

(1978) 10 KL CK 0010
In the High Court Of Kerala
Case No : M.F.A. No. 97 of 1976

Vijaya Oil Mills

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 05-10-1978

Acts Referred:

Central Sales Tax Act, 1956 — Section 14, 15, 5, 6, 8
Contract Act, 1872 — Section 59, 60, 61

Citation : (1979) 1 ILR (Ker) 115 : (1980) 45 STC 463

Hon'ble Judges : P. Narayana Pillai, J; George Abraham Vadakkal, J

Bench : Division Bench

Advocate : K. Sukumaran and K.K. Usha, for the Appellant; The Government Pleader, for the Respondent

Judgement

P. Narayana Pillai, J.

1. This is an appeal filed by an assessee from an order passed u/s 23(3) of the Kerala General Sales Tax Act (15 of 1963), for short, the Kerala Act, imposing a penalty of Rs. 20,386.24 for non-payment of tax in due time. The order was passed by the Assistant Commissioner, Alleppey. The correctness of it was challenged in revision before the Deputy Commissioner, Quilon. He set aside that order and remitted the proceeding to the Assistant Commissioner. The Board of Revenue took up the matter in revision suo motu. It restored the order of the Assistant Commissioner. The correctness of that is challenged here.

2. The assessee is a firm dealing in copra and other declared goods. For the assessment year 1966-67 it paid Rs. 2,42,339.56 up to 20th April, 1967, towards sales tax under the Central Sales Tax Act (74 of 1956), for short, the Central Act. For the same assessment year under the Kerala Act assessment was made by the department on 31st December, 1968, and notice was issued to the assessee demanding payment on or before 7th May, 1969, of Rs. 2,14,591.87 towards sales tax and Rs. 98.20 towards surcharge. On receipt of the notice the assessee sent a letter on 25th April, 1969, to the department informing it that more than

what was demanded in the notice had really been paid even long before and requesting that that amount may either be refunded or at least adjusted towards the demand made under the Kerala Act. No reply was sent to that letter. On 16th February, 1970, the department made an assessment for the same period under the Central Act. The tax found due under that Act was Rs. 10,407.17. As the amount deposited by the firm up to 20th April, 1967, was really in excess by Rs. 2,31,932.39 (Rs. 2,42,339.56 -- 10,407.17) that was directed to be refunded to the assessee. It was accordingly withdrawn by the assessee on 10th March, 1970. Thereafter the assessee deposited on 31st March, 1970, the amount of Rs. 2,14,690.07 (2,14,591.87 + 98.20) demanded under the Kerala Act. On 7th May, 1970, on the allegation that the assessee had not paid in due time the sales tax and surcharge demanded under the Kerala Act notice was issued by the Assistant Commissioner for imposition of penalty, To that, reply was sent. It was in that proceeding that the penalty already referred to was imposed.

3. According to the counsel for the revenue, the default made was during the period between 7th May, 1969, and 31st March, 1970. According to the counsel for the assessee, the default made was only during the period between 10th March, 1970, and 31st March, 1970. It was accepting the position taken up by the assessee that the Deputy Commissioner set aside the order of the Assistant Commissioner and remitted the case to him.

4. The only question for consideration is whether there was actual default of payment of the sales tax and surcharge under the Kerala Act during the period between 7th May, 1969, and 10th March, 1970.

5. Refund was ordered on 16th February, 1970, on account of the amount already deposited by the assessee up till 20th April, 1967, being in excess by Rs. 2,31,932.39. That was also far in excess of the amount found by the same officer to be due as tax under the Kerala Act for the same period. The entire excess amount of Rs. 2,31,932.39 was in the possession of the same authority to whom the payment had to be made when the two assessment orders were passed.

6. Prima facie when assessment orders are passed under two different enactments the liability to pay tax arising from each is distinct and separate. But, in the instant case, the fact that the tax is for sale or purchase for the same period of declared goods makes all the difference. u/s 15 of the Central Act and Rule 29 of the Rules framed under the Kerala Act such goods cannot be the subject-matter of multiple taxation. In that view for sales tax on transactions of declared goods there was only a single liability and after the tax was determined there was only a single debt and as the amount of Rs. 2,42,339.56 already deposited by the assessee was more than sufficient to discharge that debt which amounted to only Rs. 2,25,097.24 (2,14,591.87 + 98.20 + 10,407.17), the assessee was not a defaulter up to 10th March, 1970, the date on which alone he withdrew Rs. 2,31,932.39.

7. The result is not different even if the liabilities under the two assessment

orders are considered independent. If they are distinct and separate, questions regarding operation of adjustment as payment and application of the principles of appropriation are plainly relevant and material.

8. A payment need not necessarily be by giving cash or by issuing cheque. It can be by adjustment also. If a creditor is in possession of money belonging to his debtor and it is available for appropriation towards any account, on adjustment of it at the instance of the debtor towards a particular debt due from him there is to that extent discharge of that debt. In such cases, adjustments operate as payments.

9. When there are more debts than one due from a debtor and he makes payment to the creditor it is open to the debtor to direct it to be appropriated towards a particular debt due from him and the creditor is bound to do that. This is a general rule since the Clayton's case (1812) 35 E.R. 781 decided more than 150 years back and cited and followed in *City Discount Company Limited v. Mclean* (1874) L.R. IX Common Pleas 692. More than half a century after the decision in the Clayton's case (1812) 35 E.R. 781 the general principle laid down there was incorporated in Section 59 of the Indian Contract Act, 1872. It is Sections 59 - 61 of that Act, which deal with the subject of appropriation, Of them Sections 60 and 61 deal with modes of appropriation when the debtor has not indicated as to how it should be made.

10. Pausing there for a moment the question of applicability of the principles of Sections 59 and 60 of the Indian Contract Act to transactions in relation to realisation of revenue has to be considered. In *Ganga Bishun Singh v. Mahomed Jan* ILR (1906) Cal. 1193, the Calcutta High Court held that laws regulating the relations of an ordinary creditor and debtor could not be applied to realisation of revenue. Revenue sale was held in that case under the Revenue Sale Law (Act XI of 1859). Section 59 of the Indian Contract Act was relied upon by the defaulter to show how payment of money made by him should have been used by the Government. It was argued on his behalf that if it had been so done he would not have been found to be a defaulter and the omission to do so made the sale null and void. The High Court repelled that argument. The reasons given for the same were that the relationship between the Government and the defaulter was not that of creditor and debtor, that arrears of revenue were not debts so as to attract Section 59 of the Indian Contract Act and that Act XI of 1859 was complete by itself. This decision was expressly dissented from as being not sound by the same High Court in its later decision in *Jogendra Mohan Sen v. Uma Nath Guha* ILR (1908) Cal. 636. It was observed there that if Sections 59 and 60 of the Indian Contract Act did not apply to revenue sales then the court had to fall back on the General Law, that practically it was that law that was embodied in those sections and that there was nothing specific on the subject of appropriation in Act XI of 1859.

11. To pay tax is a duty. When it is levied it becomes a liability. Consequently, tax after it becomes due is a debt. It does not cease to be a debt from the mere fact

that special provisions for its collection are made in the Act imposing its levy. After tax becomes due the relationship between the assessee and the department is really that of debtor and creditor. Arrears of sales tax are "debts" and an assessee who defaults to pay tax is a "debtor" coming within the meaning of those expressions in Sections 59 and 60 of the Indian Contract Act.

12. When an enactment is said to be complete what is meant is only that it is exhaustive to the extent it goes. It does not mean that in respect of matters not specifically covered by it general principles of law are excluded from consideration and cannot be applied even if they are not inconsistent with it. Otherwise, even principles of interpretation of statutes cannot be applied to it. A statute until it is repealed is living law. To attempt to imprison it within the sections in it is about as reasonable as to attempt to confine a stream within a pond. The water in the pond would soon become a stagnant pool and there would no longer be a living stream. General principles of law to the extent they are not specifically excluded are applicable to any enactment. With respect we consider the decision in *Jogendra Mohan Sen v. Uma Nath Guha* ILR (1908) Cal. 636 as laying down the correct law and do not agree with the decision in *Ganga Bishun Singh v. Mahomed Jan* ILR (1906) Cal. 1193.

13. No immutable boundary is fixed in the Central and Kerala Acts to the area of operation of general principles of law. There is nothing in those enactments to indicate, even indirectly, exclusion of the principles regarding appropriation of payments. The principles embodied in Sections 59 and 60 of the Indian Contract Act do not offend and are not inconsistent with the provisions of the Central and Kerala Acts regarding sales tax. Those principles are of general application and they apply to transactions regarding sales tax under the Central and Kerala Acts.

14. When the assessment order under the Kerala Act was passed and demand for tax was made on its basis, as the goods involved were declared goods the assessee, as was expected of him as a reasonable person, sent the letter dated 25th April, 1969, requesting adjustment of the previous payments towards the tax due under the Kerala Act. The assessee could then validly make that request because the department had not till then appropriated it towards the tax due under the Central Act. In fact, an assessment order under the Central Act for the same period was passed only much later. No doubt the earlier deposit of Rs. 2,42,339.56 was made towards tax under the Central Act but that was so made because the assessee believed that as in previous years tax would be levied under that Act. But when it received the demand notice pursuant to the assessment order under the Kerala Act it rightly assumed that the taxing authority would not proceed under the Central Act in respect of the same declared goods. So respecting that order the assessee withdrew the direction it gave regarding the utilisation of the amount towards payment of tax under the Central Act and directed it to be adjusted towards the tax due under the Kerala Act. That it was competent to do. No reply was sent by the department at any time to the assessee's letter dated 25th April, 1969. The department did not

take any step also at any time after 7th May, 1969, for recovery of the tax due under the Kerala Act. All that shows that after getting the letter dated 25th April, 1969, the department by its conduct accepted the payment of the tax due under the Kerala Act by adjustment as requested in the assessee's letter.

15. The idea of imposition of penalty dawned on the authority only one year and four months after passing the assessment order under the Kerala Act. That was after the assessee withdrew on 10th March, 1970, the excess amount of Rs. 2,31,932.39 and deposited out of it Rs. 2,14,690 on 31st March, 1970. The assessee was not at fault for withdrawal of the amount. It was because the department by its assessment order dated 16th February, 1970, found that the previous deposit was in excess by Rs. 2,31,932.39 and that it was available for withdrawal that the assessee happened to withdraw it and redeposit in cash the entire tax due under the Kerala Act.

16. What was found in the assessment order under the Central Act was that the amount of Rs. 2,42,339.56 already deposited up to 20th April, 1967, was in excess by Rs. 2,31,932.39. So it was excess amount belonging to the assessee and lying with the department as available for adjustment and appropriation long before 30th May, 1969, the date on which the tax of Rs. 2,14,591.87 under the Kerala Act became due. And when the assessee asked the department to apply it towards payment of the tax due under the Kerala Act there was no option left with it but to apply it accordingly. Therefore, even if the liabilities under the two assessment orders are considered as distinct and separate the assessee was not a defaulter up to 10th March, 1970.

17. The authority empowered to make the assessment and collect the tax under both the Central and Kerala Acts is the same. The establishment of the officer in making assessment and collections under the two Acts is one and the same. In the present case, it was really the same officer, Mr. K.C. Parameswara Warier, who passed the two assessment orders under the two enactments. While he passed the assessment order under the Kerala Act on 31st December, 1968, he passed the assessment order under the Central Act only on 16th February, 1970. If he had passed the order under the Central Act earlier than that under the Kerala Act or at least if he had passed the orders under the two Acts simultaneously the question of the assessee being treated as a defaulter and consequent imposition of penalty on it may not have arisen at all.

18. Let us add this. To treat the assessee as a defaulter up to 10th March, 1970, when as a matter of fact the deposits already made by it and lying with the department till that date were more than sufficient to discharge the liability under the two assessment orders would be oppressive. The circumstance that the second assessment order was passed long after the passing of the first order has contributed its own share towards that. In order to relieve such oppression, simplify proceedings and avoid multiplicity of proceedings and unnecessary hardship and inconvenience being caused to parties, when the same officer has to make assessments under the two Acts for the same period in respect of

declared goods the need for his passing assessment orders simultaneously cannot be overemphasised. It is up to the appropriate legislature to make suitable changes in this direction in the law.

19. In the result, this appeal is allowed, the order of the Board of Revenue is set aside and the order of the Deputy Commissioner of Sales Tax is restored. There is no order as to costs. Send copies of the judgment in this appeal to the Central and Kerala State Governments.

George Vadakkal, J.

20. I am in full agreement with the decision rendered just now by my learned brother. I may add a few words of my own in support of the conclusion arrived at by us to the effect that this appeal is to be allowed.

21. The appellant-firm is a dealer, both under the General Sales Tax Act, 1963, and the Central Sales Tax Act, 1956 (for brevity, the G.S.T. Act and the C.S.T. Act). The goods it deals in include copra which is an item of declared goods u/s 14 of the C.S.T. Act. Its dealings in copra are liable to be taxed u/s 5 of the G.S.T. Act (in respect of intra-State dealings of copra), and u/s 6 of the C.S.T. Act (in respect of inter-State sales thereof) but for Section 15(b) of the C.S.T. Act, whereunder tax, if any, levied under the G.S.T. Act on intra-State sale or purchase of any declared goods is to be refunded if those goods have been subsequently sold in the course of inter-State trade or commerce. The State Government issued a notification u/s 8 of the C.S.T. Act, S.R. 0. No. 350/65 dated 13th August, 1965, directing that no tax under the C.S.T. Act shall be payable by any dealer in respect of declared goods sold in the course of inter-State trade or commerce, where tax has been levied and collected in respect of sale or purchase of such declared goods under the G.S.T. Act on condition that he shall not claim refund u/s 15(b) of the C.S.T. Act. Note that both Section 15(b) and S.R.O. No. 350/65 apply only to cases where tax has already been paid or collected under the G.S.T. Act; u/s 15(b) tax levied under the G.S.T. Act is to be refunded on payment of tax under the C.S.T. Act, and under S.R. 0. No. 350/65, if tax has been already paid under the G.S.T. Act, no tax is payable under the C.S.T. Act. Though Section 15(b) does not in terms provide as to what is to happen where tax in respect of inter-State sales of declared goods under the C.S.T. Act had been paid or collected already prior to the assessment of tax in respect of intra-State transactions of such declared goods under the G.S.T. Act, in view of the provision therein that tax under the G.S.T. Act in respect of such intra-State transactions is to be refunded, it is obvious that law does not in such cases contemplate collection of tax under the G.S.T. Act for the mere sake of returning it forthwith -- A paying money across the counter to B, to be paid back to A across the same counter and at the same time, is nothing but an exercise in futility on the part of A and B. The notification S.R.O. No. 350/65 would not be attracted to such a case because tax in respect of inter-State sales of declared goods due under the C.S.T. Act has already been paid. Therefore, the scheme of law is that so far as declared goods purchased intra-State and sold in the course

of inter-State trade are concerned, there is only one tax liability on the dealer, either u/s 5 of the G.S.T. Act or u/s 6 of the C.S.T. Act.

22. u/s 9 of the C.S.T. Act, the authorities functioning under the G.S.T. Act are empowered to assess and collect the tax payable under the C.S. T, Act, and all the provisions of the G.S.T. Act for assessment, collection, etc., of tax thereunder shall apply to assessment, collection, etc., of tax under the C.S.T. Act. As in previous years, the appellant-firm paid in advance amounts totalling Rs. 2,42,339.56 (as on 20th April, 1967), for applying the same to tax that may be found due from him u/s 6 of the C.S.T. Act in respect of copra purchased by it intra-State and sold in the course of inter-State trade during that year, and in respect of some other dealings falling within the purview of that section. By the assessment order dated 31st December, 1968, the firm was assess-ed to a tax liability of Rs. 2,14,591.87 and a surcharge of Rs. 98.20 under the provisions of and as due under the G.S.T. Act for the year 1966-67. As per the demand notice of 9th April, 1969, this tax and surcharge were payable on or before 7th May, 1969. It is not disputed that this assessment takes into account the appellant's intra-State transactions in copra in respect of inter-State sales of which the appellant had already made advance payments for applying the same towards tax that will be found to be due from him under the C.S.T. Act. The assessment of 31st December, 1968, proceeds on the premise that tax in respect of the appellant's dealings in copra is payable under the G.S.T. Act and not under the C.S.T. Act. This is presumably so since no assessment of tax under the C.S.T. Act has been made as on 31st December, 1968, and, therefore, no tax as such has been paid thereunder, as otherwise the demand (perhaps, not the assessment) under the G.S.T. Act would be improper as an exercise in futility as explained in the preceding paragraph. In view of the fact that under the law the appellant is liable to pay tax only under one or the other of the two statutes -- either in respect of intra-State transactions of declared goods under the G.S.T. Act or in respect of inter-State sales of these goods under the C.S.T. Act --, and since the authorities have proceeded on the basis that the appellant's liability for tax is in respect of intra-State transactions in these goods (copra), as on the date of demand, i. e., on 9th April, 1969, there was with the person making the demand the unapplied sum of Rs. 2,42,339.56 as belonging to the appellant-firm and at its disposal. No portion of this amount could be, nor has been, then appropriated by the payee towards tax due in respect of inter-State sales of copra or any other tax liability under the C.S.T. Act as then no assessment has been made thereunder. At any rate, an amount of Rs. 2,31,932.39 (as seen from the subsequent assessment order of 16th February, 1970, under the C.S.T. Act) was at the appellant's disposal as on 9th April, 1969, and thereafter. The appellant by his letter dated 25th April, 1969, requested adjustment of the amount lying with the department to its tax liability pursuant to the demand notice of 9th April, 1969, or to refund the same. There was no reply to this. By the assessment order of 16th February, 197P, under the C.S.T. Act, the appellant was held to have paid an excess payment of Rs. 2,31,932.39. This amount was

refunded on 10th March, 1970. The appellant paid the tax of Rs. 2,14,591.87 and the surcharge of Rs. 98.20 demanded under the G.S.T. Act on 31st March, 1970.

23. *Solvitur in modum solventis* (Money paid is to be applied according to the wish of the person paying it) is a well-accepted rule of law. What happens if the payment is not or could not be applied in accordance with such wish? The obvious answer is that money paid is free to be applied in any other manner directed by the payer, or the same is to be returned to the payer in the absence of any further direction by him as regards its application by the payee. I suppose that these principles govern this case. The appellant had paid Rs. 2,42,339.56 to be applied in satisfaction of its tax liability under the C.S.T. Act. Of this (as it turned out subsequently) Rs. 2,31,932.39 was paid to be applied to discharge the appellant's tax liability under that Act in respect of inter-State sales of copra for dealings in which according to the assessing authority, tax liability is on the intra-State sales dealings and under the G.S.T. Act, and not on the inter-State sales thereof nor under the C.S.T. Act. In other words, the assessing authority found it not possible to apply the sum of Rs. 2,31,932.39 in compliance with the direction given by the appellant. Nor was it applied. Nor could it have been applied according to the wish of the payer, the firm, from and after 31st December, 1968, the date of the assessment order under the G.S.T. Act. In fact, as on 9th April, 1969, the assessing authority had not, and could not have, applied any portion of the sum of Rs. 2,42,339.56 as per the appellant's direction, and that authority applied a small portion thereof, Rs. 10,407.17, towards the appellant's tax liability under the C.S.T. Act only on 16th February, 1970, after the appellant revoked the direction as per his letter dated 25th April, 1969. At any rate the appellant's direction to apply the sums paid in discharge of his tax liability on inter-State sales of copra could not be complied with so far as Rs. 2,31,932.39 is concerned, and this was so always from and after 31st December, 1968, for the inability to do so did not arise by force of the refund order rather, because it could not be applied according to the wishes of the appellant, it was refunded. The same authority to whom the sums were paid, made the assessment on 31st December, 1968, whereby he held that in respect of the appellant's dealings in copra, its tax liability is on intra-State dealings under the G.S.T. Act, and not on inter-State sales under the C.S.T. Act. The appellant was, therefore, entitled to seek adjustment of the amounts paid by it and lying with the assessing authority to its credit in satisfaction of its liability pursuant to the demand notice dated 9th April, 1969, and the assessing authority -- the payee -- was bound to apply this amount in the manner directed. That the payee took time till 16th December, 1970, to order refund of the excess amount is no reason to hold that there was no payment on 25th April, 1969. The appellant cannot be held to have defaulted to pay the tax demanded as per the demand notice dated 9th April, 1969, till 10th March, 1970, when only the excess amount was refunded. By adjustment the appellant paid it on 25th April, 1969, within time. We are not in this case concerned as to whether the appellant

is a defaulter during the period 10th March, 1970 (the date of refund), to 31st March, 1970 (the date of remittance), since the Deputy Commissioner's finding to that effect was not challenged by the appellant before the Board, nor before us.

24. It appears to me that if the assessing authorities deal with the assessment proceedings of this nature with a little more imagination by taking up these proceedings simultaneously, the situation like the one on hand which gives rise to the impression that the object of assessment proceedings is to create artificially defaulters (which it is not, but to raise revenue for the State according to law, and with humane approach) can be avoided.