there was no question of reopening that issue in the assessment proceedings. This is what is pithily under challenge in this original petition. As a corollary, the petitioner has also sought a declaration that it could not be brought under the cover of the Act. It is for this purpose that Article 226 appears to have been invoked, apart from Article 227 of the Constitution.

5. The learned counsel for the petitioner argued that in terms of the law laid by the Apex Court in *Bharat Sanchar Nigam Ltd. and another v. Union of India and others* [(2006) 145 STC 91 (SC)], it has to be noted that as between the assessee and the State, there would be no principle of *res judicata* in relation to every subsequent years of assessment. He relied on the decision in *Mathuram Agrawal v. State of M.P.* [(1999) 8 SCC 667] and y as quoted in *Commissioner, Central Excise and Customs, Kerala v. Larsen and Toubro Limited* [(2016) 1 SCC 170] to argue that in matters of taxation, there could be no exercise by which anything that has not covered could be brought in and subjected to tax.

6. The learned Senior Government Pleader for Department of Commercial Taxes, however, argued that the earlier judgments, namely, Exts.P17 and P18, essentially conclude the petitioner on the question of coverage as far as the years 2001-02 to 2008-09 and April-May, 2009-10 are concerned. This submission is made on the basis of the fact that those proceedings related to those periods. He also mentioned that the Bench decision in Ext.P18 affirming Ext.P17 judgment of the learned single Judge was carried to the Supreme Court in a Special Leave Petition which was later on withdrawn. We record that submission.

7. The law laid in *Bharat Sanchar Nigam Ltd. (supra)* drawing the distinction between *res judicata*, *per curiam* and principles that would apply in the range of law relating to precedents from year to year as between an assessee and the

State in relation to taxation is fairly well settled. There is no doubt about it. However, the question in the case in hand is as to whether the finding of fact rendered, inter partes, on the basis of the materials on record in writ jurisdiction on the question as to the nature of the transaction of the assessee concerned and which has gained finality at the hands of the writ court could again be reopened on the premise that the same can be subjected to repeated attack even during assessment proceedings for the periods in relation to which the High Court was called upon and it answered the invitation to adjudicate on and gave a verdict on the questions of facts raised by the assessee leading to Exts.17 and 18 judgments. In our considered view, such relief is not available to the petitioner. The findings of facts which have been rendered in writ jurisdiction through Ext.P17 judgment and affirmed in Ext.P18 judgment by the Division Bench clearly exclude any adjudication by any inferior Tribunal, Court or Authority or even in co-equal jurisdictions, in any manner reopening the issue concluded inter partes on the question of the nature of the transaction which the assessee had carried during the periods in question, that is to say, 2001-02 to 2008-09 and April and May, 2009-10. The findings of facts rendered in Ext.P17 left uninterfered with by the Division Bench through Ext.P18 concludes the assessee as well as the State on such issues. It is not merely a matter which is in the realm of precedent law. It also traverses into findings of facts which are conclusive as between the parties for particular assessment years in question. In that view of the matter, we do not find our way to disagree with the findings of the learned Tribunal before which the only issue that was raised was as to coverage and not as to the quantification in the assessment proceedings.

8. Contextually, it may not be out of place for us to note that a Division Bench of this Court in *Mayilvahanam Marketing, Shoranur v. Addl. Sales Tax Officer, Ottappalam* [VST-2008- 12-296] had reiterated the requirement to maintain uniformity, judicial decorum and continuity of law; also by ensuring that the law of precedents advises that a bench of co-equal jurisdiction should follow a binding earlier decision of co-equal jurisdiction and the binding effect of a decision does not depend upon whether a particular argument was considered therein. The said precedent was also laid down in the realm of fiscal laws. We reiterate that principle.

9. Now, we proceed to consider the question as to whether it would be proper for this Court to reopen the proceedings as if we would exercise Article 226 authority to get over the earlier binding judgments rendered in statutory jurisdictions or in jurisdiction under Article 227. The earlier round of litigation at the instance of the assessee was invoking Article 226 of the Constitution. Having found its waterloo there, the assessee lost his appeal at the hands of Division Bench as well. Those judgments are rendered in writ jurisdiction and it is jurisprudentially impermissible for the High Court to reopen its earlier verdict through subsequent proceedings at the instance of the same parties and by interpolating the earlier view following an adjudication inter partes. We are not confined merely to the principles of law relating to precedents but in such proceedings, we would

necessarily, and obediently, be tied down by principles akin to that of res judicata including concept of constructive res judicata.

10. In view of the above, we hold that no relief could be granted to the petitioner under Article 226 of the Constitution.

11. For the aforesaid reasons, this Original Petition fails and the same is accordingly dismissed.