
(1993) 03 KAR CK 0011
In the Karnataka High Court
Case No : S.T.R.P. No. 16 of 1991

Vengamma Trust

APPELLANT

Vs

State of Karnataka and others

RESPONDENT

Date of Decision : 05-03-1993

Acts Referred:

Constitution of India, 1950 — Article 286

Citation : (1994) 93 STC 207

Hon'ble Judges : R.V. Raveendran, J;K. Shivashankar Bhat, J

Bench : Division Bench

Advocate : Murthy and Kumar, for the Appellant; H.L. Dattu, Government Advocate, for the Respondent

Judgement

K. Shivashankar Bhat, J.—This revision petition by the assessee under the provisions of the Karnataka Sales Tax Act, 1957 ("the Act" for short) pertains to the assessment period April 1, 1983 to March 31, 1984. The petitioner is a hotelier wherein eatables and drinks are supplied. According to the petitioner there are two kinds of supplies. In one kind the customers may take the eatables and drinks themselves from the counter, for which the price charged is at a lower rate. In the other kind, food and drinks are served at the table in respect of which price charged includes what the petitioner terms as service charges. According to the petitioner this service charge should be excluded from the levy of sales tax because in this second category of sales, the dominant object is to render service of supplying the articles (food and drinks) and not the sale of food articles. This contention was not accepted by the Revenue and the Appellate Tribunal. The petitioner also challenges the levy of purchase tax on the turnover pertaining to fuel, i.e., levy of purchase tax on the kerosene and diesel purchased by the petitioner, on the ground that the said goods have already suffered taxes even prior to the purchases by the petitioner.

2. Dr. Krishna, learned counsel, placed before us certain papers to show that the petitioner has been charging differently for the two different kinds of customers.

For a customer who takes coffee at the counter, the rate per cup of coffee is Rs. 1.20, however, if the coffee is served at the table it is Rs. 2. Similarly, an eatable like masala-dosa if taken by the customer directly at the counter, the charge levied is Rs. 2.40, while if it is served at the table the customer has to pay Rs. 4 per dosa. Similar is the prices charged in respect of several other food articles. According to the petitioner nearly 40 per cent of the price collected from the customer when the article is served at the table represents the service charges and in the total turnover the petitioner actually claimed an exclusion of $33 \frac{1}{3}$ per cent as representing the service charges. Dr. Krishna, strongly relied on a decision of the Supreme Court rendered in Builders Association of India and Others Vs. Union of India (UOI) and Others, In the said case the Supreme Court was primarily concerned with sub-clause (b) of clause (29-A) of article 366 of the Constitution of India and its impact on article 286 of the Constitution. The Supreme Court pointed out that the purpose of introducing clause (29-A) was to enable the States to levy tax in respect of the goods which stand transferred to the customer under a works contract. It was further held that the introduction of clause (29-A) in no way enlarged the legislative power of the State under entry 54 of List II of Seventh Schedule. The Supreme Court also held that article 286 governed and operated on such a transaction also. It was also pointed out by the Supreme Court that a transfer of property in goods under sub-clause (b) of clause (29-A) is deemed to be a sale of the goods involved in the execution of works contract by the person making the transfer and a purchase of those goods by the person to whom such transfer is made. The object of the definition introduced by clause (29-A) was to enlarge the scope of "tax on sale or purchase of goods wherever it occurs in the Constitution so that it may include within its scope the transfer, delivery, or supply of goods that may take place under any of the transactions referred to in sub-clauses (a) to (f) thereof, wherever such transfer, delivery or supply becomes subject to levy of sales tax". At page 400 the Supreme Court observed thus :

"..... After the 46th Amendment the works contract which was an indivisible one is by a legal fiction altered into a contract which is divisible into one for sale of goods and the other for supply of labour and services. After the 46th Amendment, it has become possible for the States to levy sales tax on the value of goods involved in a works contract in the same way in which the sales tax was leviable on the price of the goods and materials supplied in a building contract which had been entered into in two distinct and separate parts as stated above."

3. According to the learned counsel the same reasoning would govern the case of sale of eatables and drinks in a hotel which involves sale of food articles as well as rendering of services and the two elements could be divided and should be treated separately for the purpose of levy of sales tax.

4. This Court had an occasion to consider an identical contention in K. C. Setty v. Additional Commercial Tax Officer (W.P. No. 15413 of 1987 decided on November 19, 1992) [Reported in K.C. Setty Vs. Additional Commercial Tax Officer and

others, . After referring to various decisions including the decision of the Supreme Court in Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, the Bench (of which one of us was a member) observed thus :

"Therefore, even prior to the amendment of the Constitution, the test was the dominant intention and the substance of the transaction, to find out as to whether there was a sale of goods involved in the supply of food or drinks in a hotel. If the substance of the transaction evidenced by its dominant object is the sale of food, then the supply of food certainly would be a sale which can be taxed. That was the position even under the pre-amendment period.

5. The purpose of amending the Constitution by introducing clause (29-A) referred above was to enable the States to levy taxes in respect of the sale of goods involved in a transaction while rendering service. In other words, the purpose was to neutralise the effect of the first judgment rendered in the Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, . The amendment was not to further limit the powers of the States. Therefore, it cannot be held that in every case, the supply of food and drinks by a hotelier is outside the purview of the concept of sale. The hotelier had to establish clearly that the dominant object of the transaction was rendering of services. If rendering of services was only incidental to the dominant object of sale of food, then such a sale could have been taxed even according to the decision of the Supreme Court in Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, . The object of article 366(29A)(f), therefore, is to enable the States to levy tax on the supply of goods when such a supply was incidental to the dominant object of rendering services at a hotel. Explanation (3-A) to section 2(l)(t) of the Act also has to be understood in the same manner.

6. Again it was observed at page 542, thus :

"..... To seek bifurcation of the turnover into that of (i) supply of eatables and drinks and (ii) rendering of services, the hotelier has to establish the nature of the transactions and the dominant object of the transactions. Only in case the dominant object was rendering of the services, question of applying the ratio of the decision of the Supreme Court in Builders Association of India and Others Vs. Union of India (UOI) and Others, would arise. Employing several suppliers, cleaners and helpers by itself would not prove the dominant object was rendering of services. Even for the preparation and sale of eatables, these employees are necessary."

7. The contention of the petitioner is based on the fact that whenever eatables and drinks are received by the customer at the counter, a lower rate of price is charged. It is only when the customer expects the food articles to be served at the table he is charged more and this clearly, according to the petitioner, establishes that the customer was interested in having services rendered to him for which he would pay an extra charge.

8. As observed by the Supreme Court in Northern India Caterers (India) Ltd.

Vs. Lt. Governor of Delhi, it is necessary to note that where food is supplied in eating house and/or restaurant and it is established on the facts that the substance of the transaction evidenced by its dominant object, is a sale of food and the rendering of the services is merely incidental, the transaction would undoubtedly be eligible to sales tax. The question whether rendering of service is the dominant object can also be answered having regard to the nature of the services. For example running of "floor shows" or providing musical entertainment by renowned artistes may be the dominant object and when the customers avail of the above services they may also be served with eatables and drinks. There the dominant object of the transaction is the entertainment and the serving of food and drinks will be only incidental. Customers may flock into places of such entertainments not because of the food and drinks served but because of the entertainments available. In such a situation it can safely be said that the dominant Object is not the sale of food articles. By virtue of sub-clause of of clause (29-A) of article 366, the supply of eatables and drinks could be taxed now without breaking any Constitutional bar. However, in case the dominant object is the sale of eatables and drinks and rendering of services are only incidental, even prior to the amendment of the Constitution, such a transaction was taxable as clarified in the second Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, . Normally no customer enters a hotel only to enjoy a polished service or to soothe himself by sitting in a posh restaurant. The polished service and the posh surroundings are provided by the hotelier to attract the customers who are attracted primarily by the articles supplied. No doubt, customers prefer a hotel with better Service and good surroundings but these factors have only contributory value by creating an atmosphere under which the customer could enjoy the eatables and the drinks. The observations of Justice Krishna Iyer in second Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, is relevant in this context. At page 219 of STC (679 of AIR), the learned Judge observed thus :

"..... Myriad situations, where the transaction is a sale of a meal, or item to eat or part of a package of service plus must not be governed by standard rule. In mere restaurants and non-residential hotels, many of these transactions are sales and taxable. Nor are additional services invariably components of what you pay for. You may go to an air-conditioned cloth-shop or sweetmeat store or handicrafts emporium where cups of tea may be given, dainty damsels may serve or sensuous magazines kept for reading. They are devices to attract customers who buy the commodity and the price paid is taxable as sale. The substance of the transaction, the dominant object, the life-style and other telling factors must determine whether the apparent vendor did sell the goods or only supply a package of services."

9. Material on record is not sufficient to hold that the dominant object was to render services, to avail of which the customers used to visit the hotel of the petitioner and that the sale of eatables and drinks was only incidental to the enjoyment of the services. Only because there are two types of sales is no

ground to hold that in one type the dominant object was rendering of services. Rendering of service by a hotelier is inevitable if he wants to be successful in the business. In the instant case the services rendered seems to be nothing but serving at the table, a common feature in all the restaurants.

10. The learned Government Advocate also relied on a decision of the Madras High Court in K. Damodarasamy Naidu & Bros. v. State of Tamil Nadu [1990] 76 STC 427 MAD. In view of our conclusion as above it is not necessary to refer to the said decision in detail. The contention of the petitioner therefore fails.

11. Re : Purchase tax on kerosene and diesel :

12. According to the learned counsel for the petitioner these are controlled commodities. The petitioner purchased these commodities from hawkers and petrol bunks. Earlier those hawkers or petrol bunks necessarily must have purchased these articles from dealers who must have paid tax at the sale point. Since the goods are controlled commodities a presumption should be drawn that these goods have already suffered taxes earlier.

13. G. Subramanya Reddy and Co. Vs. Karnataka Appellate Tribunal, Bangalore and Others, was cited by the learned counsel for the petitioner. In the said case the assessee was a dealer in empty bottles which he had purchased from hawkers, who were unregistered dealers. These hawkers in turn had collected the bottles from consumers or otherwise. There was no dispute that the bottles were secondhand bottles which had earlier been sold to customers by the earlier dealers or the manufacturers. It is in these circumstances a Bench of this Court held that there was earlier sales of the bottles which must have suffered tax. The decision is based entirely on the special facts of the case. The learned Government Advocate is right in relying on section 6A of the Act whereunder the burden is on the petitioner to prove that the sale or purchase of kerosene and diesel had already been subjected to tax under the Act. The statutory presumption arising u/s 6A(2) has not been displaced by the petitioner in the instant case, by showing that these articles are only controlled commodities.

14. In these circumstances, we are of the view that the petition has to fail. The revision petition is accordingly dismissed.

15. Petition dismissed.