

(2002) 02 KL CK 0014
In the High Court Of Kerala
Case No : O.P. No. 6397 of 1996

Sivaraman

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 22-02-2002

Acts Referred:

Kerala Handloom Workers Welfare Fund Act, 1989 — Section 4(2)

Citation : (2002) 02 KL CK 0014

Hon'ble Judges : M. Ramachandran, J

Bench : Single Bench

Advocate : T.A. Ramadasan, M. Pathros Mathai, M.M. Abdul Aziz, M.C. John, K. Reghu Kottappuram, M. Sasindran, Siby Mathew, Philip J. Vettickattu, M. Unnikrishna Menon, M. Ramesh Chander, P. Ali, R. Harikrishnan, A.K. Basheer, Antony Dominic, S. Abdul Salam, V.G. Arun, V. Philip Mathews, C.J. Joy, M.V. Bose, S. Sreekumar, T.N. Girija, S. Krishna Moorthy, Dinesh R. Shenoy, K.I. Mayankutty Mather, George Johnson, G. Sukumara Menon, K.M.V. Pandalai, Eldho Paul, K.A. Salil Narayanan, Sabu Sebastian and Raju Joseph, for the Appellant; Viju Thomas, Government Pleader, M.K. Damodaran, V.M. Kurien, P.C. Sasidharan and P.N. Purushothama Kaimal, for the Respondent

Judgement

M. Ramachandran, J.—The above Original Petitions have been filed challenging the constitutionality of the Kerala Handloom Workers' Welfare Fund Act. Though a learned Single Judge had on 11.7.1994, in one O.P., viz., 5296/90 repelled the challenge posed, the judgment was set aside in W.A. No. 1581 of 1994 and the entire matter again came up for consideration. On behalf of the petitioners, submissions were made by M.s. C. Chandrasekharan, R. Ramdas, K.Raghu, Dinesh R. Shenoy and M. Ramesh Chander. I had heard the learned Government Pleader, as also Mr. V.M. Kurian and P.N.P. Kaimal for the respondents. Mr. Pathorse Mathai appeared for petitioners in three of the cases. In the course of the proceedings, a preliminary issue had been raised by the respondents that by Ordinance No. 19/2001, the Act had been substantially amended, effective from 29.12.2001. The new section had not been subjected to separate challenge, and the Original Petitions were therefore to be dismissed.

2. However, petitions point out that the basic contentions are even now available, as there was changes brought about in the rate of contributions, and a slab system was introduced so far as the liability of dealers were concerned. But the grounds as urged in the Original Petitions have full relevance, and are not eclipsed because of the amendment. The issues are thus being enquired into in the aforesaid background.

3. The Kerala Handloom Workers' Welfare Fund Act, 1989 (Act 2 of 1989) was published in Kerala Gazette dated 26.4.1989 and as seen from the objective and preamble, the Act is intended to constitute a fund to promote the welfare of handloom workers and for connected purposes. u/s 3 of the Act, the Government was given owner to frame a scheme, for establishing a fund, and it was to be intended to be utilised for the following purposes, as envisaged u/s 3(4):

(a) for payment of pension,-

(i) to a member who is unable to work due to infirmity or has completed the age of sixty years; and

(ii) to a person who, before the commencement of this Act was a handloom worker or a self-employed person and passed the age of sixty years and who suffers from permanent disablement or is out of employment;

(b) for payment of family pension;

(c) for payment of financial assistance to a member who suffers from permanent disablement;

(d) for payment of loans or grants to a member to meet expenses for the marriage of children or for expenses in connection with the death of dependent or for expenses for construction or maintenance of house;

(e) to provide for maternity benefits to women workers engaged in handloom industry;

(f) to provide for the handloom workers, self-employed persons and members of their families medical facilities and educational facilities including higher education;

(g) for any other purpose specified in the scheme".

The contributions specified in Section 4, sum borrowed, grants, advances, donations, fee etc., were to be credited to the fund.

4. Section 4 dealt with contributions to the Fund. Every handloom worker has to contribute one rupee per month, and every self employed person was to contribute two rupees per month. u/s 4(2), every dealer was to contribute to the Fund, every month an amount equal to one percent of his total sale proceeds in a month. Every employer and producer of handloom products were to contribute every year, an amount equal to the amounts contributed by the handloom workers engaged by them. The Government were to pay an amount equal to

twice the amount contributed by the handloom workers and self employed persons in a year. Thus the chunk of the corpus and recurring income were expected to come from the dealers.

5. Dealers was defined u/s 2(d) as a person who is engaged in the business of purchase, sale or storage for sale of yarn of handloom cloth or any other handloom product. Section 2(f) defined an employer, as one who directly employs, whether on behalf of himself or for any other person, one or more handloom workers to do any work in connection with the various processes in handloom industry. 6. For the purpose of understanding the scope and purport of the enactment, it may also be necessary to specifically take note of the definition of handloom products (Section 2(i)); handloom workers (Section 2(j)); process in handloom industry (Section 2(n)) and producer of handloom products (Section 2(o)) which are reproduced herein below:

"2(i) "handloom products" means all types of cloth woven in handlooms out of cotton yarn, polyester yarn, silk yarn or any other blended yarn;

2(j) "handloom worker" means any person who is employed for wages to do any work in connection with the various processes in handloom industry and who gets his wages directly or indirectly from the employer, dealer or producer of handloom products and includes any person employed by or through a contractor through an agent and depends mainly on handloom industry for his livelihood and any other person engaged in handloom industry whom the Government may by notification in the Gazette, from time to time declare to be a handloom worker for the purposes of this Act.

***** 2(n) "process in handloom industry" means winding, warping, sizing, weaving and other works like goeting and dyeing;

2(o) "Producer of handloom products" means a person who carries on the business of processing handloom products for export or for internal consumption".

Yarn also was separately defined by Section 2(s) as cotton yarn, silk yarn, polyester fibre or any other blended fibre which could be used for weaving in handloom industry.

7. The petitioners in these batch of Writ Petitions are dealers, who are owners of textile shops in the State of Kerala. However, three petitions, viz., O.P.No. 1798/91, 5477/90 and 5296/90 are different and stand apart. As a matter of fact, a learned Judge had dismissed the said Original Petitions, and on appeal, the judgment was set aside, and remanded. Mr. Pathrose Mathai therein contends that the petitions are modern textile mills and perhaps yarn produced by them might have been purchased by strangers, and might have been utilised by handloom workers for production of cloth. But that does not create any nexus for the Mills with the handloom workers, and they cannot come within the purview of "dealers", as per the definition. But the larger question as to whether a dealer if at all could be fastened with the liability is presently under

examination, and the contentions could be appropriately dealt with as we proceed with the matter. This is because, the textile mills will have stocked the yarn, for sale, and technically such a person also comes within the sweep of the definition. The Division Bench, at the time of remand, also had made an observation that this aspect requires as examination.

8. As pleadings are complete, the fact arrayed in O.P. No. 15096 of 1998 could be examined. A group of textile merchants fare as petitioners here. Demands had been put up as against the petitions requiring payment of contricution statutorily required to be paid, and they have been threatened with revenue recovery proceedings They come within the definition of "dealer". It is complained that the contribution is a compulsory imposition on the dealer, but it can never be considered as a fee of tax. It is pointed out that since it comes within Entry 23 of the List III, 7th Schedule, there is no sanction for compulsory extraction from third persons like the petitioners, as they are never to be considered as employers or having any direct connection with a handloom worker. The benefit is solely intended for handloom workers, and imposition of levy violates the mandate of Constitution, and the statute is unenforceable.

9. The petitioners had also made reference to the case reported in (1985 (2) SCC 68-Gasket Radiators case) to show that the contribution leviable under Entry 23 cannot amount to a fee or tax.

10. It is further submitted that when the employers, workers and the Government contribute precious little to the fund, the dealers are treated as the milch cows, for the only reason that they had been engaging in selling textiles. There is no direct or indirect connection between a handloom worker and dealer, so as to fasten a liability for his welfare on the latter, especially since the legislative entry has to be given paramount obedience and guidance. The sale of handloom is an infinitesimally small percentage of turnover, and handloom products from other States are brought down and are kept for sale. When the preamble, amply indicates that the benefit is intended for workers in the said industry in Kerala, and in fact when there are no other beneficiaries, the stipulation for remittance of one per cent of turnover was unauthorised, and an illegal levy, not warranted by Constitution, or even on general principles. It is highlighted that what was demanded was not a levy on sale of handloom clothes manufactured in Kerala, but a portion of the total turnover of the dealer. When there is an employer for the workers, the liability, if at all could have been fastened on them alone.

11. In the course of argument, petitioners had drawn parity with the challenge made about the Fisherman's Welfare Fund, and had indicated that the Supreme Court, doubting the legality of levy had referred the issue for consideration of a Constitution Bench.* There also, the dealers of fish were sought to be covered by the enactment, as liable for contribution to the welfare fund, formulated in the year 1985. Petitioners pointed out that such class had been defined by Section 2(d) in the following terms:

"2. Definitions:- In the Act unless the context otherwise requires:

(a) to (c) *****

(d) "dealer" means any person who carries on, within the State of Kerala, the business of buying or selling or processing fish or exporting fish (in raw or processed form) or fish products and includes (i) a commission agent, a broker, or any mercantile agent, by whatever name called, and (ii) a non resident dealer or an agent of a non resident dealer or a local branch of a firm or company or Association situated outside the State of Kerala."

12. By way of reply, apart from highlighting the aspect of maintainability, the Government Pleader, with reference to the counter affidavit filed, had opposed the claims on merits as well. It had been pointed out that the workmen concerned were one of the weakest sections of the society, and having hand to mouth existence, required assistance of a welfare fund especially to meet unexpected contingencies in their life, and also for sustenance during the old age. It was submitted that the levy might not have been objectionable, since the dealers could fix the price of the commodities at their wish, as they were not dealing with controlled items, and the Government was of the view that a nominal levy, from out of their profits should be their contribution to the community of handloom workers. Reference was cited to the Mangalore Ganesh Beedi Works and Others Vs. Union of India (UOI) and Others, , Gasket Radiators Pvt. Ltd. Vs. Employees" State Insurance Corpn. and Another, , as also the challenges pertaining of Construction Workers" Welfare Fund.

13. The Standing Counsel, Mr. Kurian and Kaimal had also relied on the above decisions. Further under paragraph 29A of the Scheme, the dealer were obliged to submit monthly statements, showing sale proceeds of handloom goods to the assessing officer. Under paragraph 30(4) also they had a duty to maintain records. It was in the absence of such records, that in respect of certain assessments, the full turnover had been made as the basis of assessment. As could be seen from a few assessment orders, notionally the turnover of handloom goods of the dealers have been fixed as one-third of the total sales. Even though to respondents could not point out any statutory basis or authority to adopt the turnover of handloom goods alone for the assessment, it is submitted at the bar that notwithstanding Section 4(2) it had been administratively instructed to follow such a course. But since the basic liability itself is under examination, I am not dwelling on this inconsistencies. If the Act is applicable to the dealers, the fund would have been entitled to demand one per cent of the turnover, and need not have settled for any lesser rates, as the provision originally stood.

14. Before examining the scope of the amendment of the Act, brought in 2001, and the impact thereof on the pending petitions, I may also refer to one fact which is not disputed. In page 5 of the counter affidavit, it has been conceded that the levy is neither a fee or a tax. The levy is only intended as a contribution

to a special fund, the beneficiary being a separate class, and not the society in general. The collection go to a separate fund, and not to the consolidated fund. Of course in the light of the decision in Gasket Radiators case, a different plea could not have come.

15. The amendment presently brought in by Section 3 enhances the rate of contribution that are to come from the workers, self employed persons, employers and consequently that of the Government. But substantial reliefs have been offered to the dealers, and u/s 3(2) the contributions are to be paid on the basis of annual turnover, but subject to slabs. Therefore, in respect of dealers who have annual turnover of Rs. 3 lakhs and below, they stand exempted. The maximum contribution is fixed as Rs. 8500/- which is payable in respect of dealers whose turnover is rupees one crore and above. It is also provided that while adjusting the contributions, the amounts already in credit in respect of dealers are to be taken notice of. The learned Government Pleader points out that what has been demanded now is only a token payment, and in view of the history of the legislation this cannot be treated as a burden on the dealers and while making the amendments their views had been and appreciated.

16. The amendment as above, I do not think, has dealt with the basic objection that has been urged in the Original Petitions. Even without bringing further pleadings in the Original Petitions, the issue as to whether the category of persons who are dealers in textiles are liable to pay this contribution needs examination. It is not the quantum of levy, but the sustainability of the levy, according to the petitioners, is the dispute.

17. Apart from contending that the textile merchants, as dealers, deal with handloom fabrics or yarn it may not be possible for the State Government to point out that there is any direct connection between the two sets of persons. It is also not made clear as to what is the basis for casting the liability. There is possibility of the same commodity being the subject matter of levy at the hands of different dealers, for instance, the wholesale dealers, the retail dealers and individual traders and the provisions appear to have been incorporated in the statute without application of mind. The judgment in the Civil Appeal filed challenging the liability on dealers concerning the Fishermen's Welfare Fund Act had come when the matter was being heard by this Court on 1.2.2002. A copy of the judgment had been made available for me for perusal. Though some of the connected cases had been posted thereafter, no further arguments had come forth to show that the principles laid down there had no application here. I have to take note of the law that had been laid by the Supreme Court in more or less identical circumstance.

18. As extracted earlier, the Fishermen's Welfare Fund Act also cast liability on a dealer. Before the Supreme Court the counsel for the Welfare Fund had attempted to project a case that the levy could be characterised as a tax or fee. But in view of the specific stand that had been taken earlier, the Supreme Court had rejected this contention. It is also pointed out that such arguments may not

be available in view of the Full Bench decision in Civil Appeal No. 12788 of 1996. Dealing with the Kerala Fishermen's Welfare Fund Act, in *Gasket Radiators Pvt. Ltd. Vs. Employees' State Insurance Corpn. and Another*, the Supreme Court had occasion to deal with the identical contentions that had been projected in this case. Reliance was sought to be placed on the basis of the directive principles. As in the present case, the source of power for framing the above Fund is legislative Entry 23 of the Concurrent List. The Supreme Court has held that the State cannot in an enactment under Entry 23 of List III place the burden of an impost by way of contribution, on a section of society who is not a member of such section of society nor an employer of a person who is a member of such section of society. The burden could be placed only when there exists the relationship of employer and employee between the contributor and the beneficiary of the provisions of the Act and the Scheme made thereunder. I may quote herein the ultimate findings that has been entered into:

"In the instant case, the only nexus between the categories of persons covered by the sweep of Sub-section (d) of Section 2 of the Act, including the appellant, who carry on the business of buying or selling or processing fish or exporting fish (in raw or proceeded form) or fish products including (i) a commission agent or a broker or any other mercantile agent by whatever name called and (ii) a non resident dealer or an agent or a non resident dealer or a local branch of a firm or company or association situated out side the State of Kerala and the beneficiaries under the Act and the Scheme - fishermen is that the former are the purchasers and the latter are the catchers and sellers of fish. Such a nexus in our view is not sufficient to burden a purchaser/exporter with the impost of levy of contribution and of Section 4(2) of the Act which will clearly be outside the ambit of Entry 23 of List III of the Constitution and therefore lacking legislative competence."

19. The facts of this case squarely apply to the facts and law that have been authoritatively pronounced by the Supreme Court. The dealers cannot, by any construction or reasoning, be considered as employers of the handloom workers.

20. As pointed out by counsel for the petitioners, the funds are exclusively to be utilised for the benefit of the handloom workers. Definition of the term "producer of handloom products, yarn etc.," in no way help the Government to reach the sector of the society, who are owners of the textile shops, or producers of yarn in mechanised factories, to make them liable for payment of contribution.

21. In the aforesaid view, I hold that the levy that has been imposed on the dealers u/s 4(2) of the Act is not permissible. It is so declared. The amendments brought in 2001 also have no impact to this position. Levy from them cannot be demanded or assessed.

22. In the aforesaid circumstances, I do not think that separate orders covering O.P. Nos. 5296/90, 5825/90 and 1798/91 are warranted. They are textile mills and the fact that the products at later stages might have been utilised for production of handloom cloths does not warrant a proposition that they too are

liable for payment of contributions. It is immaterial whether or not they may come within the purview of the definition of "dealers". All the Original Petitions are allowed. The assessment orders and all coercive proceedings for enforcement therefore are set aside. There will be no order as to costs. I may also make it clear that whatever payments that might have come to the Fund from the hands of the dealers, could be retained by the Fund, as it might have been utilised for welfare measures, during the past years. The prohibition will operate only prospectively, and annuls all assessments and recovery proceedings as on today.