
(1992) 06 KAR CK 0021
In the Karnataka High Court
Case No : S.T.R.P. No's. 4 and 5 of 1989

Southern Founders

APPELLANT

Vs

State of Karnataka and another

RESPONDENT

Date of Decision : 29-06-1992

Acts Referred:

Bombay Sales Tax Act, 1953 — Section 37, 37 (1), 46, 63
Karnataka Sales Tax Act, 1957 — Section 18, 18 A, 25 (1), 29, 5 (1)

Citation : (1992) 87 STC 349

Hon'ble Judges : S.P. Bharucha, J;K. Shivashankar Bhat, J

Bench : Division Bench

Advocate : S.P. Bhat, for the Appellant; H.L. Dattu, Government Advocate, for the Respondent

Judgement

K. Shivashankar Bhat, J.—The dealer is the petitioner in both these revision petitions, under the provisions of the Karnataka Sales Tax Act, 1957 ("the Act", for short). These petitions pertain to the assessment years 1981-82 and 1982-83. The question is regarding the scope of section 18A of the Act.

2. The petitioner is the dealer in grey iron rough castings. Till the year 1980-81 this was taxed under the Act, u/s 5(1), that is to say the goods in question did not fall within any of the enumerated goods under various Schedules to the Act. The petitioner was collecting the tax from its customers according to law. In August, 1982, the petitioner entertained a doubt about the rate of tax applicable to the goods in question and sought clarification from the assessing authority. However there was no response from the assessing authority to this letter. But, in respect of the assessment year 1982-83 he made an assessment in November, 1982, treating the goods as falling u/s 5(1). The petitioner filed an appeal contending that the goods in question came under entry 2 of the Fourth Schedule to the Act. This was accepted by the appellate authority and hence be remanded the matter for fresh assessment. The goods enumerated in the Fourth Schedule are the declared goods in respect of which a single point tax is levied u/s 5(4) of

the Act at the rate specified in the Fourth Schedule. The rate of tax under Fourth Schedule was lower than the rate of tax u/s 5(1) of the Act. After the remand order the assessing authority made a fresh order even in respect of assessment year 1981-82 treating the goods under the Fourth Schedule. Since the petitioner had collected excess amount from the customers the assessing authority ordered forfeiture of the said excess amount purporting to act u/s 18A of the Act. Similar order of forfeiture was made in respect of the year 1982-83 also. The assessing authority observed that these excess collections of tax were in contravention of the provisions of section 18 and therefore the petitioner was liable for penalty u/s 18A at one and a half times the tax so collected in excess of the real tax amount. This order was affirmed by the appellate authority as well as by the Appellate Tribunal. The petitioner contended that the tax collected by the petitioner u/s 5(1), was in fact collected under a genuine belief that the goods in question were liable to be charged under the said provision and in fact all along during the previous years the Revenue also had treated the goods in question as falling u/s 5(1) of the Act. The petitioner further contended that it was a case of a mutual mistake about the applicability of the real charging provision and in such a situation section 18A of Act of the Act cannot be invoked to impose a penalty on the dealer. This contention was negated by the assessing authority in its order dated September 6, 1985, by relying upon the decision of the Supreme Court in R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another, The assessing authority observed that the dealer collected the excess amount by "pretending himself as confused about the rate of tax but the facts proved otherwise". The assessing authority ultimately levied the penalty which was equivalent to the excess amount collected by the petitioner even though section 18A empowered him to levy the penalty at one and a half times the excess collection. The Appellate Tribunal, on facts found that this was a clear case of mutual mistake regarding the rate of tax applicable. For this purpose the Appellate Tribunal has referred to the earlier order of assessment levying the tax u/s 5(1) of the Act and the failure of the assessing authority to respond to the letter addressed by the petitioner seeking clarification. However the Appellate Tribunal thought that the decision of the Supreme Court in R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another, governed the fact situation and the penalty was nothing but an act of forfeiting the sums which the petitioner was not entitled to collect. The Appellate Tribunal observed that the petitioner had not returned the excess collections to the customers from whom they were collected and therefore, to the extent such excess amounts were not refunded, penalty was leviable. The Appellate Tribunal reduced the penalty to some extent since the authorities below had committed some factual errors in the computation of the penalty.

3. The learned counsel for the petitioner contended that the provision which was the subject-matter of the decision by the Supreme Court in R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another, was quite different from section 18A with which we are concerned in the instant case. The learned

counsel argued that u/s 18A of the Act the authority was empowered to levy a penalty having regard to the circumstances of the case. Unlike the Bombay Act referred in R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another, wherein the excess collection was to be forfeited automatically without any discretion to the assessing authority, u/s 18A of the Act the levy of penalty is a discretionary power and therefore section 18A of the Act does not envisage the forfeiture of the excess amount collected by a dealer, as a matter of course; section 18A is a penal provision and should be construed in the same manner as any other penal provision is to be construed.

4. The learned Government Advocate on the other hand contended that the decision of the Supreme Court applies to the instant case u/s 18A of the Act and that the bona fides of the dealer in collecting the amount by way of tax when legally such a tax is not leviable, is entirely irrelevant; irrespective of the motives and the intentions of the dealer, he is bound to be levied with a penalty u/s 18A of the Act whenever it is found that the dealer has collected by way of tax any amount which was not legally leviable as a tax.

5. We may refer to the decision of the Supreme Court in R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another, before referring to the provision of section 18A of the Act. u/s 46 of the Bombay Act there is a bar against any person from collecting any sum by way of tax in respect of sales of any goods on which tax is not payable. Similarly no person other than a registered dealer shall collect any sum by way of tax. u/s 63 of the said Act a person who contravened section 46 was liable to be punished with imprisonment as well as with fine. Further, section 37 provided for the imposition of penalty departmentally for contravening section 46. The said section read thus, as is seen from page 502 of the reported decision :

"37(1)(a). If ant person, not being a dealer liable to pay tax under this Act, collects any sum by way of tax, or being a registered dealer collects any amount by way of tax in excess of the tax payable by him, or otherwise collects tax in contravention of the provisions of section 46, he shall be liable to pay, in addition to any tax for which he may be liable, a penalty as follows :

(i) where there has been a contravention referred to in clause (a), a penalty of an amount not exceeding two thousand rupees; and, in addition, any sum collected by the person by way of tax in contravention of section 46 shall be forfeited to the State Government.

6. It can be seen that u/s 37(1)(a) aforesaid, the person contravening section 46 shall be liable to the penalty which includes the forfeiture of the amount collected by the dealer by way of tax, which he was not entitled to collect. The penalty by way of forfeiture is thus a statutory consequence created by the Legislature without any discretion left to the authority. So long as the dealer has "collected" any excess sum illegally by way of tax it was to be forfeited to the State Government.

7. The Supreme Court was concerned with the constitutional validity of this provision. It was contended before the Supreme Court that the State had no legislative competence to enact such a provision and that the said provision also contravened articles 14 and 19 of the Constitution. The Supreme Court pointed out at page 504 thus :

"..... the trader by casting a no-fault or absolute liability to "cough up" to the State the total "unjust" takings snapped up and retained by him "by way of tax" where tax is not so due from him, apart from other punitive impositions to deter and to sober the merchants whose arts of dealing with customers may include "many a little makes a mickle". If these steps in reasoning have the necessary nexus with the power to tax under entry 54, List II, it passes one's comprehension how the impugned legislation can be denounced as exceeding legislative competence or as a "colourable device" or as "supplementary, not complementary"."

At page 506 it was observed that :

"In the present case, the narrow issue is as to whether the forfeiture clause in section 37(1) is bad because of the besetting sin of colourability."

8. It is in this context the Supreme Court posed the question as to the true character of a forfeiture and answered that the word "forfeiture" must bear the same meaning of a penalty for breach of a prohibitory direction. The Supreme Court rejected the notion that a penalty or a punishment cannot be case in the form of an absolute or no-fault liability but must be preceded by mens rea. At page 508 it was observed :

"..... The classical view that "no mens rea, no crime" has long ago been eroded and several laws in India and abroad, especially regarding economic crimes and departmental penalties, have created severe punishments even where the offences have been defined to exclude mens rea. Therefore, the contention that section 37(1) fastens a heavy liability regardless of fault has no force in depriving the forfeiture of the character of penalty."

9. It is in these circumstances it was held that the State Legislature had competence under entry 54 of List II to enact a provision like section 37.

10. In the context of the word, "forfeiture" used u/s 37, the Supreme Court observed that the words "any sum collected" used in section 37 should be understood as any amount which a dealer collected without refunding the same to the customer, on realising that such a sum was not leviable as a tax. However certain observations at page 515 will have to be noted.

"..... The word "penalty" in its limited sense in section 37(1) and section 37(4) does not include forfeiture which is a different punitive category. Forfeiture is a penalty, in its generic sense, but not a penalty in the specific signification in section 37(1) and (4). After all, the functionary is exercising quasi-judicial powers and not insisting on maximum exactions. Every consideration which is

just and relevant must enter his verdict lest the order itself be vitiated for being unreasonable or perverse exercise of discretion."

11. These observations were made to point out that if an amount is refunded by the dealer to the customer, or he undertakes to do so, to that extent there cannot be forfeiture by way of penalty. These observations are also relevant to appreciate the scope of the discretion given to the authority to impose a penalty.

12. Section 18 of the Act in substance is similar to section 46 of the Bombay Act referred in *R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another*, However, section 18A employs different language. It reads thus :

"18A. Penalty for collection in contravention of section 18. - If any person contravenes any of the provisions of section 18, the assessing authority may, after giving such person reasonable opportunity of being heard, by order in writing, impose upon him by way of penalty a sum not exceeding one and a half times such amount :

Provided further that no prosecution for an offence u/s 29 shall be instituted in respect of the same facts on which a penalty has been imposed under this section."

13. A reading of the above provision shows that the levy of penalty is not automatic. No absolute liability is fastened on the dealer who contravenes the provisions of section 18, unlike section 37 of the Bombay Act. Section 18A of the Act empowers the assessing authority to impose a penalty. The exercise of the power is entirely discretionary because phraseology is that, "the assessing authority may impose by way of penalty." The proviso to the section indicates that the imposition of penalty is a substitute for prosecution u/s 29. The section does not make it obligatory on the part of the assessing authority to impose any minimum penalty though it prescribes the maximum penalty that may be imposed. From this it is clear that the State Legislature while enacting section 18A did not intend to forfeit any excess amount collected by the dealer unlawfully, as a matter of course; a discretion was vested in the assessing authority to impose the penalty. The amount of penalty may vary from case to case depending upon the circumstances of each case. If the intention was to forfeit the entire amount collected nothing was easier than to say so clearly, as has been done u/s 37 of the Bombay Act. It has to be assumed that the State Legislature was aware of the law declared by the Supreme Court in *R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another*, on August 31, 1977. But, the Legislature thought it fit not to alter the language of section 18A, when it proceeded to substitute the said section by the Karnataka Act 18 of 1978 and then amended it by Karnataka Act 23 of 1983. This is a circumstance indicative of the legislative intention to treat the subject of penalty u/s 18A differently from the treatment meted out under the Bombay Act, considered by the Supreme Court in *R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another*,

14. The manner in which a penalty should be imposed, and its extent and scope are essentially matters of legislative policy and the policy adopted by one Legislature cannot be impliedly read into the provisions of a law enacted by another Legislature.

15. A penalty no doubt is imposed to deter a person from contravening the provisions of the law. Normally, the imposition of penalty would vary with the circumstances of each case and the quantum of penalty would depend upon the gravity of the contravention. When the law itself does not fix the quantum of penalty and leaves it to the discretion of an authority, it is reasonable to assume that the said discretion is to be judicially exercised, as otherwise it will be vesting an arbitrary power in the authority to impose the penalty as he likes. In *Hindustan Steel Ltd. Vs. State of Orissa*, it was observed at page 214 of STC; 256 of AIR

"Under the Act penalty may be imposed for failure to register as a dealer : section 9(1) read with section 25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute."

16. Even though the levy of penalty is a discretionary power, it has been held that an unreasonable exercise of such a discretion may be quashed for error of law, if the court regards the penalty as excessive in the circumstances (vide *Judicial Review of Administrative Action* by De Smith-IV Edition-page 407).

17. Having regard to the difference between the provisions of the Bombay Act which was the subject-matter to *R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another*, and section 18A of the Act with which we are concerned here, we are clearly of the view that u/s 18A of the Act imposition of penalty cannot be an automatic function by the assessing authority. The assessing authority will have to apply its mind to the circumstances under which the dealer collected the amount, which was found to be unlawful subsequently. The conduct of the dealer is certainly relevant while imposing the penalty u/s 18A.

18. A learned Judge of the Allahabad High Court had an occasion to consider

almost a similar contention in Commissioner of Sales Tax v. Prakash Trading Co. [1982] 51 STC 342. The question was whether the dealer who carried on business without registration could be penalised as a matter of course. The Revenue relied upon the decision in R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another, The learned Judge pointed out that that the Joshi's case [1977] 40 SCT 497 (SC) is not an authority for the proposition that wherever mens rea is excluded the authorities are left with no discretion; that would make the levy automatic; the provision then could have read that an assessee who does not get itself registered shall be liable to pay penalty at the rate provided. But actually the Act conferred a discretion on the assessing authority because he had to be "satisfied" that the dealer had committed a breach of the provision. This satisfaction had to be arrived at after enquiry and hearing the assessee. There was no statutory compulsion, rather it was discretionary to impose the penalty. In the circumstances of the case the bona fides of the dealer was held to be relevant and the principle stated by the Supreme Court in Hindustan Steel Ltd. Vs. State of Orissa, : was applied.

19. Earlier in the year 1971 a Bench of this Court had an occasion to consider the scope of section 18A in Ganesh Foundry v. Commercial Tax Officer The Bench held at page 261 :

"In the instant case, there was a bona fide doubt as to the rate of tax chargeable on the goods in question. In fact, the assessing authority when he made the assessment order for the year 1963-64 on 11th April, 1967, had held that the goods are liable to tax at four per cent. The petitioner had made collection at four per cent. It was only on appeal to the appellate authority that the rate was reduced to two per cent. If the petitioner had collected tax at two per cent, but the assessing authority and the appellate authority had held that tax is chargeable at four per cent, the assessee would be left without any means to collect the deficit tax from the customers. These are circumstances which the authority exercising powers u/s 18 has to take into consideration before levying penalty. What is the amount of penalty that should be levied would also depend upon the facts and circumstances of each case. Without considering the circumstances under which the collection was made, the assessing authority could not have straightway levied penalty u/s 18A equal to the excess amount collected by it."

20. We are in respectful agreement with the above observation of this Court. Mr. S. P. Bhat, learned counsel for the petitioner, pointed out that similar view taken by the Madras High Court was not interfered with by the Supreme Court and the SLP filed by the State was dismissed, as reported in [1988] 69 STC 2 SC , item 6. Recently another Bench of this Court, of which one of us was a member, also took the same view in State of Karnataka v. Subramanian [1992] 84 STC 230.

21. It is necessary to note that the contravention alleged against the petitioner herein is that he has "collected" by way of tax an amount which could not have been collected. In R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills

Limited and Another, , the Supreme Court observed that the word "collected" should be understood as a continued attempt to retain the amount of tax collected and in a case where the amount is refunded or a provision is made for the refund of the same by the dealer to the person from whom it is collected, such a retention in the meanwhile cannot be treated as an "amount collected"; in other words, if the dealer sincerely made an attempt not to enrich himself unduly it may not be a case of collection of an amount in contravention of the Act for the purpose of imposing a penalty. At any rate, the conduct of the dealer in such a situation in attempting to refund or to make a provision for refund, to the customers of the excess collection will certainly be a very relevant factor while considering the question of imposing the penalty.

22. In the instant case there is a clear finding by the Appellate Tribunal that the collection of the amount was inevitable having regard to the mutual mistake committed both by the assessee and the department as to the rate of tax applicable to the goods in question. Therefore it cannot be said that the petitioner acted deliberately to enrich himself by collecting any sum by way of tax which the petitioner was not entitled to do so. Mr. S. P. Bhat, learned counsel for the petitioner, fairly stated before us that the petitioner will make every attempt to refund these excess amounts collected from the customers, to the respective customers as far as possible. This statement is also recorded by us here as an additional factor which would go a long way in favour of the petitioner while considering the case u/s 18A.

23. Having regard to the finding given by the Appellate Tribunal that there was a mutual mistake and the petitioner was not guilty of any deliberate attempt to enrich himself by invoking the provisions of the Act and in the light of the statement made by the learned counsel for the petitioner, there is no reason to impose any penalty on the petitioner u/s 18A of the Act in the manner done by the respondents. The levy of penalty will have to be accordingly set aside. It is accordingly set aside.

24. Revision petitions are allowed.

25. Petitions allowed.