(2008) 08 KAR CK 0055

In the Karnataka High Court

Case No : Writ Petition No. 11473 of 2007

Prakrith Builders Pvt. Ltd. APPELLANT

Vs

State of Karnataka and Others RESPONDENT

Date of Decision : 11-08-2008

Acts Referred:
Karnataka Sales Tax Act, 1957 — Section 12 (3), 22 (3), 22 (5)

Citation : (2009) 19 VST 589

Hon'ble Judges : D.V. Shylendra Kumar, J

Bench : Single Bench

Advocate : Raghuraman and Chythanya K.K, for the Appellant; K.M. Shivayogiswamy, High Court Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

D.V. Shylendra Kumar J.

1. Writ petitioner is a private limited company having its registered office in the first floor of R. K. Commercial Complex, Behind Ramamurthy

nagar Police Station, Banaswadi Village Panchayat, Bangalore 560 016 and claims to have been engaged in construction of residential apartments

on its own lands and sale of the same on and after construction.

2. It is the version of the petitioner that the petitioner had started its business of construction and sale of flats in the year 2001-02 and the said

business had been carried on up to March 31, 2005.

3. It appears that the Deputy Commissioner of Commercial Taxes (Intelligence-I), South Zone, Bangalore 560 020 had issued notice to the

petitioner u/s 12(3) of the Karnataka Sales Tax Act, 1957 (for short, ""the Act"") and had finalised the same for the years 2001-02 to 2004-05 in terms of the order dated November 29, 2006 and followed it up with demand notice for payment of the amount determined under the order.

4. Under the assessment order, it appears that the assessing authority had taken the view that the petitioner was liable to pay taxes under the

provisions of the Act.

5. It is also the version of the petitioner that the petitioner had preferred appeals against these orders before the Joint Commissioner of Commercial

Taxes (Appeals) in terms of the provisions of Section 20 of the Act, but those appeals having been dismissed in terms of common order dated

January 19, 2007, the petitioner wanted to pursue further remedies by way of filing second appeal before the Karnataka Appellate Tribunal by

invoking the provisions of Section 22(3) of the Act. It is because the petitioner is facing problems in getting his appeal admitted and also in seeking

interim order of stay of recovery of the amount as determined by the assessing authority and affirmed by the first appellate authority and having

found provisions of Section 22(3) and 22(5) of the Act, particularly, as amended by Karnataka Act No. 26 of 2004 in force from August 1, 2004,

has approached this Court questioning the constitutional validity of the provisions of Sub-section (3) of Section 22 as also Sub-section (5) of

Section 22 of the Act.

6. The main grounds urged in support of the writ petition are that the appeal remedy provided u/s 22(3) of the Act is virtually rendered negatory by

the almost impossible condition stipulated for making the appeal tenable or for the Tribunal to admit and entertain the appeal which is the

requirement of deposit of 50 per cent of the amount in dispute in the appeal before the Tribunal and it is contended that this provision is violative of

Articles 14 and 19 of the Constitution of India and therefore is liable to be declared as unconstitutional.

7. Likewise, the validity of Section 22(5) of the Act is also questioned on the premise that the provision virtually interferes with the discretion of the

Tribunal for granting an interim order in favour of the appellant; that such provisions are also virtually in the teeth of the vested right of appeal

conferred on the assessee under the statute ; that the provisions of this nature mandating deposit of high amount as 50 per cent even in a situation

where the amount as determined by the assessing authority is an arbitrary amount is unreasonable provision ; that it is violative of Article 14 of the

Constitution of India, etc.

8. The petitioner has also sought for quashing of the proceedings before the court of the Spl. JMFC (Sales Tax), Seshadripuram, Bangalore in

Civil Misc. No. 06/2007 wherein the respondents have taken steps for recovery of the amount of Rs. 39,54,049 which is the amount determined

as due and payable by the petitioner for the years 2001-02 to 2004-05 for recovery of this amount as though it is fine under the provisions of the

Criminal Procedure Code.

9. Notice had been issued to the respondents. The respondents-State and the statutory authorities have entered appearance through Sri K. M.

Shivayogiswamy, learned Government Pleader and have also filed statement of objections wherein the validity of the provisions is defended.

10. The facts leading to the determination of the amount as sales tax liability on the part of the petitioner, particularly, after the inspection of the

premises and by reopening the proceedings and by calling in aid Section 12(3) of the Act for the reason the petitioner had not filed any returns

earlier and for passing such assessment orders the authority had also placed reliance on the ruling of the Supreme Court in the case of K. Raheja

Development Corporation Vs. State of Karnataka, are all narrated and it is contended that the demand is justified; that while the petitioner can

avail of the appellate remedy u/s 22 of the Act, it is bound to comply with the conditions as provided in the very section; that there is no merit in the

challenge to the validity of this provision.

11. It is also pointed out that an appellate remedy can be availed of only in terms of the statute provided for such appellate remedy and not

otherwise ; that the petitioner has no vested right of appeal in terms of Section 22 of the Act even without complying with the conditions

enumerated therein.

12. I have heard Sri Chythanya, learned Counsel for the petitioner and Sri K. M. Shivayogiswamy, learned Government Pleader.

13. It is very vehemently submitted by Sri Chythanya, learned Counsel for the petitioner, that the provisions of Section 22 of the Act are very

obnoxious in so far as imposing the condition of deposit of 50 per cent of the amount in dispute in the appeal and also even the provision relating to the conferring of discretion on the Tribunal in granting stay of any part of the other 50 per cent disputed in the appeal and such discretion is to be

decided only for deposit of the other 50 per cent.

14. Submission is that such provisions are virtually arbitrary for the reason that they do not make any distinction between such assessees on whom

the determination might be proper and valid and the case of such assessees on whom arbitrary assessment orders might have been passed.

15. It is also submitted that an assessee suffering an illegal or fanciful order is also being required to deposit 50 per cent of the amount in dispute,

which is a very onerous condition as if the assessee is not in a position to deposit such amount, the remedy of appeal itself is denied and that is how

the discrimination is brought about.

16. It is also submitted that calling upon the assessees like the present petitioner who have closed their business and reopening the assessment for

earlier years and raising demand is also violative of Article 19 of the Constitution of India.

17. Sri Chythanya, learned Counsel for the petitioner, would also draw attention to yet another prayer in the writ petition which is one for issue of

directions to the Tribunal to entertain the appeal even without any such deposit in terms of the provisions of Section 22(3) of the Act by exercising

the inherent power and jurisdiction of this Court in writ jurisdiction.

18. In support of such submission, learned Counsel for the petitioner would draw attention to the decision of the Madras High Court in the case of

Royal Insulation (P) Ltd. Vs. The Commercial Tax Officer, Mad and the decision of the Supreme Court in the case of L. Chandra Kumar Vs.

Union of India and others, .

19. What is sought for is that the petitioner may be relieved of the rigor of operation of the statutory provisions for the present and the Tribunal

directed to entertain the appeal and dispose of the same on merits as otherwise it would put undue hardship on the petitioner and it virtually would

deprive the appellate remedy before the Tribunal.

20. Sri K. M. Shivayogiswamy, learned Government Pleader, also seeks to ; place reliance on the ruling rendered in the case of Commercial Tax

Officer, XII Circle, Bangalore and others Vs. Swathi Traders, wherein the Division Bench of this Court pointed out that the right of appeal is neither an inherent right nor a fundamental right but a right conferred under the statute and can be availed of only in the manner as provided in the

statute and not independent of statutory provisions.

21. Sri Shivayogiswamy, learned Government Pleader, would also place reliance on the decision of the Supreme Court in the case of Seth Nand

Lal and Another Vs. State of Haryana and Others, and particularly paragraph 19 of this judgment which reads as under:

19. 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 subsections (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 land holdings 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 land

holdings 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 the 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/revision authority to relax or waive the condition, cannot be regarded as onerous or unreasonable. The challenge to Section 18(7) must, therefore, fail.

22. Sri Shivayogiswamy, learned Government Pleader, also points out that this Court while issuing notice had granted a conditional interim order to

stay further proceedings before the Magistrate subject to the condition that the petitioner deposits 50 per cent of the amount which is subject-

matter of the appeal before the Tribunal ; that the petitioner never deposited this amount in terms of the order dated October 3, 2007 and

therefore the respondents had brought this to the notice of this Court and therefore the order had been further clarified by this Court on November

6, 2007 which reads as under:

DVSKJ:

November 6, 2007

While Ms. Manjula, learned Counsel for the petitioner, seeks two weeks'' time, Ms. Niloufer Akbar, learned AGA, submits that the petitioner

having not complied with the conditional stay order dated October 3, 2007 directing the petitioner to deposit 50 per cent of the amount sought to

be recovered from it under the proceedings before the Special JMFC (Sales Tax) and as the petitioner has not deposited the amount so far, the

respondents should be permitted to proceed further in the matter.

If the petitioner, who had been granted a conditional stay order, has not complied with the conditions, the stay order does not operate. The

respondent may follow up the consequence, if they so think.

that the petitioner is not even a bona fide litigant prosecuting for any genuine relief, but prosecuting this petition only to postpone or evade payment

of tax as determined and therefore the writ petition should be dismissed without examining anything further on merits in this case, etc.

23. While it is a fact that the petitioner has not complied with the interim order stipulating condition of deposit, I find that the petition is also not

having any merit for the simple reason that there is no infirmity, particularly, to fall foul of Article 14 or 19 of the Constitution of India in the

statutory provision of Section 22(3) and 22(5) of the Act.

24. Sub-sections (3) and (5) of Section 22 of the Act read as under:

22. Appeal to the Appellate Tribunal.-(3) The appeal or the memorandum of

cross-objections shall be in the prescribed form, shall be verified in

the prescribed manner, and in the case of an appeal preferred by any person other than an officer empowered by the State Government under

Sub-section (1), shall be accompanied by proof of payment of one half of tax or other amount disputed and also a fee equal to two per cent of the

amount of assessment objected to, provided that the sum payable in no case be less than two hundred rupees or more than one thousand rupees.

[read with Rule 30(1)(a) to (c)]

(5) Notwithstanding that an appeal has been preferred under Sub-section (1), and notwithstanding anything contained in any other law for the time

being in force, tax or any other amount shall be paid in accordance with the assessment or other order made in the case:

Provided that the Appellate Tribunal may, in its discretion, stay payment of one half of the tax or other amount disputed, if the appellant makes

payment of the other half of the tax or other amount disputed along with the prescribed form of appeal:

Provided further that the Appellate Tribunal shall dispose of such appeal within a period of one-hundred-eighty days from the date of the order

staying proceedings of recovery of one half of tax or other amount and, if such appeal is not so disposed of within the period specified, the order of

stay shall stand vacated after the said period and the Appellate Tribunal shall not make any further order staying proceedings of recovery of the

said tax or other amount.

25. As pointed out by Sri Shivayogiswamy, learned Government Pleader, it is now quite well-settled that a right of appeal which is creature of the

statute can be availed of in the manner provided for in the statute itself and no one can claim any right independent of the statutory provision as

pointed out by the Supreme Court time and again. It is neither any fundamental right nor any vested right.

26. It is open to the petitioner to avail of the right of appeal in terms of the provisions of Section 22 of the Act itself. Even a discretion conferred on

the Tribunal for grant of interim order being made subject to certain compliances is again a statutory provision and the Tribunal on whom is

conferred the appellate jurisdiction and in whom is vested some discretion are all matters which can be so exercised in terms of the statute and not independent of it and therefore there cannot be any lacunae or illegality in a provision of this nature. The very assertion that the petitioner has some

vested right to prosecute the appeal in any manner he likes is more illusory than a reality.

27. In so far as the argument that the provision is violative of Article 14 of the Constitution of India as it treats such assessees against whom the

order might have been passed bona fide and other assessees who might have suffered an arbitrary order, is concerned, it is not an argument which

can be entertained as a right of appeal can be availed of by all assessees in the manner provided for by the statute and not otherwise. In fact, if

statute makes an invidious discrimination from person to person as to the manner in which the appellate remedy can be availed of, that will be the

case of discrimination and not the present statute as it stands as of now.

28. The argument relating to violation of Article 19 of the Constitution of India is also meritless for the reason that the liability is determined under

the statute provided for raising revenue to the State.

29. It is not as though the petitioner''s business is sought to be regulated or prevented and the right under Article 19 of the Constitution of India is in

no way touched upon under the assessment order or under the appeal provision. The appeal provision if at all is a provision which provides a way

of relief to the petitioner and cannot be construed as a provision denying right under Article 19 of the Constitution of India.

30. The provisions under which the Customs Act, 1962 stipulating pre-deposit had also come up for examination before the Supreme Court in the

case of Vijay Prakash D. Mehta and Another Vs. Collector of Customs (Preventive), Bombay, and the provisions have been upheld by the

Supreme Court. In fact, the Supreme Court had taken the view that no one has a right of appeal as a matter of course and even if an order is left

without any remedy of appeal, the order does not become bad as an arbitrary provision and order enabling provision. Such was the view taken by

the Supreme Court in the matter of damages under the Employee''s Provident Funds and Miscellaneous Provisions Act, 1952 (See Organo

Chemical Industries v. Union of India AIR 1979 SC 1803). On the authority of law as declared by the Supreme Court, a right of appeal is a

statutory right and can be availed of only in terms of the provisions of the Act and not otherwise. The provision does not become bad for imposing

such conditions as it is within the competence and wisdom of the Legislature.

31. I do not find any merit at all in the challenge to the Constitutional : validity of Section 22 of the Act. The manner in which the petitioner has

been prosecuting this petition even without complying with the conditional order passed by this Court also disentitles the petitioner from seeking

relief before this Court and rendering the petition liable for dismissal.

32. In the result, interim orders granted earlier in the writ petition are all : vacated and the writ petition is dismissed.

