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**(2005) 08 KAR CK 0040**

**In the Karnataka High Court**

**Case No :** Writ Petition No's. 8602 and 8603-24 of 2004

Pro Lab A Partnership Concern and Others

APPELLANT

Vs

The State of Karnataka and Others

RESPONDENT

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**Date of Decision :** 19-08-2005

**Acts Referred:**

Constitution of India, 1950 — Article 21, 265, 366 (29A)  
Karnataka Sales Tax Act, 1957 — Section 12 (3), 5 B, 58

**Citation :** (2006) ILR (Kar) 475 : (2006) 1 KCCR 30 : (2006) 144 STC 33

**Hon'ble Judges :** S. Abdul Nazeer, J;R. Gururajan, J

**Bench :** Division Bench

**Advocate :** R.N. Narasimha Murthy, for Aaren Associates, M.N. Harish, Vidya Harish, Santhosh S. Nagarale, Pradeep S. Sawkar and Sriranga S., for Sundra Swamy Ramdas and Anand, R.N. Narashimha Murthy, for Aaren Associates, M.N. Harish, Vidya Harish and T.N. Keshavamurthy, for the Appellant; S. Sujatha, AGA, for the Respondent

**Final Decision :** Allowed

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## Judgement

R. Gururajan, J.—All these Writ Petitions are referred to the Division Bench, by a Learned Judge of this Court in terms of an order dated 3.3.2004. All these Writ Petitions are disposed of by this common order.

2. Facts in W.P.Nos. 8602 and 8603-24/2004:

The petitioners are carrying on the business at different places within the State of Karnataka. They are registered as dealers under the Karnataka Sales Tax Act (for short "the Act"). The Petitioners operate photographic studios and are engaged in providing service to customers for processing and supplying photographs, photo prints and photo negatives. The petitioners submit that Section 5-B of the Act provides for levy of tax on the taxable turnover relating to transfer of property in goods involved in the execution of works contracts that are specified in the 6th Schedule to the Act. Entry No. 25 of this Schedule as it was enforced up to 6.9.1999 specified works contracts relating to "processing

and supplying photographs, photo prints, photo negatives" and during different years prescribed rate of tax at 8% and 10%. A Division Bench of this Court in its Judgment dated 6.9.1999 *Keshoram Surindranath Photo-Mag (P) Ltd., and Ors. v. Asst. Commissioner of Commercial Taxes (LR), City Division, Bangalore and Ors.*, (2001) 121 STC 175 declared Entry 25 of the 6th Schedule to the Act which specified the works contract of "processing and supplying photographs, photo prints and photo negatives" and also prescribed rate of basic tax payable, as beyond the scope of Article 366 of the Constitution of India. The SLP filed by the State was dismissed on 20.4.2000.

3. Later the Supreme Court rendered a Judgment in the case of *Rainbow Colour Lab and Anr. v. State of Madhya Pradesh and Ors.*, (2000) 118 STC 9 that the work carried out by M/s. Rainbow Colour Lab was only in the nature of service contract not involving any sale of goods and therefore it was not liable to sales tax. The activities carried on by the petitioners are identical with those of Rainbow Colour Lab as also in the case of *Keshoram Surindranath Photo Mag (P) Ltd.*, declaring Entry No. 25 of the 6th Schedule to the Act as beyond the scope of Article 366 of the Constitution of India. Thus, the activity of the petitioners as regards of "Processing and supplying photographs, photo prints" and the amounts received in connection with the said activity do not fall within the ambit of Section 5-B of the Act and that it does not attract any tax as these activities do not amount to "sales; as defined under Article 366(29A) of the Constitution of India. The State lacks legislative competence to levy sales tax on the activities carried on by the petitioners. The petitioners say that despite the above legal position, assessment orders were passed and endorsements were issued in respect of the petitioners" concern in obedience to circular instructions issued by the Commissioner for Commercial Taxes. It was the case of the State that the Supreme Court in *ACC Ltd. v. Commissioner of Customs*, 124 STC 59 has overruled the decision in 118 STC 9. The endorsements issued to the petitioners were challenged and also the Circular instructions by way of Writ Petitions in this Court. A Division Bench of this Court allowed the Writ Petition by way of an order dated 30.7.2003 reported in *Golden Colour Labs and Studio and Ors. v. The Commissioner of Commercial Taxes*, ILR 2003 Kar 4883. This Court while quashing the aforesaid circular and all orders and endorsements issued a declaration that the decision in *Keshoram Surindranath Photo-Mag (P) Ltd.*, rendered on 6.9.1999 and affirmed by the Supreme Court holding that Entry-25, VI Schedule of the Act is unconstitutional for want of legislative competence, continues to be binding on the State Government.

4. The petitioners say that the State Government in the meanwhile proceeded to enact the Karnataka Taxation Laws Act, 2004 which came into force with effect from 29.1.2004. A copy of the Gazette Notification is at Annexure "A" Section 2(3) of the said amendment seeks to re-introduce on retrospective effect Entry 25 which is identical to the provision which was declared as unconstitutional for want of legislative competence in the aforesaid case. The amendment would be to make the processing and supply of photographs, photo prints and photo

negatives, right from the year 1989, although levy of sales tax on the said processes has held to be unconstitutional, as stated above. Aggrieved by the amendment, the petitioners have filed these Writ Petitions.

5. W.P.Nos. 10170-72/2004 are filed by M/s. Photo Emporium and others. The facts in these cases are as under:

6. The petitioners say that their main business is running of a photo studio which involves the making of photographs, photo prints, enlargements etc. For the assessment years 1990-91 to 1998-99, the petitioners have filed monthly and annual returns before the Assessing Authority under the Sales Tax Act and the returns were verified and assessment orders were passed for the said period. The petitioners refer to Rainbow Colour Lab's case and sought for rectification of the assessment order and sought for refund of tax paid by the petitioners. The Assessing authority accepted the same and passed rectification order and allowed refund of Rs. 1,72,748/-. Thereafter, the petitioners received 9 demand notices from the respondent. The basis for the said notices was Circular No. 17/2002-03 dated 27.9.2002 issued by the 3rd respondent directing rectification of orders of assessment. The petitioners filed objections. Thereafter rectification orders were passed and demand notices were issued. The petitioners challenged the said action in W.P.Nos. 3218-3235/2003 and W.A.Nos. 3079-96/2003 before this Court. This Court allowed the Writ Petitions and Writ Appeals. Subsequent to the Judgment of this Court, Entry-25 was enacted retrospectively with effect from 1.7.1989. Pursuant to the same, the 2nd respondent issued two notices u/s 12(3) of the Act for the years 2001-02 and 2002-03 proposing to make best Judgment assessment and proposing to levy certain taxes in the matter. The petitioner also say that during the pendency of the above matter, the respondent-authority has passed an assessment order in terms of Annexures "M", "N", "P" and "P1". Demand notices were sent to the petitioners in terms of Annexures "Q", "R", "S", "T", "U" and "V". The petitioners with these facts are seeking for various prayers including quashing of the assessment orders and the subsequent demand notices in terms of the prayers. The petitioners also say that by virtue of the retrospective amendment, the petitioner is being subjected to a levy a sum of Rs. 8,11,208/- and Rs. 7,53,118/- which is violative of Article 265 of the Constitution of India. The same is confiscatory and the levy is unconstitutional and liable to be quashed as such. The petitioners' right under Article 21 is violated by the respondent.

7. Facts and grievances in the connected cases are same or similar.

8. The State has entered appearance. Matters are heard for final disposal.

9. Sri. R.N. Narasimha Murthy, Learned Senior Counsel invites our attention to the various Judgments on the question in the case on hand. Ultimately, Learned Counsel says that in terms of Golden Colour Labs and Studio and Ors. v. The Commissioner of Commercial Taxes, (Supra) the impugned amendment is unconstitutional and liable to be set aside by this Court. Learned Senior Counsel

says that there are no subsequent Judgments considering Entry-25 or a similar entry in any other Judgment. Therefore, in terms of the Golden Colour Lab decision, the amendment is to be declared as unconstitutional for want of legislative competence in the light of a binding Judgment of this Court in Keshoram Surindranath photo-Mag (P) Ltd., and Ors. v. Assistant Commissioner of Commercial Taxes (LR), City Division, Bangalore and Ors. (Supra). He refers to various case laws to us in support of his submissions.

10. Sri Naganand, Learned Senior Counsel appearing in the connected Writ Petitions further argues that assuming without admitting that the Act is valid, even then, the demand notices are to be declared as unsustainable since the proceedings would show of confiscatory nature proceedings and that there could be no retrospective operation in so far as confiscatory proceedings are concerned. He wants the assessment orders/the demand notices to be declared as illegal and unconstitutional in these cases.

11. Smt. Sujatha, Learned Additional Government Advocate for the State invites our attention to the various Judgments to says that the Supreme Court in ACC Ltd. v. Commissioner of customs (Supra) has ruled that Rainbow Colour Lab and Anr. v. State of Madhya Pradesh and Ors. runs contrary to the Judgment of Constitution Bench of Supreme Court in Builders Association v. Union of India, (1989) 73 STC 379. In view of ACC Ltd. v. Commissioner of Customs case, the assessing authority has every right and jurisdiction to pass orders in the light of the amendment Act. She refers to the Golden Colour Lab's case to contend that a careful reading of the said Judgment would show that the State Government has been provided with a power to re-enact a provision similar to Entry-25 in terms of the findings in para 23 of the said Judgment. She therefore says that in the light of the findings of this Court, the State is fully justified in re-enacting the impugned amendment. She says that Courts have ruled that retrospective imposition of tax is a valid piece of legislation. She wants the petitions to be dismissed.

12. After hearing, we are of the view that the only question that requires for consideration is as to whether Section 2(3) and Section 5 of the Karnataka Taxation Laws (Amendment) Act of 2004 has the Constitutional approval or not in terms of the material placed before us.

13. To answer this question, this Court has to notice the history resulting in Karnataka Act No. 3/2004. Section 58 of the Act was inserted in the Act by Act No. 27/85 with effect from 1.4.1986. The term "works contract" is defined u/s 2(1)(v-I) as including any agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property. The 6th Schedule enumerates the description of works contract involving transfer of property in goods, in regard to which tax is payable u/s 5B. Entry-25 of 6th Schedule reads as under:

| Period                                                                           | Rate         | of        | Tax | No.            | Works       | Contract | u/s | 5-B |
|----------------------------------------------------------------------------------|--------------|-----------|-----|----------------|-------------|----------|-----|-----|
| and 1.7.1987 to                                                                  | supplying of | 31.3.1996 | 6%  | photographs,   | 1.4.1996 to | 8%       |     |     |
| photo prints                                                                     | and          | 31.3.1998 |     | photonegatives | from        | 1.4.1998 | 10% |     |
| ----- 14. This Entry-25                                                          |              |           |     |                |             |          |     |     |
| in 6th Schedule was challenged in this Court in the case of Keshoram             |              |           |     |                |             |          |     |     |
| Surindranath photo-Mag(P) Ltd. v. Assistant Commissioner of Commercial Taxes     |              |           |     |                |             |          |     |     |
| (LR), City Division, Bangalore. The Division Bench, after hearing, upheld the    |              |           |     |                |             |          |     |     |
| contention of the assesses and declared that Entry-25 as unconstitutional on the |              |           |     |                |             |          |     |     |
| following reasoning:                                                             |              |           |     |                |             |          |     |     |

"Photography is a process of an art of producing visible images on sensitive bodies by action of light or other form or radiant energy. Duration of action of light and also use of the chemical is highly a technical expertise. Therefore taking into consideration the various decisions referred to above it could be considered that it is a works contract where property which is transferred in paper is only incidental to such contract. In strict sense, it is a service where the main object is not transfer of property in goods. A good photograph, as observed by the Apex Court, is a thing of beauty and revives nostalgic memories. It is a work of art. In B.C. Kame's case (1977) 39 STC 237 (SC) it has already been held that there is no sale involved and in spite of the fact that it is a works contract it could not be subjected to tax because the intention of the parties to not to transfer the goods in the execution of said works contract. It is only ancillary and incidental to service contract. The photographs are not marketable or saleable commodity and as such no tax can be levied. Entry 25 of the Sixth Schedule to the Karnataka Sales Tax Act, 1957, therefore is beyond the scope of Article 366 of the Constitution of India."

15. The State challenged the said decision in special Leave to appeal No. 61136/2000 and connected matters. The Supreme Court rejected it.

16. The Supreme Court subsequently in subsequent cases noticed the Judgment of the Kerala High Court in Bavens v. Union of India, (1995) 97 STC 161 in which the Kerala High Court has ruled as under:

"There is no works contract involved in this category of photographer's activity. However, modernised the camera be the skill of the photographer is still important for getting the best results. It cannot also be treated as a sale of the photograph for the reason that it is not the intention of the customer to buy a photograph from the photographer is his service, artistic skill and talent. If any property passes to the customer in the form of photographic paper, it is only incidental to the service contract. No portion of the turnover of a photographer relating to this category of work would be exigible to sales tax."

17. The Supreme Court ruled that they are in agreement with the view taken by the Kerala High Court. When the Special Leave Petitions filed by the Karnataka

Government against the decision in Keshoram came up for admission, the Supreme Court dismissed the SLPs, relying on the decision in "Rainbow" case. The decision in "Keshoram" declaring Entry 25 of the sixth Schedule was unconstitutional, thus attained finality.

18. Subsequently, a three Judge Bench of the Supreme Court rendered its decision in Associated Cement Companies Ltd. v. Commissioner of Customs. The Supreme Court in ACC's case ruled in para 26 reading as under:

"In arriving at the aforesaid conclusion the Court referred to the decision of this Court in Hindustan Aeronautics Ltd. v. State of Karnataka and Everest Copiers. But both these cases related to the pre-forty-sixth Amendment era where in a works contract the State had no jurisdiction to bifurcate the contract and impose sales tax on the transfer of property in goods involved in the execution of a works contract. The Forty-sixth Amendment was made precisely with a view to empower the State to bifurcate the contract and to levy sales tax on the value of the material involved in the execution of the works contract, notwithstanding that the value may represent a small percentage of the amount paid for the execution of the works contract. Even if the dominant intention of the contract is the rendering of a service, which will amount to a works contract, after the Forty-sixth Amendment the State would not be empowered to levy sales tax on the material used in such contract. The conclusion arrived at in Rainbow Colour Lab case, in our opinion, runs counter to the express provision contained in Article 366(29-A) as also of the Constitution Bench decision of this Court in Builders' Association of India v. Union of India."

19. In the meanwhile, in Tata Consultancy Services v. State of Andhra Pradesh, (2001)4 SCC 629 in the Supreme Court notices A.C.Cs case. After noticing, the Supreme Court was of the view that the said decision is to be referred to a Constitution bench. The Constitution Bench of the Supreme Court in Tata Consultancy Services Vs. State of Andhra Pradesh, has now held that even an incorporeal or intangible property can be goods if put on a medium for transfer or marketing.

20. Thereafter, the State Government issued a Circular dated 27.9.2002. That Circular was challenged in batch of petitions in this Court. A Division Bench of this Court, after hearing the Writ Petition in which the circular was challenged, framed two points for its consideration in (Golden Colour Lab case):

- i) Whether the pronouncement of law in ACC, in regard of levy of Sales Tax on works contract, will prevail over the decision in "Rainbow".
- ii) Even if the decision in ACC prevails over the law declared in Rainbow and Keshoram, whether the authorities under the Act can proceed on the basis that Entry 25 of 6th Schedule is reinstated or restored to the statute, and subject to tax u/s 5B of the Act, the turnover relating to transfer of property in goods involved in processing and supplying of photographs, photo prints and photo negative.

21. The first issue was answered in para 13.

22. In so far as second issue is concerned, the Division Bench in the Golden Colour Lab case has noticed the various contentions and various Judgments in its order. Thereafter, the Division Bench notices in paras 22.3 and 23 reading as under:

"22.3. The above decisions make it clear that where a statute or its provision, held to be unconstitutional and void by the High Court, is declared constitutional and valid, in an appeal or otherwise, by a larger Bench or by the Supreme Court, such statute or its provision (which is declared unconstitutional) becomes enforceable. The restoration of the statute or its provision, is automatic, without any re-enactment. In the words of the Supreme Court, the statute or its provision, comes out of the eclipse. What if there is no such automatic restoration and the decision declaring the statute or its provision unconstitutional and void for want of legislative competence, attaining finality? Even in such a situation, in two circumstances, such statute or its provision can be brought back to life, by re-enacting it. The first is when there is a constitutional amendment which removes the lack of legislative competence. The second is when the Supreme Court dealing with the constitutional validity of a similar enactment (or provision of an enactment) of another state, declares it to be constitutionally valid by applying or evolving a different legal principle. That is for example, if a provision of Sales Tax Law of State "K" is declared to be beyond the Legislative competence and void by the High Court or Supreme Court, and later an identical or similar provision of Sales Tax Law of State "M" is declared by the Supreme Court to be valid by applying a different principle, then State "K" can re-enact the provision (Note: for this purpose, where the earlier decision holding the provision of law of State "K" to be void is of the Supreme Court, the later decision holding a similar provision of law of State "M" to be valid should be of a larger Bench of the Supreme Court). In brief the principle emerging can be summarised thus:

i) Where the very provision, held to be constitutionally invalid is reconsidered in an appeal or otherwise subsequently, and held to be valid, then the provision stands restored to the statute and becomes enforceable, without being re-enacted.

ii) Where the decision holding the provision to be Constitutionally invalid attains finality, and thereafter a similar provision in some other enactment is considered and held to be valid on a different legal principle, then the provision earlier declared invalid does not get revived. But it may be re-enacted if the State Legislature so chooses.

23. Let us supply the said principles to the case on hand. A Division Bench of this Court in Keshoram declared that Entry 25 was constitutionally invalid and the Supreme Court affirmed the said decision by order dated 20.4.2000 in SLAP (Civil) No. 6136-6163/2000 and connected cases. Thus the declaration that Entry

25 was invalid and unenforceable, attained finality. Thereafter the Supreme Court has neither reconsidered nor pronounced upon the validity of Entry 25 in any other decision. It is not, therefore a case of temporary eclipse, as in the case of *Shenoy*, but a case obliteration of the provision from the statute book, as in *Sahadev*. In fact the position in this case is much stronger than *Sahadev*, because the decision of this Court in *Keshoram* has been upheld by the Supreme Court in SLP (Civil) No. 6136-63/2000 and connected matters. Therefore even if Supreme Court subsequently laid down a different principles in ACC (referring to the decision in *Rainbow* which dealt with a similar provision in MP sales Tax Act), that will not automatically revive Entry No. 25. The decision in ACC may at best enable the State to re-enact a provision similar to Entry 25."

24. Ultimately the Division Bench in paras 26 and 27 has ruled as under:

"26. We are therefore of the view that in spite of the enunciation of law in ACC, Entry 25 has not stood revived or restored into the 6th Schedule of the Act. Therefore the Authorities under the Act cannot levy tax under the Act in regard to transfer of property in goods involved in processing photo negatives and supplying of photo prints and photographs, as if Entry 25 has stood restored in the 6th Schedule to the Act.

25. In view of the foregoing, we allow these petitions with the following directions:

i) The Circular No. 17/2002-03 dated 27.9.2002 issued by the Commissioner of Commercial Taxes, Karnataka is quashed;

ii) It is declared that the decision in *Keshoram Surindranath Photomag(P) Ltd. v. Assistant Commissioner of Commercial Taxes (TR), City Division, Bangalore* rendered on 6.9.1999 (121(2001) STC 175) affirmed by the Supreme Court in SLP (Civil) No. 6136-6163/2000 and connected cases decided on 20.4.2000, holding that Entry 25 in 6th Schedule of the Act, is unconstitutional, for want of Legislative competence, continues to be binding on the respondents.

iii) As a consequence, it is declared that the authorities under the Act cannot proceed on the basis that Entry 25 is restored to 6th Schedule of the Act by virtue of the decision of the Supreme Court in ACC reported *M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs*, . Nor can they proceed with or decide any proceeding on the basis that Entry 25 in 6th Schedule is restored to the Act.

iv) All proceedings initiated or orders passed in the cases of petitioners, by the authorities under the Act on the basis of Commissioner's Circular No. 17/2002-03 dated 27.9.2002 are quashed.

v) Parties are to bear their respective costs."

26. A careful reading of the entire Judgment in *Golden Colour Lab* case, would show that unless Entry 25 is declared to be invalid and unsustainable in any

subsequent proceedings, the Judgment of Keshoram continues to be binding on the State Government. Unless and until Entry 25 is considered as or unless and until the Supreme Court re-considers and pronounces upon a similar entry 25 of any other State, the Keshoram decision continues to be binding on the State. In these circumstances, the petitioners are right in their submission that in the light of the binding Judgment of Keshoram and in the absence of any declaration in terms of the findings in para 23, the State Government lacks legislative competence in the light of a binding Judgment on the parties. We therefore find substance in the argument of the petitioners with regard to the unconstitutionality of the impugned Act in the case on hand in the given circumstances.

27. At this stage, we must also notice an argument of the State with regard to re-enactment in the light of the observations of the Division Bench in Golden Colour Lab case. It is no doubt true that the Division Bench did say that the decision in ACC, at best, may enable the State to re-enact the provisions similar to Entry 25. This sentence has to be read along with other findings in paras 22.3, 23, 26 and 27. If read the Judgment as a whole, it would be clear that re-enactment is permissible or possible only in the event of a subsequent declaration with regard to Entry 25 being invalid and unenforceable and only in the event of the Supreme Court re-considering or pronouncing a similar question in similar term as in Entry 25 in terms of the findings in para 23. Admittedly, it is nobody's case before us that Entry 25 was reconsidered in any other Judgment subsequent to Golden Colour Lab. In these circumstances, the Golden Colour Lab case is binding on the parties.

28. In the light of our discussion with regard to legislative competence in terms of this order, it is unnecessary for us to consider the submission of Sri. Naganand, Learned Senior Counsel with regard to confiscation. In these circumstances and in the result, these petitions are accepted and we declare that the provisions of Section 2(3) as unconstitutional. Respondents are hereby restrained from enforcing the provisions of the Karnataka Taxation Amendment Act, 2004. In the light of the declaration in terms of the orders in so far as Act No. 3/2000 is concerned, all consequential proceedings including assessment order and consequential demands are also set aside. Parties are to bear their costs.