

(1999) 09 KAR CK 0015

In the Karnataka High Court

Case No : Writ Petition No's. 32428 of 1993, 14332 and 14442-43 of 1998

Shreyas Papers Pvt. Ltd.

APPELLANT

Vs

State of Karnataka and Others

RESPONDENT

Date of Decision : 22-09-1999

Acts Referred:

Karnataka Sales Tax Act, 1957 — Section 13 (2) (i), 15
State Financial Corporations Act, 1951 — Section 29

Citation : (2001) 121 STC 94

Hon'ble Judges : V.K. Singal, J;T.N. Vallinayagam, J

Bench : Division Bench

Advocate : A. Sathyanarayan, for the Appellant; S. Sujatha, High Court Govt. Pleader, for the Respondent

Final Decision : Allowed

Judgement

V.K. Singhal, J.—In all these matters, the controversy being common, they are disposed of by this common judgment.

2. In W.P. No. 32428 of 1993, validity of Section 15 of the Karnataka Sales Tax Act, 1957, has been assailed while in W.P. Nos. 1444243 of 1998, the action of the respondents in initiating the proceedings, for recovery from purchaser of plant, land and building has been challenged.

3. The facts of the case are that, there was a concern in the name M/s. Mishal Paper Mills (P) Ltd., manufacturing duplex board, to which financial assistance was provided by the State Financial Corporation. In respect of default, when the payments were not made by the said company, powers u/s 29 of the State Financial Corporations Act, were invoked and assessments of the assets of the unit were taken. Thereafter, steps were taken by the Financial Corporation for auctioning the said unit. The petitioner purchased the land, plant and machinery in auction as the highest bidder. In respect of the recovery of dues of sales tax, proceedings were initiated against the defaulting company and notices were issued to the petitioner treating it as the transferee-company. It is in this

background that the provisions of Section 15 of the KST Act and the action of the respondent have been challenged.

4. Section 15 of the KST Act reads as under ;

"Tax payable on transfer of business, etc.--(1) When the ownership of the business of a dealer liable to pay tax or penalty or any other amount under the provisions of this Act, is transferred, the transferor and the transferee shall jointly and severally be liable to pay any tax or penalty or any other amount payable in respect of such business and remaining unpaid at the time of transfer, and for the purpose of recovery from the transferee such transferee shall be deemed to be the dealer liable to pay the tax or penalty or other amount under this Act."

5. There was a judgment given in Alpha Silicones Vs. Assistant Commercial Tax Officer (Recovery), Gulbarga and another, , where a similar controversy was considered by the single Bench of this Court, it was found that the transferee has purchased the concern in an auction held by the KSFC. The ownership in this context was interpreted as the assets of the business both movables and immovables along with the goodwill of the business. It was held that the KSFC had only acted as an agent for the transferor being a creditor of the dealer, like any other creditor, the steps which have been taken to recover the loan advanced by it to the defaulter of the security of the business assets, it was held that the purchasers are the transferees. Since Section 15 of the KST Act, provides that the liability is on the transferor as well transferee, they being jointly and severally liable for the payment of tax and penalty for any other amount payable under the Act in respect of the business transferred and remaining paid at the time of transfer. It was considered that the transferee gets into the shoes of the transferor and takes over the liability of the transferor and along with the ownership of the business. Since, the provision is made with the object of payment of tax payable by the transferor it was construed that the payment shall be made from transferee.

6. From the perusal of the provisions of Section 15 of the KST Act, it is evident that the liability of the transferee is fixed when the ownership of the business of the dealer is transferred. There can be transfer of the entire business or it can be part transfer of the business. But in a case where "ownership of the business" is transferred, it can refer only to the transfer of the entire business. The transferor and transferee have been jointly and severally made liable for payment of tax, penalty and other dues and by deeming fiction the transferee is deemed to be the dealer liable to pay the said amount. So far as the validity of such provision is concerned, it may be observed that it is one of the steps by which the Legislature has thought it fit to recover the dues from the transferee and the power can be considered ancillary and incidental to the main power for collection of tax which is one of the basic ingredients in the entire process of levy and collection. The transferor in order to avoid his liability or payment of the dues under the Act, may transfer the business. The transfer which makes the

transferee liable to pay the dues of transferor. This power being ancillary and incidental to the main power cannot be considered as ultra vires any of the provisions of the Constitution.

7. Regarding the liability of the transferee, it may be observed that transferee is liable only when the ownership of the business is transferred. Business comprises of the regular and systematic activity with an object of earning of profits. The machinery, plant, building and the land over which they have erected or constructed are only the tools of such business. Assets and liabilities including goodwill are the necessary ingredients to constitute a business, besides the stocks and other movable and immovable items connected with the said business. Section 29 of the KSFC Act, 1951 reads as under :

"Where any industrial concern, which is under a liability to the Financial Corporation under an agreement, makes any default in repayment of any loan or advance or any instalment thereof, or in meeting its obligations in relation to any guarantee given by the Corporation, or otherwise fails to comply with the terms of its agreement with the Financial Corporation, the Financial Corporation shall have the right to take over the management or possession or both of the industrial concern, as well as the right to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation."

Whenever the power is invoked under this provision, the transfer of the assets, namely the land, building, plant and machinery by the State Financial Corporation is in its independent right and not as an agent of the defaulting dealer. The purchaser gets absolute rights in transferred property. The finding given by the learned single Judge in the case of Alpha Silicones Vs. Assistant Commercial Tax Officer (Recovery), Gulbarga and another, referred to above to that extent are not correct.

8. Learned Government Advocate has pointed out that u/s 13(2)(i) if there is a default in making the payment of tax or any other amount due under the Act, then the whole of the amount outstanding on the date of default shall become immediately due and shall be charge on the properties of the person or persons liable to pay the tax or any other amount due under the Act. This charge which has been created only when the defaulting dealer is assessed and fails to make the payment, in such a case he will not be entitled to sell the property to any other persons free from encumbrance and the property shall remain subject to charge so credited by this section. Section 29(2) of the State Financial Corporation provides "any transfer of property made by the Financial Corporation, in exercise of its powers under Sub-section (1) shall vest in the transferee all rights in or to the property transferred (as if the transfer) had been made by the owner of the property". By this provision, so far as the transferee is concerned, his rights are protected and it is considered as if the transfer is made the owner of the property. In other words State Financial Corporation has the power to confer the right over the property transferred to the transferee while

exercising the power u/s 29 of the Act. The property if already charged u/s 13(2) (i) and sold by the State Financial Corporation, then to the extent of the charge so created by this section, the State authorities are entitled to recover the amount from the State Financial Corporation out of the proceeds of the sale and will have priority for recovery of dues as a charge on property as has been held in Dena Bank Vs. Bhikhabhai Prabhudas Parekh and Co., This case was affirmed by Supreme Court in Dena Bank Vs. Bhikhabhai Prabhudas Parekh and Co. and Others, .

9. We have to consider only the liability of the purchaser in auction. There is no provision under the Sales Tax Act, which creates liability on such purchasers. It is only by virtue of Section 15 that liability is sought to be fastened treating him as the transferee for treating the person as a transferee of the ownership of the business, there must be transfer of the entire assets and liabilities including the goodwill. Merely, transfer of land, building, plant and machinery by the State Financial Corporation, in exercise of the powers u/s 29 of the KSFC Act, 1951 will not make the purchaser a transferee. It has not come on record that the goodwill and other assets and liabilities of the business were transferred to the purchaser. Similar controversy had come up before the Madhya Pradesh High Court in the case of Bajranglal Bajaj Vs. The State of Madhya Pradesh and Others, where it was held that "there being no transfer of goodwill it could not be said that the purchaser is a transferee of the business". In Kalaria Oil Mills Vs. The State of Gujarat and Others, which interpreting Section 19(4) of the Bombay Sales Tax Act, 1959 it was observed that what constitute succession in business is a transfer of a business or a part thereof as such and not merely the transfer of some of the assets of business. Doma Sao Mohanlal Vs. State of Bihar and Others, and Kanhaiya Lal v. State of Rajasthan [1992] 86 STC 30 (Raj). In Sreemati Vasant Tanna and Another Vs. The State of Bihar and Others, it was observed that to make transferee liable there must be transfer of entire business. The auction purchaser was held not liable to pay the dues of old consume of electricity in Isha Marbles Vs. Bihar State Electricity Board and Another, as the demand of arrears are contractual liability. In Rambali Bhuleshwar Vs. Sales Tax Officer, Recovery I, Bombay and Others, sale by Collector in the course of recovery proceedings was not considered a case of transfer of business. In Santokh Singh Karam Singh of Malout Vs. The Punjab State and Another, transfer was of entire stock and tenancy right. In State of Orissa v. Raja Stores [1987] 65 STC 82 (Ori) the transfer was of stock in trade. The petitioner being the purchasers in the auction from the State Financial Corporation, only of the land, building, plant and machinery could not be considered to be transferee as the entire assets and liabilities including the goodwill of the business has not been transferred.

Petitions are accordingly allowed.