
(1997) 07 KAR CK 0106
In the Karnataka High Court
Case No : WP. No. 14030-32 of 1997

Videocon International Ltd.

APPELLANT

Vs

The State and Others

RESPONDENT

Date of Decision : 15-07-1997

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Karnataka Sales Tax Act, 1957 — Section 22 (3A), 5 (3A)

Citation : (1997) ILR (Kar) 2427

Hon'ble Judges : Tirath S. Thakur, J

Bench : Single Bench

Advocate : S.G. Shivaram and Vasan Associates, for the Appellant; K.M. Shivayogiswamy, for the Respondent

Final Decision : Dismissed

Judgement

Tirath S. Thakur, J.—In these Petitions for a writ of mandamus the Petitioner seeks to prevent the Respondents from recovering the amount of Sales-tax held payable by it for the assessment year 1991-92 to 1993-94.

2. The Petitioner is a dealer under the Karnataka Sales-tax Act, 1957 dealing in Electronic and Electrical Goods like Television-sets, Washing machines, Air-coolers, Air-Conditioners etc., all manufactured and sold under the Trade name "Videocon". For the State of Karnataka it is the sole selling out let for all the products bearing the trade make Videocon; after procuring the same from various manufacturers.

3. Assessments for the assessment years 1991-92 to 1993-94 were completed by the first-Respondent by three different orders passed by him in that regard. While doing so, the assessing Authority, rejected the claim for exemption made by the petitioner and held that the Sales effected by the petitioner were taxable u/s 5(3-A) read with proviso 3 thereof. Aggrieved the petitioner appealed to the second-Respondent Additional Joint Commissioner of Commercial Taxes, Bangalore, who by a common order dated 24th of April, 1997 dismissed the

Appeals and upheld the orders of assessment impugned before him. Dissatisfied with the Appellate Order, the petitioner has preferred a second Appeal before the Appellate Tribunal which are presently pending. The petitioner's case in the present Writ Petitions is that even though it has an excellent case, in the Appeals pending before the Tribunal, yet in the light of the provisions of Section 22(3-A) and (5) of the Act, the Appellate Tribunal has no jurisdiction to grant any interim stay against the recovery of the amount of tax determined pending disposal of the Appeal before it, leaving no alternative for it except to seek a mandamus from this Court in its extraordinary writ jurisdiction.

4. I have Heard the Learned Counsel for the parties at length.

5. Section 22(3-A) & (5) of the Act forbid the Tribunal from staying the payment of tax, penalty or any other amount due under the Act pending disposal of the Appeal before it in cases where the order for such payment is made by the Deputy Commissioner or the Joint Commissioner u/s 20. The common order under challenge in the Appeals filed before the Tribunal having been passed by the Joint Commissioner of Taxes (Appeals), the Tribunal would have no jurisdiction to grant any interim stay against the recovery of the amount of tax determined. Constitutional validity of the provisions of Section 22(3-A) and (5) was examined and upheld by a Division Bench of this Court in *Commercial Tax Officer, XII Circle, Bangalore and others Vs. Swathi Traders*, . This Court held that a right of appeal was neither a fundamental nor an inherent right. Any such right being a mere creature of the Statute could be taken-away by the Legislature if it considered appropriate to do so. It was held that the provisions of Section 22(3-A)(5) as amended by Karnataka Amendment Act 15/88, neither took away nor curtailed or crippled the right of appeal. The provisions simply deprived the Appellant Tribunal or its power to grant a stay at the second Appeal stage and that any such provision was in no way violative of Article 14 of the Constitution of India.

6. The question then was whether an assessee could in any such situation approach this Hon'ble Court in its writ jurisdiction for the grant of a stay against recovery pending disposal of the Appeal by the Tribunal. This aspect was also examined by a Division Bench of this Court in *Karnataka Handloom Development Corporation Ltd. Vs. Addl. Deputy Commissioner of Commercial Taxes*, . The Court held that the power of the High Court to intervene under Article 226 and stay recovery of the amount of tax pending disposal of the Appeal by the Tribunal, was unaffected by the provisions contained in the Act, but that power could be exercised only in appropriate cases where the Revenue was prima facie shown to be recovering an amount which was not recoverable or the action proposed to be taken was wholly without jurisdiction. From the two decisions of this Court referred to above it is apparent that while the Tribunal has no jurisdiction to grant stay of the recovery of the amount of tax determined, the power of this Court to intervene and stay such recoveries in appropriate cases remains available and can be invoked.

7. What then, can be said to be "appropriate cases", where the power vested in this Court ought to or can be legitimately exercised so as to stay recovery of amounts that have been held payable by the Assessing Authority and upheld in Appeal by the first Appellate Authority is the next question. Generalisations are hazardous and should therefore be avoided. That is partly because experience shows that human affairs are so varied, and the situations they throw up, in the course of their conduct so numerous that it is difficult to conceive of let alone exhaustively enumerate cases in which it may be appropriate for a Court to exercise its writ jurisdiction to intervene and stay the recovery of the amount of tax determined by the assessment authorities. I therefore do not propose to embark upon any such exercise looking to the difficulties besetting such a task. All that can be done is to identify certain broad principles which may among others be made applicable to situations where a Writ Court is called upon to prevent recovery of what has already been determined as due and payable. The first and the foremost out of these considerations must be the fact that a mere existence of a right of Appeal is no reason why pending the exercise of such a right or the disposal of the appeal there should necessarily be an interim order of stay. Right of Appeal it is now fairly well settled is neither an inherent nor a fundamental right and may be taken-away or curtailed by the Statute under which it is conferred. That being so, a right of appeal can continue to serve the purpose even when the Appellate Authority before whom the same can be exercised is disabled by the Statute itself from granting any relief by way of stay of recovery. The right to seek the appellate remedy would in such a situation be deemed to be one which is available sans the right to seek an interim stay or the power to grant the same. I see no difficulty in countenancing such a situation for if the right of appeal can be taken away in toto, there is no reason why its exercises cannot be made subject to such conditions as the legislature may in its wisdom choose to impose. Suffice it to say, that the very existence of a right of appeal or the pendency of the Appeals before the Tribunal would not by itself create any equitable considerations in favour of the Appellant.

8. Second and an equally weighty consideration for the Court to keep in mind would be that a stay of recovery of the amount of tax held payable under the Act, cannot and should not be granted just because the petitioner has made out a prima facie case in his favour. Questions of "public interest" "Balance of convenience", "irreparable injury" and the like shall have to be kept in view while considering the grant or refusal of a stay involving recovery of public Revenues. Reference in this connection can be gainfully made to the of quoted decision of the Supreme Court in Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, where the Court has observed thus:

"Even assuring that the company had established a prima facie case but it was not sufficient justification for granting the interim orders as was done by the High Court. There was question of balance of convenience in favour of the Government and not the respondent company. Very often some courts act as if furnishing a bank guarantee would meet the ends of justice. No Government

business and for that matter no business of any kind can be run on mere bank guarantee. Liquid cash is necessary for the running of a Government as indeed any enterprise. Where matters of public revenue are concerned, it is of utmost importance to realise that interim orders ought not to be granted merely because a prima facie case has been shown. More is required. The balance of convenience must be clearly in favour of the making of an interim order and there should not be slightest indication of a likelihood of prejudice to the public interest.

xxx xxx xxx xxx Interim orders can be made in the interest of justice where gross violations of the law are perpetrated or are about to be perpetrated. It is the bounden duty of the Court to intervene and give appropriate interim relief. In cases, where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizens' faith in the impartiality of public administration, a Court may well be justified in granting interim relief against public authority. But, since the law presumes that public authorities function properly and bonafide with regard to the public interest, a Court must be circumspect in granting interim orders of a far reaching dimensions or orders causing administrative, burdensome inconvenience or orders preventing collection of public revenue for no better reason than that the parties have come to the Court alleging prejudice, inconvenience or harm and that a prima facie has been shown. There can be and there are no hard and fast rules. But, prudence, discretion and circumspection are called for."

To the same effect is the view taken by a Division Bench of this Court in Wipro Infotech Ltd. Vs. C.E.G.A.T.,

9. The third and no less an important consideration to be kept in mind would be whether the order under challenge in Appeal before the Tribunal suffers from any error of jurisdiction or is so palpably wrong as to make recovery of the amount of tax demanded look unfair and arbitrary. In other words it is not just an arguable case which the petitioner must make out but a prima facie excellent case for it to be entitled to seek a discretionary relief by way of an interim stay in the extraordinary writ jurisdiction of the Court under Article 226. That precisely is the purport of the view taken by the Division Bench in HANDLOOM DEVELOPMENT CORPORATION'S CASE (supra) also.

10. Coming then to the case at hand, the concurrent findings recorded by the Assessing Officer and the First Appellate Authority, prima facie suggest that the so-called first sales made in favour of the petitioner are no more than a mere device aimed at avoiding the payment of sales-tax lawfully due and recoverable from it. As per the provisions of Section 5(3A) of the K.S.T. Act, the first sale of goods mentioned in the II Schedule to the Act is liable to tax while sales made by subsequent dealers are not. In order however to avoid payment of tax, certain dealers appear to have adopted a novel modes operandi. What they would do is to have the goods manufactured with a brand name outside the State of Karnataka, get the goods so manufactured transferred on consignment basis to places within Karnataka and sell the same to the Brand name Owner on

a lower price to proportionately reduce their tax liability. The goods so purchased by the Brand owner would then be sold at their market price claiming exemption from sales tax on the ground that the sale made by the brand owner his agent or dealer was a second sale. The difference between the price at which the brand owner would purchase the goods from the manufacturer and that at which the same were eventually sold by the brand owner or his agent to the consumers being considerable the State Amended Section 5(3A) to add a third proviso to the same which reads thus :

"Section 5(3):- Levy of tax on sale or purchase of goods:-

(1) Every dealer shall pay for each year tax on his taxable turnover at the rate of (Ten percent) at the point of sale.

xxx xxx xxx xxx (3) Notwithstanding anything contained in Sub-section (1) the tax under this Act shall be levied-

(a) in the case of the sale of any of the goods mentioned in column (2) of the Second Schedule, by the first or the earliest of successive dealers in the State who is liable to tax under this section, a tax at the rate specified in the corresponding entry of column (3) of the said Schedule, on the (taxable turnover) of sales of such dealer in each year relating to such goods;

xxx xxx xxx xxx xxx xxx xxx xxx Provided further that where any goods liable to tax under this Act are produced or manufactured by a dealer with the name or trade mark registered under the Trade and Merchandise Marks Act, 1958 (Central Act 43 of 1958), of any other dealer and which are not used by the latter as raw materials, component parts or packing materials as defined under the explanation to Section 5-A, the sale of such goods by the dealer who has produced or manufactured to the dealer who is the brand name or trade mark holder, shall not be deemed to be, but the subsequent sale of such goods by the dealer having the right either as proprietor or otherwise to use the said name or the trade mark, either directly or through another, on his own account or on account of others shall be deemed to be the sale by the first dealer liable to tax under this Section."

11. A plain reading of the above would show that the intention behind the introduction of the proviso was to plug leakage and evasion of tax by creating a legal fiction that the sale made by a dealer who enjoys rights qua the brand name either as a proprietor or otherwise shall be deemed to be the first sale liable to tax under the Act. The net effect of this provision, therefore is that the sale made by any such dealer entitled to use the brand name or trade mark, alone was treated as a taxable sale, no matter any such sale was not in fact the first sale of goods. The authorities below have found on an appreciation of the material assembled on the record that the petitioner had adopted a procedure which falls within the mischief of proviso to Section 5(3) extracted above. The Authorities have in this regard recorded the following significant findings:

- i) That the goods handled by the petitioner were shown to have been purchased by it from various concerns mentioned in the Assessment Orders which were in turn floated by the Videocon Group of Companies for the manufacture and sale of Videocon trade marked products;
- ii) That within the State of Karnataka, the above mentioned concerns, are managed by the petitioner company's staff only as the former have no staff of their own;
- iii) That the manufacturer sellers of the goods have within the State of Karnataka transferred the goods to the petitioner company alone who is the sole selling agency of Videocon trade marked products. These manufacturers in fact were found to have acted on the petitioner company's instructions and arranged the goods with Videocon trade mark from their manufacturing units at Aurangabad and other places situated in other States;
- iv) That the Modus Operandi adopted by the so-called first Sellers was to have the goods transferred from their respective manufacturing units to their places of business within the State of Karnataka namely Bangalore, Mangalore and Hubli and soon after the receipt of goods, the same were invoiced to the petitioner Company on the very same day on which the goods were received from outside, in the same quantities as received and at the same rate at which they had been received;
- v) That the so-called Sellers had not charged even loading and unloading, transportation, Insurance and other incidental expenses from the petitioner. These expenses were found to have been borne by the petitioner company besides others;
- vi) That even though the registered trade mark "Videocon" stood in the name of Sri P.N. Dhoot and Mrs. P.N. Dhoot, partners of a Firm M/s. Videocon Aurangabad yet the petitioner company has exclusive rights to sell the said products within the State of Karnataka and has in that behalf been incurring entire expenditure on publicity, Seminars, Conventions etc., thereby establishing that the petitioner is the real user of the trade name, the Registered Owners being no more than silent spectators, who have consented to the use of the trade mark by the petitioner for marketing goods produced under the Brand name "Videocon".

Based on the above findings the authorities have applied proviso to Section 5(3A) of the Act, ignored the first sale and treated the sale made by the petitioner-Company alone as the taxable sale.

12. Learned Counsel for the petitioner did not question the factual aspects of the findings recorded by the Authorities, but contended that the proviso invoked by the Authorities was not really applicable to the case, as the petitioner was not the proprietor of the trade mark or brand name "Videocon". He urged that the sale made in favour of the petitioner by the Manufacturers was not therefore a sale which could be ignored in terms of the said proviso nor could the

subsequent sales made by the petitioner in favour of its dealers or Agents be brought to tax. He strenuously argued that proprietorship of the Trade Mark was an essential requirement for the proviso to be attracted. I do not however see any substance in this submission for the same overlooks the words "Or otherwise" appearing in the expression "the subsequent of sales by the dealers having the right either as proprietor or otherwise" in the proviso. The expression "Or otherwise" makes it clear that the dealer to whom the goods manufactured under a brand name are sold need not necessarily be the proprietor of any such brand name. The words "Or otherwise" are wide enough to conceive of a situation where the dealer who purchases the goods from the Manufacturer even though not as a proprietor in the true legal sense is all the same a beneficiary of the said Trade Mark or is making use of the same with the consent or connivance of the registered owner. That is what precisely appears to have happened in the present case also. According to the findings recorded by the Authorities even though the trade mark "Videocon" is owned by Mr. & Mrs. Dooth of Aurangabad, the entire expenditure on publicity, aimed at popularising the said trade mark and holding Seminars, conventions etc. is incurred by the petitioner who enjoy exclusive rights of dealership in Karnataka in respect of all such goods manufactured under the said Brand name. It is not therefore as though the brand owner, has any independent stake different from that of the petitioner. The petitioner and the proprietors of the brand name, have on the findings recorded by the assessing authority a commonality of interest in the use of the Trade/ Brand name which is sufficient to attract the application of the proviso to Section 5(3A).

13. It was next argued that the petitioner had already deposited 50% of the amount of tax determined by the Assessing Authorities and provided a Bank Guarantee for the remaining half, which arrangement was sufficient to secure the interest of the State as the petitioner was prepared to keep the Bank Guarantee renewed till the final disposal of the Appeals before the Tribunal. The said arrangement could according to the learned Counsel be continued without causing any serious prejudice to the Respondents.

14. It is true that pending disposal of the First Appeal the recovery of the amount of tax had been stayed by the 1st Appellate Authority upon the petitioner depositing 50% of the said amount and furnishing a Bank Guarantee for the remaining. That does not however necessarily mean that even when the Appeals had failed and the orders of Assessment upheld by the Appellate Authority in toto, the interim arrangement made must continue. In its discretion the First Appellate Authority was well within its power to have insisted upon deposit of 50% of the tax amount simultaneously securing the remaining 50% in the form of a Bank Guarantee. That arrangement was however to be effective only till the appeals were disposed of. The right of a 2nd Appeal to the Tribunal does not however include the right to seek an ad-interim stay against the amount already determined. The Legislative intent is in fact much too clear against any such stay being granted during the pendency of the 2nd Appeal. Just because there was an

interim stay order during the pendency of the First Appeal would not therefore be enough for this Court to continue the said order even during the pendency of an Appeal before the Tribunal. As the Assessee exhausts its right of consecutive Appeals, its entitlement to seek an interim stay has to be judged by reference to standards that may vary from stage to stage. At the First Appeal stage the power to grant a stay is recognised while it is not so recognised at the stage of the second Appeal. An assessee cannot therefore claim a stay at the 2nd Appeal Stage for no better reason than the fact that a stay had been granted during the pendency of its first appeal. This is particularly so when the arrangement by way of a Bank Guarantee has not been considered enough particularly in cases involving public revenues. As observed by the Supreme Court, Government, do not run with Bank guarantees but with hard cash. A Bank Guarantee is no more than an illusory satisfaction for the Government to have in place of the amount which it is entitled to demand especially when the amount runs into crores of rupees as is the position in the present case.

15. Applying the broad principles stated in the earlier part of this judgment to the instant case I find that the petitioner has not made out any case for the grant of an interim relief in exercise of the writ jurisdiction of this Court. Neither has petitioner demonstrated any palpable error of jurisdiction or illegality in the order passed by the Assessing Authority and upheld by the Appellate Authority nor can the balance of convenience be said to be in its favour. Suffice it to say that the petitioner has failed to make out an excellent case for the grant of an interim order in its favour, having regard in particular to the findings recorded by the Authorities below that the entire exercise of getting the goods manufactured under a brand name getting them transferred to Karnataka, on consignment basis, purchasing the same for a price much less than what is the market value thereof is no more than an ingenious device aimed at somehow defeating its tax liability. Proviso three to Section 5(3) has therefore been rightly held by the authorities below to be applicable to the instant case. While parting I feel tempted to quote the following passage from the Constitution Bench decision of the Supreme Court in *McDowell and Co. Ltd. Vs. Commercial Tax Officer*, where Chinnappa Reddy, J., has made the following observations:

"The financial needs of the welfare State, if backed by the law have to be respected and met. There is behind taxation laws as much moral sanction as is behind any other welfare legislation and it is a pretence to say that avoidance of taxation is not unethical and that it stands on no less a moral plane than honest payment of taxation. The proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally or liberally nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax and whether the transaction is such that the judicial process may accord its approval to it. It is neither fair nor desirable to expect the Legislature to intervene and take care of every device and scheme to avoid taxation. It is up to the Court to take stock to determine the nature of the new and sophisticated

legal devices to avoid tax and consider whether the situation created by the devices could be related to the existing legislation with the aid of "emerging" techniques of interpretation to expose the devices for what they really are and to refuse to give judicial benediction.

Decision of the Andhra Pradesh High Court affirmed."

In the result these petitions fail and are accordingly dismissed with costs assessed at Rs. 2,000/-. The Tribunal shall however expedite hearing and disposal of the Appeals filed by the petitioner before it, uninfluenced by the observations made in this judgment.