

(1995) 11 KAR CK 0072

In the Karnataka High Court

Case No : Writ Petition No's. 10360 of 1986, 2824 to 2827 of 1987, 8185 of 1988, 10675 of 1990, 19152 of 1991 and 26485 of 1993

Shetty Leasing (India) Ltd. and another

APPELLANT

Vs

Union of India and another

RESPONDENT

Date of Decision : 21-11-1995

Acts Referred:

Central Sales Tax Act, 1956 — Section 14, 15
Constitution of India, 1950 — Article 286, 366
Karnataka Sales Tax Act, 1957 — Section 50 C

Citation : (1996) ILR (Kar) 2329 : (1996) 40 KarLJ 237

Hon'ble Judges : S. Venkataraman, J; S. Rajendra Babu, J

Bench : Division Bench

Judgement

S. Rajendra Babu, J.—These petitions are filed challenging the constitutional validity of section 50-C of the Karnataka Sales Tax Act, 1957 (hereinafter referred to as "the Act"), by which the State levies tax on transfer of right to use any goods.

2. On behalf of the petitioners, it is urged that the legislative power under entry 54 of List II of the Seventh Schedule to the Constitution to impose to a tax on the transfer of any right to use any goods would not include the power to levy such tax in respect of transactions which are in the courses of sales in the course of inter-State trade or commerce or in the course of sales outside the State levying such tax or in the course of import or export inasmuch as it is beyond the legislative competence of the State Legislature to impose sales tax on inter-State sales or sales outside the State and also in the course of import or export. It is urged that the law made by the Parliament under article 286(2) and 286(3)(b) read with article 269(3) of the Constitution is a condition precedent for exercise of the legislative power of the State to impose tax on transactions involving transfer of right to use any goods for any purpose and since no law has been enacted by Parliament in that regard, it is not open to the State Legislative to exercise power to impose such tax. The definition of "sale" in the Central Tax Act

has been amended after the 46th Amendment within its ambit a transfer of the right to use any goods for any purpose and it cannot be treated to be law made under articles 269(3) and 286(2) of the Constitution in relation to sales arising out of such transfers. In the absence of a common situs being involved in application of such legislative as in section 4 of the Central Sales Tax Act, levy u/s 5C impermissible. It is submitted that it is not permissible for the State Legislature to expression "sale" so as to include within its ambit the sale or purchase of goods in the course of inter-State trade or commerce or in the course of import or export and thereby assume power to impose taxes on the same and the definition of us situs as contemplated in Explanation (3)(d) of section 2(t) is itself invalid being violative of article 286 of the Constitution of India.

3. We may now advert to the history of this legislation. Originally, by Act No. 27 of 1985, section 5C was amended to levy tax on the taxable turnover in respect Seventh Schedule. Now, tax is sought to be levied on total turnover in respect of transfer of right to use goods by amending the Act by Act No. 4 of 1992 with retrospective effect.

4. Being this history in mind, it is submitted that the Legislature did intend to levy on all transactions which have been excluded in terms of article 286(1) and (2) under entry 92A of List I of the Seventh Schedule. Thus, it is contended that section 5C is not traceable to entry 54 since it includes transactions covered by article 286 and entry 92A of the Seventh Schedule. It is also urged that the provision itself is opposed to the scheme of the Act and therefore deserves to be quashed. In understanding the concept of an inter-State sale, it is urged that, it must be borne in mind that the movement of goods from one State to another State whether occasioned by the sale and the sale and the movement goods is in incident as an as a necessary consequence and was inseparably connected with sale or purchase; that there was no break between the purchase and movement of goods to another State; that it is immaterial whether the sale or purchase takes place within the State so long as the movement of goods is an incident of the sale or purchase, it amounts to inter-State sale or purchase.

5. On behalf of the State following submissions are made :

There cannot be any "sale or purchase of goods in the course of inter-State trade and commerce" or "outside the State" or "in the course of the import of goods into, or export of the goods of out of the territory of India", in respect of the taxable event stated in section 5C read with clause (d) of Explanation (3) of section 2(t) of the Karnataka Sales Tax Act, 1957. The reason is that the Central Sales Tax Act, 1956, has not been made applicable to the taxable event stated in section 5C of the Act and no law as envisaged under article 269 and article 286(2) has been enacted by the Parliament to the taxable event in question.

It is submitted that the basis of exigibility of tax u/s 5C of the Act is sub-clause (d) of clause (29-A) of article 366 of the Constitution.

The supreme Court in the case of Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, has held that the provisions of sections 3, 4, 5, and sections 14 and 15 of the Central Sales Tax Act, 1956, are applicable to the transfer of property in goods involved in the execution of works contract covered by article 366(29-A)(b).

The aforesaid conclusion of the Supreme Court is based on the reasoning (as could be inferred from the discussion in the judgment) that the Constitution (Forty-sixth Amendment) Act, 1982, has made it possible to divide single and indivisible works contract into one for sale of goods and other for supply of labour and services and the contract so it relates to sale of goods is a "sale" as defined in section 2(g) of the Central Sales Tax Act. Hence the provisions of the Central Sales Tax Act held to be that apart of the works contract. This reasoning adopted in respect of works contract cannot be made applicable to the taxable event stated in section 5C of the Act as it is no "sale within the definition of section 2(g) of the Central Sales Tax Act. It is not permissible in law to expend state the definition of "sale" in section 2(g) of the Central Sales Tax Act to include the taxable event stated in section 5C of the Act by relying on article 366(29-A) of the Constitution. Such interpretation would result in amending section 2(g) of the Central Sales Tax Act which is permissible in our constitutional scheme. The definitions given in article 366 of the Constitution would apply only to interpret the expressions used in the Constitution. This made clear by the opening words in article 366. It is submitted that the fiction created in latter part of article 366(29-A) applies only to the interpretation of the expression "sale or purchase of goods" used in article 269(3) and article 286(2) of the Constitution. The object is to the Parliament to make law under articles 269(3) and 286(2) of the Constitution in respect of the transactions referred to in sub-clauses (a) to (f) of article 366(29-A).

The expression "total turnover" in the context it is used in section 5C of the Act will have to be interpreted to mean the total consideration in respect of the taxable event stated in section 5C of the Act. The latter part of section 5C immediately after the expression "total turnover" would clearly suggest that it is to be interpreted differently from the definition to it in section 2(u-2) of the Act. The scope of taxable event (as explained in para 1 above) will be another compelling reason to interpret the expression total turnover to be different from the definition given to it in section 2(u-2) of the Act.

There is nothing arbitrary or discriminatory 5-C of the Act and hence the contention that it is violative 14 of the Constitution is not tenable.

6. In our to correctly appreciate the contentions urged on behalf of the parties and to consider the same, it is necessary to set out section 5C of the Act as amended. Section 5C reads as follows :

"5-C. Levy of tax on the transfer of the right to use any goods. - Notwithstanding anything contained in sub-section (1) or sub-section (3) of section 5, but subject

to sub-sections (5) and (6) of the said section, every dealer shall pay for each year a tax under this Act on his total turnover in respect of the transfer of the right to use goods mentioned in column (2) of the Seventh Schedule for any purpose (whether or not for a specified period) at the rates specified in the corresponding entries in column (3) of the said Schedule."

7. The power to levy tax by the State arises from entry 54 of List II of the Seventh Schedule to the Constitution. What this entry authorises is tax on sale or purchase of goods as defined under article 366(29-A) of the Constitution subject to the limitations contained in article 286 amongst other provisions of the Constitution. Article 286(1) clearly mandates no tax shall be imposed on sale or purchase which takes place - (a) outside the State, (b) in the course of import into or export out of India. Power is conferred on the Union particularly to legislate in respect of levy; of tax on sale or purchase of goods by the following provisions : Article 269(2); article 286(3); article 286(3)(b) read with article 366(29-A)(b), (c), (d) and entries 92, 92-A, 92-B of List I. In respect of these transactions covered by article 286(1) and where power is conferred upon particularly to levy tax the State Legislature has no competence to bring to tax the sale.

8. The tax levied u/s 5C of the Act is with reference to the definition of "total turnover" contained in section 2(u-2) of the Act. In this context, reference should also be made to the definition of "taxable turnover" contained in section 2(u-1) of the Act wherein a provision is made to exclude turnover of purchase or sale in the inter-State trade or commerce or in the course of export or import of goods outside or inside the territory of India, while "total turnover" is the aggregate of turnover including the transactions whether or not the whole or any portion of turnover is liable to tax or in the course of inter-State trade or commerce or in the course of import of goods into the country. The Legislature has made a distinction between turnover of the sale of goods on which tax is not leviable and sale of goods on which tax is leviable. Necessarily section 5C of the Act must be construed such that the sales on which no tax is leviable have been included in section 5C of the Act. We must attach necessary importance to the use of the words "taxable turnover" in contrast to "total turnover" used in section 5C as a result of which the ambit of incidence of tax has been widened so as to include transactions outside the sphere of tax within the competence of the State. Thus section 5C transgresses the limits as it enables tax to be imposed on deemed sales that take place in the course of inter-State trade or commerce or in the course of import or export. Since the invalidity of section 5C goes to the root of imposition of tax, section 5C has got to be declared as invalid.

9. In view of the legislative history we should hold that the intention of the Legislature is clear to levy tax on all transactions by a definition of "total turnover" and not "taxable turnover". The taxing scheme of the Act and the provisions of section 2(u-1) and (u-2) will together mean the inference drawn by us. As the tax base is indicated to be turnover including inter-State transactions or

import/export transactions, it obviously means that the scheme of taxation itself includes such levy, which is impermissible in law. In an identical situation in *Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others*, tax was levied on turnover which included the amount of sale received or receivable for sale, transfer, delivery or supply of goods referred to in clause (o) wherein sale is referred. No part of the definition of "turnover" excluded any outside transactions. Considering the effect of these provision the Supreme Court held that the Legislature has not made explicit provision for exclusion of transactions constituting deemed sales which take place in the course of inter-State trade or commerce or outside the State or in the course of import and export in relation to which the State Legislature lacks the competence to impose a tax under entry 54 of the State List. Nor has any provision been made with regard to sale of goods which are declared to be special importance in inter-State trade or commerce and are governed by sections 14 and 15 of the Central Sales TAX ACT. Hence, it was held that the said provisions is invalid.

10. The expression "total turnover" is identical with the expression "turnover" in the Rajasthan Sales Tax Act which came up for consideration before the Supreme Court in *Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others*, The said expression meant the aggregate amount of the sale prices received or receivable for a sale, transfer, delivery or supply by a dealer in any of the ways referred to in clause (o) wherein the expression "sale" is defined. In that case, it was noticed by the Supreme Court that the Legislature had not made any express provision for exclusion of transactions constituting deemed sales which take place in the course of inter-State trade or commerce or outside the State or in the course of import and export in relation to which the State Legislature lacks the competence to impose a tax under entry 54 of the State List. Nor has any provision been made with regard to sales of goods which are declared to be of special importance in the inter-State trade or commerce and are governed by sections 14 and 15 of the Central Sales Tax Act.

11. A comparison of the provisions in our Act with the Rajasthan Act would indicate that the expression "total turnover" would includes tax being levied on sales in the course of import and to ignore the restrictions placed by section 15 of the Central Sales Tax Act in relation to imposition of tax on goods which are declared to be special importance. It is also noticed in the said decision that constitutional validity of the provision has to be determined on the basis of its provisions and on ambit of its operation as reasonably construed and if, so judged, it does not pass the test of constitutionality it cannot be pronounced valid merely because it is administered in a manner which might not conflict with the constitutional requirements. For that proposition, reliance can be placed on the decision in *Collector of Customs v. Nathella Sampathu Chetty* [1962] 3 SCR 786.

12. However, the learned Government Advocate sought to contend that the expression "total turnover" in the present case will have to be understood with

reference to the context and must be taken to mean that it excludes transactions in relation to which State would not be in a levy tax. But this argument does not stand close scrutiny. Prior to the amendment of the Karnataka Sales Tax Act by Act 4 of 1992, provisions of sections 5C which was inserted by Act No. 27 of 1985 brought to tax only "taxable turnover" and not "total turnover". Therefore, the legislative intent is very that what is sought to be taxed is as defined thereon. Therefore the argument that with reference to context the different meaning will have would to be given would not arise. Hence, we have no hesitation to accept the contention advanced on behalf of the petitioners that section 5C is invalid and we declare the same as unconstitutional and void. Petitions shall stand allowed. Rule made absolute accordingly.

13. Writ petitions allowed.