
(2016) 01 KL CK 0050
In the High Court Of Kerala
Case No : W.A. No. 1844 of 2014

Murugan Agencies

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 14-01-2016

Acts Referred:

Constitution of India, 1950 — Article 142, Article 265

Citation : (2016) 1 KerLJ 399 : (2016) 1 KHC 415 : (2016) 1 KLT 554

Hon'ble Judges : T.B. Radhakrishnan and Anu Sivaraman, JJ.

Bench : Division Bench

Advocate : M. Gopikrishnan Nambiar, P. Gopinath, P. Benny Thomas and K. John Mathai, for the Appellant; Sebastian Chempappilly, GP, for the Respondent

Final Decision : Allowed

Judgement

Anu Sivaraman, J.—1. This appeal is preferred by the unsuccessful writ petitioner/ assessee against the judgment of the learned single Judge dismissing W.P.(C). No. 17385 of 2008. The writ petition was filed challenging Exhibits P13 and P15 orders issued by the Commercial Tax Officer refusing refund of the tax already paid under the Kerala Tax on Luxuries Act, 1976 (for short, the Act, 1976"). The appellant is a firm which is a registered dealer in tobacco products. It had preferred O.P. No. 2190 of 1995 challenging the liability for payment of luxury tax. An interim order was issued in that case on 10.2.1995 refusing to stay the operation of Section 4A of the Act, 1976, but directing the petitioner to file returns. So far as the payment of tax contemplated under Section 5(3) of the Act, 1976 is concerned, the petitioner was directed to furnish bank guarantee to the satisfaction of the assessing authority on or before 15th of every month in relation to the tax payable for the preceding month. Thereafter, by judgment dated 4.8.1977, the writ petition was allowed following the judgment in O.P. No. 5478 of 1994. By the said judgment, Section 4A of the Act, 1976 and the schedule thereto as amended by the Finance Bill, 1994 were declared unconstitutional, invalid and inoperative and the said provisions were set aside.

It was urged in the writ petition that the appellant had been furnishing returns as provided in the interim order till the provision was declared unconstitutional. However, in the matter of furnishing of bank guarantee, it is submitted that by Exhibits P1 to P5, the commercial tax authorities had requested the appellant to make payment of at least a portion of the total luxury tax in cash in lieu of the bank guarantee already furnished. It was specifically held out that "if the case is decided in your favour, you can claim refund of the tax remitted". It is submitted that the appellant had made payments in lieu of the bank guarantee believing the specific written undertaking by the authorities that the amounts would be refunded in case it succeeds in the writ petition. According to the appellant, a total amount of Rs. 11,24,92,135/- was paid by the appellant for the period from January, 1995 to May, 2001 as cash payment in lieu of the bank guarantee. As stated earlier, O.P. No. 2190 of 1995 was allowed by judgment dated 4.8.2001. The writ appeal filed by the State was dismissed. The matter was taken up before the Apex Court and by Exhibit P9 judgment, the Apex Court dismissed the civil appeal relying on the decision reported in *Godfrey Philip India Limited v. U.P.*, (2005) 2 SCC 515. The appellant thereupon approached the respondents seeking refund of the amounts paid in lieu of the bank guarantee as directed by this Court. It was the specific case of the appellant that the amounts collected by the respondents in lieu of the bank guarantee as ordered by the Court, were in the nature of a loan advanced by the appellant and it was on the basis of the specific undertaking that such amounts would be refunded in case of his success in the pending litigation that such amounts happened to be paid. However, the Commercial Tax Officer, by Exhibit P13, relying on the decision of the Supreme Court in *Godfrey's* case (supra), rejected the request made by the appellant and stated that the tax paid shall not be refunded. It was the contention of the Revenue that the Supreme Court had in the *Godfrey's* case (supra) relying on an earlier judgment in *Somaiya Organics (India) Ltd. v. State of UP*, (2001) 5 SCC 519 held that even in cases where levy of tax or duty was found to be invalid prospectively, tax already collected would not be refundable. It was also held in *Godfrey's* case (supra) that if the assessee has collected any amount towards luxury tax from consumers/customers after obtaining interim orders, they are liable to pay the said amounts to the respective State Governments.

2. The appellant preferred Exhibit P14 reply pointing out that the finding regarding non refund of the duty already collected was entered in the *Somaiya Organics* case (supra) only in view of the fact that the Supreme Court had exercised its jurisdiction under Article 142 of the Constitution of India to strike down the offending provision only with prospective effect and therefore, there was no question of applying that principle to the instant case. It was pointed out that in view of the interim orders rendered in O.P. 2190 of 1955, the appellant need have only furnished a bank guarantee and that amounts had been paid only on the assurance of refund by the respondents. This was again rejected by Exhibit P15 order dated 21.1.2008, which prompted the filing of the writ petition.

3. The Revenue had filed a detailed counter affidavit admitting that an amount of

Rs. 11,24,92,135/- had been paid by the appellant towards luxury tax during the period from 1995 to 2001. However, it is stated that the Honourable Supreme Court in Godfrey's case (supra) had, relying on an earlier decision in Somaiya Organics" case (supra), held that while striking down the impugned Acts, it is not appropriate to allow any refund of tax already paid under the impugned Acts. It was further held that bank guarantees, if any, furnished by the assessee will stand discharged. It is further stated that while striking down the impugned Acts, the Apex Court did not think it appropriate to pass orders directing refund of taxes already paid under the Act. It is further contended that the appellant had continued to collect amounts towards luxury tax from consumers/customers even after obtaining interim orders from this Court. It is therefore urged that the amount paid by the appellant was the amount collected from the consumer and therefore no prejudice was caused to the appellant by the refusal to refund the said amount. The learned single Judge accepted the said contention raised by the Revenue and held that the appellant was not entitled to refund of tax already paid. Aggrieved, the appellant has come up in this appeal.

4. Heard Sri. P. Gopinath Menon, learned counsel for appellant and Sri. Sebastian Champappilly, Special Government Pleader appearing for the Commercial Taxes Department.

5. The learned counsel for the appellant would submit that the instant case is different and distinct from the cases referred to by the learned single Judge in as much as the amounts of which the appellant is claiming refund of are not the amounts paid as tax. Article 265 of the Constitution of India specifically enjoins that no tax shall be levied or collected, except by authority of law. The appellant had challenged the levy of luxury tax by filing O.P. No. 2190 of 1995. While admitting the writ petition, the learned single Judge had directed the appellant to file monthly returns and to furnish bank guarantee to the tune of his tax liability. The authorities had however requested the appellant to pay the amounts due as tax in cash in lieu of the bank guarantee which was to be furnished by the appellant. The respondents had specifically undertaken that the amounts so paid in cash would be refunded in case the appellant was successful in the litigation. The litigation ultimately ended in the quashing of Section 4A of the Kerala Tax on Luxuries Act, 1976. The appellant, who was to have furnished only bank guarantees in terms of the interim order available in this case, had paid amounts in cash on the specific understanding that such amounts would be refunded if the appellant was successful in the litigation. In the above view of the matter, it is urged by the learned counsel that the refusal to refund the amounts so collected from the appellant would be a fraud on them by the statutory authorities and would also amount to a confiscatory act on their part which is not supported by any due process of law. It is also urged by the learned counsel that the appellant had furnished all available materials before the respondents to prove that they had made no collection of luxury tax from their customers and that the amount paid by them in lieu of the bank guarantee was made out of their own fault and therefore the appellant is eligible for refund.

6. Per contra, it is contended by the learned Special Government Pleader for Commercial Tax that the decisions in Somaiya Organics" case (supra) and Godfrey's case (supra) would specifically go to show that the appellant was not entitled to refund of tax already paid by them even in case the levy was later found to be bad in law. The amounts paid as tax till the date of the invalidation of the changing provision in the Act was not liable to be refunded is the principle laid down in the above decisions, according to him. It is further contended that no reliable material was produced by the appellant before the authorities to prove that the appellant had not collected luxury tax from their customers. The appellant who was the dealer under the Act was statutorily enjoined to collect such tax from their customers or end consumers as the case may be. Since the tax on luxuries was included in the MRP, the appellant had evidently collected the same for the period in question and therefore, the appellant was only remitting the tax collected by them and could not be held to be entitled to refund in the light of the finding of the Apex Court in Godfrey's case (supra), it is urged.

7. We have gone through the contentions and the materials on record as well as the judges papers in W.P(C).17385 of 2008 as well as O.P.51278 of 1994. We find that the initial order of the learned single Judge at the time of admission of the O.P. was as follows:

"....There will be no stay of operation of Section 4A as prayed for by the petitioner. The petitioner shall comply with the provisions of the Kerala Tax on Luxuries Act, 1976 regarding filing the return. But, so far as the payment of tax contemplated by Section 5(3) is concerned, the petitioner shall furnish bank guarantee to the satisfaction of the assessing authority on or before the 15th of every month in relation to the tax payable for the preceding month. If default is committed in complying with any of these conditions, the State will be entitled to recover whatever amount is due by way of luxury tax from the petitioner."

8. The writ petition was ultimately allowed on 4.8.2001. The appeal to the Division Bench as well as the Civil Appeal preferred against the same were dismissed. However, during the pendency of the writ petition, Exhibits P1 to P5 communications were issued requiring the appellant to make payments on the specific undertaking that such amounts would be refunded if the appellant was successful in the litigation. We have gone through the judgment referred to by the learned single Judge and the Commercial Tax Officer to deny the benefit of refund to the appellant. The relevant findings in the judgment of the Apex Court in Somaiya Organics" case (supra) are as follows:

"35. Furthermore in view of the enunciation of the law by this Court in Oswal Agro Mills Ltd. case a bank guarantee which is furnished cannot be regarded as payment of excise levy which the Government is entitled to retain. The furnishing of a bank guarantee is ordered normally in order to ensure collection of dues. Where, however, the State, as in the present case, has been held not to be entitled to collect or realise vend fee after 25-10-1989 it cannot be allowed to invoke the bank guarantee and realise the amount of vend fee. What cannot be

done directly cannot be done indirectly either. Furnishing of bank guarantee is only a promise by the bank to pay to the beneficiary the amount under certain circumstances contained in the bank guarantee. Furnishing of bank guarantee cannot tantamount to making of payment as it was to avoid making payment of the vend fee that bank guarantees were issued. The respondents, in other words, are not entitled to encash the bank guarantees and realise vend fee in respect of the period prior to 25-10-1989.

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39. Lastly, while relying on *Mafatlal Industries Ltd. v. Union of India* Shri Dwivedi submitted that the appellants had realised the amount of vend fee payable by taking that figure into account while determining their sale price and, therefore, the State is entitled to recover the same as it would otherwise result in unjust enrichment to the appellants.

40. In *Mafatlal* case the principle of unjust enrichment was invoked as refund was claimed even though the amount of excise duty paid had already been recovered. This principle resulted in the Court declining to order refund. The principle of unjust enrichment does not apply in the present case, in view of the direction given in second *Synthetics* case that no refund be given. This is in line with the principle of unjust enrichment. But that principle cannot be extended to give a right to the State to recover or realise vend fee after the statute has been struck down and it has been categorically stated that "the respondent States are restrained from enforcing the said levy any further...".

The contention of the respondents in the teeth of the aforesaid direction cannot, therefore, be accepted. This is apart from the fact that there is no factual basis on which this Court can conclude that the appellants have in fact realised the amount of vend fee and allowing them to retain it will result in their getting enriched unjustly."

That was a case where the provision had been overruled only prospectively by the Supreme Court exercising its extraordinary powers under Article 142 of the Constitution of India. It was in such circumstances that it was held that no refund of the tax already collected and paid need be made by the Revenue. However, in the said judgment itself it has been specifically stated that furnishing of bank guarantee does not amount to payment of tax and is only a guarantee for future payment. Payment of tax not having been made, no bank guarantee provided in terms of the interim order could be encashed was the finding of the Apex Court.

9. In *Godfrey's* case (*supra*) also this finding of the Apex Court had been adverted to hold that no refund of tax already paid need be made. It was further pointed out that in case the tax paid is the tax collected from end users or customers, the dealer would not be entitled to refund. In the instant case, the appellant had a specific case that no amount had been collected as tax from the customers. The appellant had produced certificates from their auditors, which

was the only available material to prove their contention. The appellant contends that the rejection of the appellants claim for refund for the reason that he had produced only a certificate of the Chartered Accountant to prove that the amount claimed as refund had not been passed on to its customers by the petitioner is illegal and is against the decision of this Court reported in *Cadbury India Ltd. v. Union of India*, , 2015 (315) E.L.T. 488 (Ker.).

10. In any view of the matter, the appellant contends that since the appellant was only enabled by the provisions to collect tax from the customers, there was no mandate to do so and the appellant had, as a matter of fact, not collected such tax. In support of this contention, the appellant places reliance on the decision of the Apex Court in *Kanthi Enterprises and others v. State of Karnataka and others*, , (2002) 7 SCC 283. What arises from a consideration of the facts in this case is that the appellant had been enjoined by an interim order of this Court only to furnish bank guarantee for amounts payable as luxury tax. The appellant was requested to pay the tax in cash in lieu of the bank guarantee on the specific understanding that such amounts would be refunded, if the appellant was successful in the litigation. This was specifically held out in the communications produced as Exhibits P1 to P5 by the appellant. Had the appellant furnished bank guarantee as directed by this Court, going by the ratio of the decision in *Somaiya Organics's* case (*supra*), that bank guarantee could not have been enforced against the appellant and the same would have to be discharged. All the similarly situated petitioners, who had furnished bank guarantee in terms of the interim orders, were therefore entitled avail the benefits of the interim order. The question of unjust enrichment does not arise in the instant case, since the appellant was enjoined only to furnish bank guarantee and therefore would not be liable to have the same encashed. It is only because the appellant had paid the amounts as requested by the respondents by Exhibits P1 to P5 in cash that the question arises before us for consideration.

We are of the definite opinion that the State cannot be permitted to take advantage of a wrongful promise held out by it to deprive the appellant of the amounts that it would otherwise have been entitled to, had it not succumbed to the assurances held out in Exhibits P1 to P5. In the above view of the matter, we are convinced that the appellant is entitled to refund of the amounts paid in pursuance of Exhibits P1 to P5 communications. The appeal is accordingly allowed. The judgment of the learned single Judge is set aside and writ appeal and writ petition are ordered accordingly.