
(1984) 01 KAR CK 0012

In the Karnataka High Court

Case No : Criminal R.P. No. 197 of 1982 and Connected Cases

State of Karnataka

APPELLANT

Vs

Narasimhamurthy

RESPONDENT

Date of Decision : 31-01-1984

Acts Referred:

Karnataka Sales Tax Act, 1957 — Section 10 (1), 13 (3) (b)

Citation : (1984) ILR (Kar) 852

Hon'ble Judges : Venkatesh, J

Bench : Single Bench

Judgement

Venkatesh, J.—Since common questions of law and facts are involved in all these cases they were clubbed and heard together.

2. The proceedings under challenge in these cases are proceedings initiated in the courts below at the instance of the concerned Assistant Commercial Tax Officers u/s 13(3)(b) of the Karnataka Sales Tax Act, 1957 (the Act).

3. The assessees, on appearing in the courts below, raised objections to the proceeding taken up mainly on the ground that the order of assessment was void and, therefore the proceeding to recover the tax covered under that assessment order should not be permitted. The learned Magistrate, Chintamani, Kolar District, upholding the objections of the assessee concerned, dismissed the petitions filed by the Assistant Commercial Tax Officer. But the learned Magistrate, K.G.F., over ruling similar objections raised by the assessees has decided to take further action in the matters.

4. The assessees in all these cases are running hotels and restaurants at several places as noted in the concerned assessment orders.

5. Their main objection for the proceedings taken up against them was that the supply of mals etc, by them to their customers did not amount to "a sale" within the meaning of the Act and, therefore, sales tax could not have been levied re : those transactions. In support of this contention they place reliance on the

decisions of the Supreme Court in *State of Himachal Pradesh - v. -; Associated Hotel Limited and; Northern India Caterers - v. - Lt. Governor of Delhi*. The learned counsel appearing for the assessee submitted that the assessment orders in question were void ab initio being contrary to the relevant provisions of law and therefore the courts below had rightly proceeded to examine the correctness or otherwise of the concerned assessment orders. He argued that the orders of the learned Magistrate, Chintamani, has to be upheld and that of the learned Magistrate, K.G.F., should be set aside.

6. It was argued by the learned State Public Prosecutor that the power of the Magistrates was very much limited u/s 13(3)(b) of the Act and that they had absolutely no powers to sit in judgment on the correctness or otherwise of the concerned assessment orders on merits.

7. Section 13(3)(b) of the Act reads as follows :

"13. PAYMENT AND RECOVERY OF TAX.....

(1).....

(2)

1. The State of Punjab Vs. Associated Hotels of India Ltd., 2. Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, (3) Any Tax assessed, or any other amount due under this Act from a dealer or any other person may without prejudice to any other mode of collection be recovered.

(a) as if it were an arrear of land revenue, or

(aa) by attachment and sale or by sale without attachment of any property of such dealer or any other person by the assessing authority or the prescribed officer in accordance with such rules as may be prescribed :

(b) notwithstanding anything contained in the Code of Criminal Procedure, 1973 (Central Act 2 of 1974) on application to any Magistrate, by such Magistrate as if it were a fine imposed by him :

Provided that where a dealer or other person who has appealed or applied for revision of any order made under this Act and had complied with an order made by the Appellate or the revising authority in regard to the payment of the tax or other amount, no proceedings for recovery under this sub section shall be taken or continued until the disposal of such appeal or application for revision".

8. Now the question is were the assessment orders open to any collateral attack in proceedings initiated u/s 13(3)(b) of the Act ?

9. In this connection the following observations of the Supreme Court in *Central Poteries, Nagpur - v. - State of Maharashtra* may be noted :

"There is a fundamental distinction between want of jurisdiction and irregular assumption of jurisdiction. Whereas an order passed by an authority with respect

to a matter over which it has no jurisdiction is a nullity and is open to collateral attack, an order passed by an authority which has jurisdiction over the matter, but has assumed it otherwise than in the mode prescribed by law, is not a nullity. It may be liable to be questioned in those very proceedings, but subject to that it is good, and not open to collateral attack. Therefore even if the proceedings for 3. (1962) 13 S.T.C. 472 assessment were taken against a non registered dealer without the issue of a notice u/s 10(1) that would be a mere irregularity in the assumption of jurisdiction, and the orders of assessment passed in those proceedings cannot be held to be without jurisdiction and no suit will lie for impeaching them on the ground that Section 10(1) had not been followed."

10. In order to examine this question a few more facts are required to be noted. It is nobody's case that articles supplied in an eating house or restaurant is not at all exigible to sales tax in this State. But, what is contended is that the food supplied by these Hoteliers and restaurant owners amounts to service of meals to casual visitors and is, there fore, not taxable as a sale under this Act, in view of Northern India Caterers .

11. The ratio of the decision in that case came up for a clarification before the Supreme Court in Review Petitions preferred by the State seeking a review of that case. Declining to review that decision the Court observes as under :

"It appears from the submissions now made that the respondent as well as other States are apprehensive that the benefit of the judgment of this Court will be invoked by restaurant owners in those cases also where there is a sale of food and title passes to the customers. It seems to us that having regard to the facts upon which our judgment rests undisputed as they have remained throughout the different stages of the litigation and the considerations, which they attract, no such apprehension can be reasonably entertained. Indeed, we have no hesitation in saying that where food is supplied in on eating house or restaurant, and it is established upon the facts that the substance of the transaction, evidenced by its dominant object, is a sale of food and the rendering of services is merely incidental, the transaction would undoubtedly be exigible to sales tax. In every case it will be for the taxing authority to ascertain the facts when making an assessment under the relevant sales tax law and to determine upon those facts whether a sale of the food supplied is intended."

The Court observes that if the dominant object of the Hoteliers or restaurant owners was to sell food and rendering 4. Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, service was only incidental, such a transaction would be exigible to sales tax. The Court further observes that it is a question of fact in each case as to whether it is or not.

12. In fact to clarify the doubts that might have arisen in view of the decisions in Associated Hotel Limited and Northern India Caterers, the Parliament by the Constitution 46th Amendment Act, 1982 has amended Article 366 by inserting a new Clause 29 A. Clause 29 A contains an inclusive definition of the term "tax on

the sale or purchase of goods" and that includes supply of food or other articles for human consumption (see Clause 29A (f) of Article 366 of the Constitution). Section 6 of the Constitution 46th Amendment Act, 1982 while validating and providing for exemption of transactions, if any, that had taken place earlier to the commencement of that Act and amenable for tax under the Sales Tax Laws, throws the burden on the assessee to prove that the transactions carried on by him which are proposed to be taxed fall into the excepted category.

13. It is thus clear that in a given case it is for the assessing authority to find out as to the exact nature of the transaction. It would be well within his jurisdiction to find out whether the transactions involved were liable to tax or not. It cannot be said that the authority lacked inherent jurisdiction to deal with the matter. Therefore, the assessment orders were not liable for any collateral attack in the Courts below.

14. In these cases the Courts below had erred in going behind the assessment orders. If the assessee concerned was aggrieved by the assessment order he could have questioned the correctness of the same in an appropriate forum under the Act.

15. For the reasons stated, Cr. R. Ps. 837 and 840 of 1981 and 53/82 are hereby dismissed. Cr. R.P. Nos. 197 to 204 of 1982 are hereby allowed and the orders impugned set aside and the matters are remitted to the learned Magistrate, Chintamani, for appropriate action in the matter.

16. Immediately after the pronouncement of this order, the Learned Counsel for Petitioners in Cr. R.P. Nos. 839 and 840/82 made an oral application for a certificate of fitness for appeal to the Supreme Court.

Neither any substantial question of law as to the interpretation of the Constitution nor any other substantial question of law of general importance which needs to be decided by the Supreme Court arises in these cases. Hence, certificate sought for not granted.