
(2008) 08 KL CK 0016

In the High Court Of Kerala

Case No : Writ Petition (C) No. 16460 of 2008 (H)

Vasantha Anirudhan

APPELLANT

Vs

State of Kerala and Another

RESPONDENT

Date of Decision : 19-08-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 254
Contract Act, 1872 — Section 126
Income Tax Act, 1961 — Section 147
Kerala General Sales Tax Act, 1963 — Section 19C
Kerala Value Added Tax Act, 2003 — Section 26

Citation : (2008) 08 KL CK 0016

Hon'ble Judges : V. Giri, J

Bench : Single Bench

Advocate : C.K. Thanu Pillai, for the Appellant; Vinodchandran, Special Government Pleader, for the Respondent

Judgement

V. Giri, J.—The petitioner, inter alia, challenges the validity of Section 26 of the Kerala Value Added Tax Act, 2003 (hereinafter referred to as, "the VAT Act"). She also challenges the orders passed by the second respondent levying penalty on the petitioner purportedly u/s 19C of the Kerala General Sales Tax Act, 1963 (for short, "the KGST Act") read with Section 26 of the VAT Act. The orders levying penalty, exhibits P-11 and P-12, are appealable in terms of the provisions of the Act. Since the learned Counsel for the petitioner and learned Special Government Pleader made submissions as regards the constitutional validity of the provisions under challenge as also on the jurisdiction over the action taken by the authorities concerned, I have considered the contentions on merits, without relegating the petitioner to the alternate remedy available under the Act in circumstances where I was convinced that apart from the issue regarding the validity of the provisions of the Act, the question touching upon the jurisdiction of the authority to act u/s 26 of the Act genuinely arises for consideration in this writ petition.

2. The petitioner claims to be a housewife, having no business interests whatsoever. The petitioner's husband late Anirudhan was a Government contractor. He expired on November 5, 2000. Later Anirudhan and the petitioner's son Biju Anirudhan had jointly conducted business under the name and style of M/s. Vasan Enterprises. Apparently, this business was stopped on May 30, 1995. Biju Anirudhan thereafter commenced business under the name and style of M/s. Anjaneya Motors, as a proprietary concern for the distribution of opel cars. The said concern also dealt with the spare parts of cars. M/s. Anjaneya Enterprises is registered under the KGST Act as also under the VAT Act.

3. On February 21, 2008 the petitioner received summons from the Assistant Commissioner, second respondent, to appear before him on March, 11 2008. Several questions dealing with the business of Biju Anirudhan, the petitioner's son, was put to her. The petitioner pointed that she has no information about her son's business as such. Her son had taken some private loans from her and these loans were repaid either in cash or by way of cheques. The petitioner's husband had two cars at the time of his death. Biju Anirudhan had taken those two cars. At the instance of her son, she stood as a guarantor for some loan taken by Biju Anirudhan from the bank. She was not a participant in the business run by Biju Anirudhan. For the purpose of enabling Biju Anirudhan to avail of a loan from State Bank of India, M. G. Road Branch, Thiruvananthapuram, the petitioner had made available the property belonging to her in Survey No. 3639/2/5 of Kaudiar Village as an additional security, even at a point of time where the said property had already been mortgaged by the petitioner as a security for a housing loan availed by her. The petitioner has produced a copy of the statement recorded by the second respondent on March 11, 2008 as exhibits P-3. Either dissatisfied with the explanation or deposition, as it were, exhibits P-4 to P-9 notices were issued by the second respondent proposing to impose a penalty on the petitioner u/s 19C of the KGST Act read with Section 26 of the VAT Act. These notices relate to the years 2001- 02 to 2006-07. Exhibits P-4 to P-9 are almost identically worded, at least, insofar the portions therein relating to the petitioner are concerned. Since the submissions made by counsel referred to the contents of the notices and since the arguments had also centered around the exercise of jurisdiction by the second respondent u/s 19C of the KGST Act or u/s 26 of the VAT Act, as the case may be, it would be useful to refer to the relevant portion of exhibit P-4, which reads as follows:

6. Further enquiry also revealed that Smt Vasantha Anirudhan, mother of the dealer, has invested money in the business for a common interest of sharing profit on account of deposit of money in cash. Due to this reason, she has mortgaged her property in Union Bank of India for raising fund for the business of M/s. Anjaneya Motors which was a running business from 2000-01 in which she has invested money in cash and cheques. For example, she received cheques as follows:

Federal Bank Ltd. - A/c. No. 1686 Date Cheque No Amount July 17, 2002

504982 Rs. 50,000 April 26, 2003 555389 Rs. 1,00,000 May 7, 2003 555394 Rs. 3,00,000 May 7, 2003 555395 Rs. 70,000 May 9, 2003 555396 Rs. 60,000

Smt. Vasantha Anirudhan is therefore liable to be assessed u/s 19C of the KGST Act 1963.

4. Exhibits P-10 and P-11 are the replies given by the petitioner to exhibits P-4 to P-9 notices. The replies are dated May 24, 2008. The relevant portion of the replies reads as follows:

You have stated in the notices that on enquiry by you it is found that I have made investment in the business of M/s. Anjaneya Motors, stood surety for the loan raised by Sri Biju Anirudhan and shared profit from the business showing that five cheques for a total amount of Rs. 5,80,000 during the period from July 17, 2002 till May 9, 2003 have been received by me.

Please note that M/s. Anjaneya Motors is a proprietary concern solely owned by Sri Biju Anirudhan. According to my information he has obtained sales tax registration in his own name and conducted the business by he himself. I have absolutely no connection with his business or any other business. I am only a housewife. I have pledged my properties with the Union Bank of India for the loan taken only on an additional collateral security. I have given the additional security as requested by my son and not because I have got any interest in his business. He has given me the above amount of Rs. 5,80,000 during the period from July 17, 2002 till May 9, 2003 towards the price of the cars owned by my husband and taken by him after his demise. The vehicles are one Opel Astra car bearing the Registration No. PY01 N-444 and Tata Seira bearing No. KL-01 J-4044 and it is not a sharing of profit as alleged. This has absolutely no connection with the business of my son in any way.

It may please be seen that you have no materials to hold that I have participated in the business of my son, M/s. Anjaneya Motors. Therefore, your statement that I have participated in the business of my son, M/s. Anjaneya Motors is false and frivolous and no details gathered were furnished to me.

5. Apparently, the objections exhibits P-10 and P-11 were not taken into account by the second respondent, nor was the petitioner afforded an opportunity of hearing as such. But the proposals made under exhibits P-4 to P-9 were confirmed and the orders in relation to the period of assessment 2005-06 and 2006-07, passed u/s 26 of the VAT Act, as exhibits P-12 and P-13 are under challenge in this writ petition. Since the counsel for the petitioner had raised a contention that the objections to the proposals to levy penalty, though dated May 24, 2008, were actually served in the office of the second respondent prior to the date by exhibits P-12 and P-13, i.e., April 3, 2008, I had called for the files leading to exhibits P-12 and P-13 and Special Government Pleader Mr. Vinod Chandran has made available the same. The precise date on which the orders were despatched from the office of the second respondent was not clearly available from the files as such. But the orders themselves show that an

opportunity of hearing, as such, was not afforded to the petitioner before the passing of exhibits P-12 and P-13 orders.

6. I heard learned Counsel for the petitioner Sri C. K. Thanu Pillai and the learned Special Government Pleader Sri Vinod Chandran.

7. I heard learned Counsel on both sides on the question of validity of Section 26 of the VAT Act and on the question touching upon the jurisdiction of the second respondent to pass an order u/s 26 of the VAT Act.

8. The challenge against the constitutionality of Section 26 of the VAT Act, I dare say, seems to be mounted on nebulous grounds. Since what is challenged is a provision in a plenary statute, the grounds available in this regard would be limited to the following:

(a) Violation of the constitutional provisions.

(b) Legislative competence.

(c) Repugnancy vis-a-vis the provisions of any Central statute, within the meaning of Article 254 of the Constitution of India.

9. There is no challenge to Section 26 of the VAT Act on the ground that it is repugnant to the provisions of any Central statute as such, occupying the same field. The challenge seems to be rested on the ground that the provision is violative of Articles 14 and 19 of the Constitution, to the extent to which the provision enables the competent authority to rope in the guarantor of an assessee also by way of a protective assessment u/s 26 of the VAT Act. This, it is contended, is violative of Articles 14 and 19. In an ambiguous way, it is also contended that since it is violative of Articles 14 and 19 of the Constitution, it should also be treated as beyond the legislative competence of the State Legislature. I think, it is better to deal with the contention as posed by Sri Thanu Pillai, in the course of his argument, than go by the pleadings in this regard in the writ petition. Section 26 of the VAT Act reads as follows:

26. Protective assessment.-Notwithstanding anything to the contrary contained in any judgment, decree, order, direction or decision of any court, Tribunal or other authority, where the assessing authority has reason to believe that any person is, or was carrying on business in the name of, or in association with any other person, either directly, or indirectly, whether as agent, employee, manager, power of attorney holder, guarantor or in any other capacity, such person and the person in whose name the registration certificate, if any, is taken, shall jointly and severally, be liable for the payment of the tax, penalty or other amount due under this Act which shall be assessed, levied and recovered from all or any of such person or persons, as if such person or persons are dealers:

Provided that before taking action under this section, the persons concerned shall be given a reasonable opportunity of being heard.

10. A similar view has been taken by the Supreme Court in a recent decision

reported in Aslam Mohd. Merchant Vs. Competent Authority and Others, .

11. Sri Thanu Pillai's contention is that it might be open to the assessing authority to rope in any person, who is associated with the assessee as agent, employee, manager, power of attorney holder or any such like capacity. But, a guarantor as such, stands on a different footing. The contention is that an agent, in law, is entitled to represent the principal and in several cases, he is the alter ego of the latter. An employee or a manager, it is contended, would be a participant in the business. A power of attorney is another species of an agency. All these jural relationships, it is contended, contemplate a participation in the business of the principal, albeit to a limited extent. But a guarantor shares a different kind of jural relationship with the assessee. A "contract of guarantee", as defined u/s 126 of the Contract Act, treats the principal, creditor and guarantor as three different entities. The contract of guarantee is imprinted with certain specific characteristics and operates in a limited sphere. A guarantor, on the strength of a contract of guarantee, can never be a participant in the business run by the principal, and therefore, the Legislature has acted beyond its competence in roping in the guarantor within the ambit of Section 26 of the VAT Act.

12. I am not impressed with this argument. With due respect to the learned Counsel for the petitioner, the fallacy in the argument is rested on the assumption that the power u/s 26 of the VAT Act is exercised in such a manner as to rope in a person, who is associated with the business of the assessee, on the strength of or by reason of such association being relatable to the jural relationships mentioned in the provision. That is to say, the argument proceeds on the premise that agent, employee, manager or power of attorney holder of the assessee could be roped in on the strength of Section 26 of the VAT Act, merely by reason of such jural relationship with the assessee. But this is not what Section 26 of the VAT Act contemplates. The jurisdictional factor which enables the assessing authority to proceed u/s 26 of the VAT Act is that there should be reason to believe that any person is or was carrying on business in the name or in association with any other person. It is the actual association with the business of the assessee (or the person in whose name the registration stands) that fulfils the basic jurisdictional factor for the assessing authority to proceed against a person other than the assessee u/s 26 of the VAT Act. If there is a business association between the assessee and the non-assessee, as the case may be, then the latter cannot claim immunity from a proceeding u/s 26 of the VAT Act by styling himself to be an agent, employee, manager, power of attorney holder or a guarantor. In other words, it is not the existence of the jural relationship between an agent and principal, employer and employee, employer and manager or a principal and power of attorney holder that gives rise to proceedings u/s 26 of the VAT Act. What the provision, therefore, provides for is that, if a person is associated with the business of another and the latter is an assessee or if the latter is actually a benami of the former, the mere fact that the non-assessee is in a position to pin on the label of an agent/employer/manager

on his lapel should not give him the opportunity to escape the clutches of law. Section 26 of the VAT Act does not mean or is intended to mean that an agent/employee/manager or power of attorney holder of an assessee, would be automatically vulnerable to be proceeded against u/s 26 of the VAT Act merely by reason of the fact that they are placed in such a jural relationship with the assessee as such. It is not the existence of a jural relationship between the principal and the agent, or an employee/employer or a principal and power of attorney holder that enables the assessing authority to invoke the power u/s 26 of the VAT Act. It is the association of the non-assessee with the assessee in the pursuit of business that would satisfy the jurisdictional factors contemplated u/s 26 of the VAT Act.

13. Once this position is accepted, then it follows, as a logical sequence that a "guarantor" as such is contemplated by Section 26 of the VAT Act only as a measure of making it clear that if a non-assessee is associated with the assessee, in the pursuit of the latter's business, the mere fact that there is a jural relationship of a principal debtor and a guarantor will not stand in the way of the assessing authority legitimately proceeding u/s 26 of the VAT Act, provided the jurisdictional factors which are otherwise provided for are satisfied. In my view, the challenge mounted by the petitioner to Section 26 of the VAT Act on the ground that the Legislature has no competence to rope in a guarantor also within the ambit of Section 26 of the VAT Act will, therefore, have to be held as misconceived and misplaced.

14. Further the challenge to the constitutionality or validity of a provision in a plenary statute carries with it in its wake an extremely onerous burden on the part of the person who mounts the challenge. The provision contained in the plenary statute reflects the will of the people and it could be interfered with only on extremely limited grounds. The law, on this point, has been referred to in extenso by the Supreme Court in *Government of Andhra Pradesh and Others Vs. Smt. P. Laxmi Devi*, . The following passage from the judgment of the Constitution Bench of the Supreme Court, in *R.K. Garg and Others Vs. Union of India (UOI) and Others*, , referred to in *Government of Andhra Pradesh and Others Vs. Smt. P. Laxmi Devi*, with respect, deserves reproduction:

Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. It has been said by no less a person than Holmes, J. that the Legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the Legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this

admonition been more felicitously expressed than in *Morey v. Doud* [1957] 354 US 457 where Frankfurter, J. said in his inimitable style:

In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The Legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events—all these show that self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability.

The court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry"; "that exact wisdom and nice adaption of remedy are not always possible" and that "judgment is largely a prophecy based on meagre and uninterpreted experience". Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what may one call trial-and-error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts cannot, as pointed out by the United States Supreme Court in the *Secretary of Agriculture v. Central Reig Refining Company* 94 Law Ed. 381, be converted into Tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any Legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities and inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the Legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the Legislature in dealing with complex economic issues.

(Emphasis supplied)

15. Sri Vinod Chandran also refers to the judgment of a learned Judge of this Court in *Kayemyes Trading Company v. State of Kerala* [1994] 2 KTR 401, wherein a challenge against Section 19C was repelled by this Court. Paragraph 10 of the said judgment eloquently speaks the mind of the court. The same also,

with respect, deserves reproduction:

I do not find any substance in this contention either. Guidelines for the exercise of the power are found in the section itself, namely that the assessing authority should have reason to believe that any person is or was carrying on business in the name of or in association with any other person either directly or indirectly. The language of the section is clear without any vagueness or ambiguity in it. It is clear enough as to the circumstances in which it applies. The intent of the section is obvious that the State should be able to recover the tax from the person really effecting the sale. The expression "reason to believe" is a well known term in the law of taxation (vide Section 147 of the Income Tax Act, 1961) and in administrative law and has never been understood as an expression of nebulous content, affiliated with the vice of arbitrariness. I hold that Section 19C does not confer any arbitrary or undivided power making it offensive of Article 14 of the Constitution of India.

16. For all the reasons mentioned above, I am of the view that the challenge to the validity of Section 26 of the VAT Act deserves to be repelled and I do so.

17. Learned counsel for the petitioner Sri Thanu Pillai then submits that notwithstanding the existence of jurisdiction with the second respondent to invoke the power u/s 26 of the VAT Act, the same is conditioned by certain factors which obviously will have to be satisfied. He refers to the words "reason to believe" as occurring in Section 26 of the VAT Act and submits that the said collocation of words has a definite meaning in law. Reference is made to the following passage in the judgment of the Supreme Court in *Ganga Saran and Sons P. Ltd. Vs. Income Tax Officer and Others*, :

It is well-settled as a result of several decisions of this Court that two distinct conditions must be satisfied. First, he must have reason to believe that the income of the assessee has escaped assessment and secondly, he must have reason to believe that such escapement is by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. If either of these conditions is not fulfilled, the notice issued by the Income Tax Officer would be without jurisdiction. The important words u/s 147(a) are "has reason to believe" and these words are stronger than the words "is satisfied". The belief entertained by the Income Tax Officer must not be arbitrary or irrational. It must be reasonable or, in other words, it must be based on reasons which are relevant and material. The court, of course, cannot investigate into the adequacy or sufficiency of the reasons which have weighed with the Income Tax Officer in coming to the belief, but the court can certainly examine whether the reasons are relevant and have a bearing on the matters in regard to which he is required to entertain the belief before he can issue notice u/s 147(a). If there is no rational and intelligible nexus between the reasons and the belief, so that on such reasons, no one properly instructed on facts and law could reasonably entertain the belief, the conclusion would be inescapable that the Income tax Officer could not have reason to believe that any part of the

income of the assessee had escaped assessment and such escapement was by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts and the notice issued by him would be liable to be struck down as invalid.

18. It is contended that, being a fiscal statute, the same connotation will have to be attributed to the words "reason to believe" as occurring in Section 26 of the VAT Act as well. Though the court cannot investigate into the adequacy or sufficiency of the reasons which have weighed with the assessing authority in coming to the conclusion, for the purpose of invoking the power u/s 26 of the VAT Act, the court can certainly examine whether the reasons are relevant and have a bearing on the matters in regard to which he is required to entertain a belief, legitimately, for the purpose of the Act. I have already referred to the relevant portion of exhibits P4 notice, on the strength of which the petitioner is sought to be roped in u/s 26 of the VAT Act. Since, what have been challenged in this writ petition are the orders, exhibits P-12 and P-13, it would be appropriate to refer to the relevant findings in exhibits P-12 and P-13, given by the second respondent, to support the action u/s 26 of the VAT Act. It reads as follows:

Smt Vasantha Anirudhan in response to the summons dated February 21, 2008 appeared on March 11, 2008 and deposed that she had invested money in her son's (Sri Biju Anirudhan) business and had received money by way of profit from Sri Biju Anirudhan through cheques and by cash. Smt Vasantha Anirudhan had mortgaged a property including residential building to Union Bank of India to assist and participate in the business needs of Sri Biju Anirudhan. Hence Smt. Vasantha Anirudhan was carrying on business in association with Sri Biju Anirudhan and therefore liable for the payment of tax, penalty and all other amount due under this Act.

19. The first factual finding is that the petitioner has invested money in her son's business. This factual finding is sought to be related to the deposition made by the petitioner before the second respondent on March 11, 2008. Exhibits P-3 is the said statement/deposition. I have been taken through exhibits P-3 in detail. All that the petitioner has stated is that, she has helped her son in his business.

20. Nowhere in the statement has she deposed that she has invested money in the business of her son Biju Anirudhan. I do not find any support for the factual finding in exhibits P-12 and P-13 orders that the petitioner had invested money in her son's business. There is no statement anywhere that she was, therefore, associated with the business of her son. It would not be an exaggeration to term the aforementioned factual finding in exhibits P-12 and P-13 as a "perverse finding of fact". The fact that a mother might have helped her son in the pursuit of the latter's business cannot be construed as an admission on the part of the mother that she had also invested in her son's business.

21. The second factual aspect referred to in exhibits P-12 order is that the petitioner had mortgaged the property, which included a residential building, with

the Union Bank of India to assist and participate in the business venture of Sri Biju Anirudhan. The petitioner does not deny the fact that she had made available the property belonging to her as a security for a loan availed by Biju Anirudhan for his business. The said property was mortgaged. What is the jural relationship that springs into existence by reason of this ? The petitioner becomes a guarantor or a surety for a loan obtained by her son. Does that by itself satisfy the jurisdictional conditions necessary for invoking the power u/s 26 of the VAT Act ? It does not. As I have found above, the fact that a person had stood as a guarantor vis-a-vis an assessee, does not, by itself, render him vulnerable to a protective assessment u/s 26 of the VAT Act. The crucial factor necessary to render him liable for a protective assessment is that he must have participated in the business of the assessee and therefore, the mere fact that he could claim the position of an employee/agent or a guarantor vis-a-vis the assessee, should not help him to wriggle out of the liability which otherwise is statutorily fastened on him or capable of being fastened on him, as the case may be. In the circumstances, the mere fact that the petitioner has stood as a guarantor for her son for availing a loan from the bank does not, ipso facto, make her vulnerable for a protective assessment u/s 26 of the VAT Act.

22. I am of the view that the reasons, which have been given by the second respondent, both in the notices as also in the impugned orders as "reasons to believe" that the petitioner was associated in the business of her son, are really irrelevant and have no bearing on the matters in regard to which "he is required to entertain a belief" for the purpose of Section 26 of the VAT Act. The exercise of power which led to exhibits P-12 and P-13, in the circumstances, is capable of being branded as an arbitrary exercise, violative of Article 14 of the Constitution of India.

23. There is yet another reason which vitiates exhibits P-12 and P-13, in my view. It is clear that the objections raised by the petitioner have not been adverted to by the second respondent. Though there is a controversy as to whether the objections were received prior to the passing of the order of assessment, at any rate, it has to be found that the petitioner was not afforded a hearing before the passing of exhibits P-12 and P-13 orders. The orders are, therefore, violative of the principles of natural justice as well.

24. For all these reasons, I am of the view that the petitioner is entitled to succeed, insofar as the challenge against exhibits P-12 and P-13 orders is concerned. The writ petition is, therefore, allowed in part. Exhibits P-12 and P-13 are quashed. But, it is made clear that it is open to the second respondent to issue fresh notices u/s 26 of the VAT Act, provided there are "reasons to believe" that the petitioner had also carried on business in association with her son Biju Anirudhan and participated in the business of M/s. Anjaneya Motors, stated to be owned by Sri Biju Anirudhan. The assessing authority shall keep in mind the observations made in this judgment as regards the parameters within which he is required to operate, while invoking the powers u/s 26 of the VAT.