

(2007) 11 KAR CK 0047
In the Karnataka High Court
Case No : Writ Petition No. 27318 of 2005

World Resorts Ltd.

APPELLANT

Vs

The State of Karnataka and Others

RESPONDENT

Date of Decision : 28-11-2007

Acts Referred:

Karnataka Sales Tax Act, 1957 — Section 12 B, 14

Citation : (2008) ILR (Kar) 565 : (2009) 20 VST 642

Hon'ble Judges : D.V. Shylendra Kumar, J

Bench : Single Bench

Advocate : G.K. Bhat and D. Sudha, for the Appellant; Niloufer Akbar, GA for R1-R5, Prashanth N. Hegde, for R7 and VRH Legal Services for R10, for the Respondent

Judgement

D.V. Shylendra Kumar, J.—This writ petition is a typical illustration of gross abuse of the writ jurisdiction of this Court.

Petitioner is an artificial person - a company registered under the Companies Act, 1956, and who claims to be a dealer registered under the provisions of the Karnataka Sales Tax Act, 1957 [for short, KST Act] and Karnataka Tax on Luxuries Act, 1979 [for short, KTL Act] who has come up with prayers which on the face of it may not be achievable, with inadequate pleadings to support the prayers and on irrelevant grounds urged in support of the writ petition.

2. This writ petition is in the context of certain garnishee notices that had been issued to the bankers of the petitioner M/s. Oriental Bank of Commerce, Sadashivanagar, Bangalore, M/s. Andhra Bank, Vidyapeetha Circle, Bangalore and Punjab National Bank, M G Road, Bangalore, u/s 14 of the KST Act [copies produced at Annexures - E, F, G, H and J] and also notice u/s 8A of the KTL Act, produced at Annexure-K to the writ petition, whereunder it had been indicated that the writ petitioner is liable to pay Rs. 5,05,80,704/- due under the KTL Act and recovery notice [Annexure-L to the writ petition] indicating part of this amount i.e. Rs. 2,71,26,216/- payable for the years 2004-05 and 2005-06,

unless paid within 15 days of the receipt of the notice, the amount will be realized by attachment and sale of movable and immovable properties of the petitioner, and it is for quashing of these garnishee notices/demand notices this writ petition is presented.

3. While the petitioner has sought for quashing of the garnishee notices, has also sought for quashing of attachment and restraint notices for recovery of the amount this apart, a writ in the nature of mandamus also sought for, to direct the first respondent state to extend the benefit of tax exemption as per the tourism policy and guidelines of 1992, modified from time to time, as per Annexure - B and C, as given in the ease of similarly situated persons. A further mandamus is also sought for to direct the state and the officers of the commercial tax department to revoke the garnishee notices questioned in this writ petition in terms of Annexure - E, P, G, H and J and also the demand notices as per Annexure - K and L to the writ petition. In the alternative, the garnishee notices are sought to be quashed.

4. The premise on which the petition is presented to this Court is that the petitioner had been making efforts to secure the benefit of exemption/concession provided to persons setting up hotel establishments in the notified areas in terms of the 1992-1997 policy of the government providing for tax concessions under the provisions of the KST Act, Karnataka Entry Tax Act and the KLT Act etc., and such efforts not having fructified and in that context, the petitioner had come to this Court on an earlier occasion by filing a writ petition in WP No 34982 of 2004, seeking for a writ of mandamus to compel the respondents to consider the request/representation of the petitioner for such tax benefits under the tourism guidelines issued by the respondents with effect from 1-7-1997 and that writ petition was dismissed, as having become in fructuous, by this Court in terms of the order dated 30-6-2005 for the reason that the respondent had come up with plea that the representation of the petitioner had been considered and replied in terms of the communication dated 8-2-2005, but that communication only negated the request of the petitioner and therefore the petitioner is constrained to question this communication by filing the above writ petition yet again seeking for the very relief; that denying such benefits to the petitioner, which the petitioner is otherwise entitled for the benefit in terms of the policy, while by itself is an illegal and arbitrary action, the respondents on the other hand have extended such benefits to other persons who have established such hotel or resort; that notwithstanding such other establishments being located within the city of Bangalore, exemption has been given, whereas the petitioner is denied exemption; that such act on the part of the state amounts to discrimination as against the petitioner and therefore while communication at Annexure-A should be quashed, a writ of mandamus should be issued for extending the benefits in favour of the petitioner.

5. The respondents had been put on notice, they have entered appearance through counsel. The state and its officers are represented by Ms. Niloufer Akbar,

learned Additional Government Advocate.

6. State and its officers have filed statement of objections on 31-3-2006 and additional statement of objections on 18-7-2006. In the statement of objections it is, inter alia, contended that the petitioner is not entitled for any of the relief sought for, neither for a writ of certiorari nor for a writ of mandamus; that the petition averments are incorrect and misleading; that the petitioner has no entitlement in law to get relief as prayed in the writ petition; that while it is a fact that the petitioner is a registered dealer under the provisions of the KTL Act, Central Sales Tax Act, 1956 and KST Act, the assessment in respect of the petitioner's tax liability under the enactments has been completed upto the year 2002-03 and such assessment orders have also been served on the petitioners; that follow up demand notices had been issued; that the petitioner had paid tax up to this year, but for the financial year 2003-04 and 2004-05, though the petitioner had filed monthly returns and had admitted the liability for payment of tax and collected tax, had not paid the entire admitted tax in terms of the returns filed u/s 12B of the KST Act and it is for the recovery of such amounts, proceedings had been initiated and the serving of garnishee notices on the bankers of the petitioner was in that context. It is averred that the petitioner, who had collected the tax from its customers, which should have been remitted to the state along with the returns, had retained the amount and has therefore misused the funds of the state. It is also averred that the situation is same under the provisions of the KTL Act also and the total taxes that is due under different enactments like KST Act and KTL Act even in terms of the returns filed and admittedly collected from its customers by the petitioners amounts to Rs. 6,57,85,442/- and that the petitioner had not remitted this amount and therefore it became necessary for the state and its officers to resort to recovery proceedings in terms of the garnishee notices and demand notices.

7. The petitioner has filed rejoinder to the statement of objections to urge that the disposal of the petitioner's request/representation by the department of tourism pointing out that the petitioner is not entitled for any tax concession, in view of the project being located in Bangalore rural district, as per the communication dated 29-3-2001 produced as Annexure-R-1 to the statement of objections, is of no consequence for the petitioner to seek for the benefits of tax concession or to assail the rejection in terms of Annexure - A for the reason that the petitioner has fulfilled necessary requirements to claim the benefit of government policy for the period 1992-1997; that the petitioner has been apprising the department concerned of the establishment of a five-star hotel/resort at Nagarur village, Dasanapura hobli, Bangalore north taluk ever since 1995; that correspondence has gone on between the authorities and the petitioner and it is not though the petitioner has for the first time apprised the department of tourism only in terms of application dated 23-12-2000 referred to in the communication of the department of tourism dated 29-3-200 [Annexure-R - 1].

8. It is also averred in the rejoinder that passing of the assessment orders for the earlier periods in respect of which the petitioner was claiming concession/benefit will not come in the way of petitioner seeking relief of garnishee notices and demand notices being quashed and also for a mandamus to be issued to the respondents to extend the tax benefits in terms of the policies as prevailed from 1992 to 1997.

9. It is contended in the additional statement of objections filed on behalf of the state that the tourism policy under which tax sops were offered to persons establishing tourist homes and hotels/resorts which were in vogue for the years 1992 - 1997 had come to an end and a new policy is in vogue from 1-6-1997 and under the new policy, tax concessions are not extended to units located within the Bangalore urban district or rural district and the petitioner not falling under the B, C, D or E category of the locations, no benefits can be offered in favour of the petitioner under the policy as it prevailed on and after 1-6-1997. It is also indicated that without admitting, assuming that the petitioner falls under "B" category of location, the petitioner should have complied with the requirements of submitting the prescribed documents such as original plan approved, license from the authority concerned, title deed of the land/partnership deed, project report, latest khata extract and encumbrance certificate and no-objection certificate and also should have obtained necessary certificates after completion etc; that the petitioner not having followed any of the procedures as having prescribed in the package of tourism policy of 1997, nor procedures laid down under the KTL Act, cannot claim the benefits assured under the policy, particularly for tax concessions. It is averred that the petitioner though did not fulfill any of the requisite conditions, had nevertheless made representation before the first respondent claiming that it fulfils all the conditions and that representation was rightly rejected in terms of the communication dated 8-2-2005. It is also indicated that the petitioner had not filed any appeal against the assessment orders passed by the authorities and recovery proceedings were warranted and are justified; that the petitioner cannot seek for a restraint order to compel the respondent-authorities to refrain from recovery nor can the petitioner seek for quashing of these notices, as the basis for issue of recovery notices is not questioned by the petitioner at any point of time before any forum.

10. In respect of demand notices, it is averred in the statement of objections that the demand notice is one for the reduced amount, after giving credit to the amount that had been paid by the petitioner during the pendency of the earlier writ petition and as per the court orders; that whatever amount that had been paid has been deducted and the balance amount was sought to be enforced, which is valid in law; that there is no occasion for this court to quash the same.

11. The additional statement of objections was filed particularly for the purpose of justifying the action on the part of the respondent-authorities in extending the tax benefits in respect of two companies named by the petitioner viz., M/s Eagleton Golf Resorts and M/s Leela Ventures Ltd, by indicating that while M/s

Eagleton Golf Resorts had applied through the single window agency even as early as on 10-3-1995 and 8-5-1995 under the then tourism policy for the period 1992 - 1997, when even units in Bangalore rural district were covered under category-B in respect of concession and the said organization had pursued its request for tax benefit in accordance with the procedure prescribed, followed up necessary steps etc., and ultimately was able to get the Tx exemption for a period of seven years from 1-4-2000 in terms of the government notification dated 30-5-1998. It is also indicated that in the case of M/s Leela Ventures Ltd., it was found to be a unique venture; that it was one of its kind for the entire state; that the government having regard to the considerable spin off benefits to the related sectors had extended tax benefits, but the petitioner not having applied in the proper form, not having pursued the matter in terms of the policy for the period 1997-2002 and not being eligible for exemption, the recovery of tax is perfectly justified and the writ petition should be dismissed.

12. On behalf of the petitioner, it is urged by Sri G K Bhat, learned Counsel that the petitioner has been making efforts for getting the benefit ever since it sought for permission to establish a resort/hotel at its present location, which was in the year 1995, as per the document No. 1 produced along with the rejoinder filed in this writ petition; that it is not open to the respondents now to say that there was no timely effort by the petitioner to get such benefits; that the petitioner has all along been corresponding with the necessary and relevant departments and officials; that on an earlier occasion, the petitioner had approached this Court by filing a writ petition, which was rendered infructuous by the conduct of the respondents who had come up with a reply that the petitioner's request had been disposed of without even apprising the court that it had been rejected and therefore it has become necessary for the petitioner to seek relief in the present petition yet again; that it had all along entertained hope that it could get necessary exemptions having fulfilled all conditions and particularly in the wake of the development that other units such as M/s Eagleton Golf Resorts and M/s Leela Ventures Ltd, located within the limits of Bangalore city having given such exemption and yet another unit similarly situated like the petitioner also had been given such exemption and therefore it cannot be said that the petitioner had not pursued the matter with any vigour and bona fides etc. It is also submitted that the rejection of the request of the petitioner is most arbitrary and the reason assigned is not tenable and the same should be quashed and necessary directions issued as sought for by the petitioner. It is also the submission of learned Counsel for the petitioner the petitioner collected tax in terms of the monthly returns filed by the petitioner only because the petitioner was entertaining a bona fide belief that it would get the tax exemption and there would not have been any need or liability on its part to pay any tax.

13. Ms. Niloufer Akbar, learned Additional Government Advocate, appearing for the state and its officers, on the other hand, submits that the petition is totally without bona fides; that the petitioner has abused the enabling provision of collecting tax under the enactment from the customers/consumers by collecting

the tax but retaining it for itself; that lack of bona fides on the part of the petitioner is also demonstrated by the very conduct, as the petitioner who had collected tax from the customers and who should have remitted to the treasury even as per the statutory provisions had not remitted the entire tax collected within time; that only because the petitioner defaulted it became necessary for the authorities to resort to recovery; that the petitioner, who had paid such tax up to the years 2001-02, had defaulted totally in remitting the tax collected to the department for the years 2002-03 and 2003-04, whereupon follow-up action had been taken; that there is absolutely no ground for quashing the garnishee notices and demand notices; that the petitioner taking advantage of an undertaking made by the government advocate before the court on 12-4-2006 that recovery proceedings would be kept in abeyance till first week of June 2006, has avoided paying taxes thereafter; that the petitioner neither paid any tax thereafter, except for paying a sum of Rs. 80,00,000/- on one occasion and another sum of Rs. 50,00,000/- on another occasion nor has stopped collecting taxes from its customers and the petitioner continues to be in default in respect of the balance, which has added up to Rs. 20.30 crore as of now, [though Sri G K Bhat, learned Counsel for the petitioner would dispute the figure regarding the liability of the petitioner as of now] and also submits that the petitioner has not paid all taxes thereafter nor has complied with the provisions of the statutory enactment; that there is nothing placed on record to indicate either way, but if the past conduct of the petitioner is any guide, one can easily infer that the petitioner has continued steadily in not remitting/paying taxes.

14. Though it is submitted by the learned Counsel for the petitioner that if any amount were outstanding there was no impediment on the part of the respondent-authorities to recover the amount and the state can recover any tax or arrears of tax only in accordance with law, it nevertheless reflects on the bona fides and conduct of the petitioner, particularly in the context of relief sought for in the present writ petition, more so for seeking a writ of certiorari to quash the garnishee notices and demand notices. In fact there is absolutely no occasion for this Court either to quash the garnishee notices or demand notices and the prayer is an idle prayer without any factual or legal basis and is nothing but an attempt to ward off recovery proceedings.

15. The petitioner, who had collected substantial amount from the customers by way of tax payable to the state, running to several crores, if has retained the same without remitting it in time, it is not only a statutory violation but amounts to a misappropriation of fund of the state, as the petitioner has no legal right to hold on to such amount collected from its customers. Such conduct in itself while is sufficient to disentitle the petitioner the relief sought for, I do not find any factual or legal basis to quash the notices at Annexure- E, F, G, H, J, K and L to the writ petition.

16. Coming to the prayer for issue of a mandamus, it is found that the petitioner had not made any efforts in terms of the procedure prescribed for getting a

benefit like tax concession whether under the 1992-97 policy or 1997-2002 policy also, or even subsequently. While in terms of the records placed before the court, the first attempt made on the part of the petitioner appears to be only through an application dated 23-12-2000, it had been promptly dealt with and responded by the department of tourism, government of Karnataka in terms of its reply dated 29-3-2001 [Annexure- R1 to the statement of objections]. This communication has never been made subject matter of any challenge. It is clearly indicated therein that the approval to set up World Resorts Ltd., No 31/32, Nagarur village, Dasanapura Hobli, in terms of the application dated 23-12-2001, was approved subject to the two conditions viz.,

1) the promoter shall obtain clearance from pollution control board and weight and measurement department; and

2) This project is not entitled to got any incentives and concessions announced in the tourism policy as the location of this project falls in Bangalore rural district,

and it is clear that the petitioner is not getting the so-called tax benefit which the petitioner had aspired for even in terms of this communication dated 29-3-2001. If the petitioner had not pursued for any relief as against this communication, there is no point in the petitioner keeping on representing to various departments time and again and addressing letters to chief minister or other ministers and contending that such representations have elicited adverse response; that they deserve to be quashed.

17. On the other hand, the petitioner's own pleading in this writ petition as contained in para-3, which is as under:

...The petitioner even though has not filed application for extension of benefits as per the said guidelines but has filed representation before the 1st respondent fulfilling all the fulfilling all the conditions....

clearly indicates that the petitioner though had not made any effort nor had applied in accordance with the guideline and the procedure put forth and even after eliciting adverse reply in terms of Annexure- R1, appears to have put forth a claim that the petitioner had fulfilled all conditions in a letter addressed to the state government. The petitioner has pleaded that it has complied with such requirements in this writ petition as per the averments in para-3 and it is in this context the petitioner had brought about a comparison between the petitioner and the two other units namely M/s. Eagleton Golf Resorts and M/s Leela Ventures Ltd.

18. If the petitioner, on its own pleading, has not complied with the necessary requirements and procedure and had not made any attempt to get over the adverse communication as per Annexure-R1, there is nothing further that is required to be examined by this Court for issue of a writ of mandamus to compel the respondent-authorities to provide tax benefits as the petitioner is seeking for. On this ground alone, the prayer for writ of mandamus fails.

19. However, for the sake of completion, in the context of the petitioner's pleadings, particularly in the context of the averments of discrimination, which has been replied by the respondents in their counter, irrespective of the correctness or justifiability of the version of the respondents in making a distinction between the petitioner and the other two units, what can be inferred is that while the respondents have found some uniqueness in the case of the units of M/s Leela Ventures Ltd., and therefore seek to avoid the allegation of discrimination, in so far as the other unit - M/s Eagleton Golf Resorts is concerned, what is offered is that they had sought for concession even in terms of 1992-97 policy, when there was no bar for according such benefits in the particular location, and having pursued and got the benefit only in terms of the government order of the year 2000 and therefore, there is no comparison between the case of the petitioner and with that of M/s Eagleton Golf Resorts.

20. So far as denial of benefit/concession in favour of the petitioner is concerned, it is for the two reasons that the petitioner had not made a proper application as per the requisite procedure and that the petitioner when sought for exemption, the policy that was prevailing was the 1997-2002 policy, under which the place where the petitioner's unit was located was not one which is eligible for such concession/benefits.

21. Assuming that the respondent-authorities had committed any infraction, violation or illegality in extending the tax benefit, which was otherwise not available to the other two units namely M/s Eagleton Golf Resorts and M/s Leela Ventures Ltd., that in itself cannot be a ground for the petitioner to seek for issue of a writ of mandamus to compel the authorities to extend like benefits in favour of the petitioner also. A writ of mandamus is issued only if the petitioner is entitled in terms of a statutory provision for a right and that right has been demanded by following the requisite procedure and making applications in the prescribed form etc., and there is inaction on the part of the statutory authorities in considering the application, and not otherwise. While the illegality on the part of the respondent-authorities in extending an otherwise not available benefit or tax concession in favour of other persons if should have been made subject matter for issue of a writ of certiorari, perhaps it could have been examined and the possibility of issue of a writ could have been considered, in the absence of any such challenge to such illegal action and even if there is a challenge, and success in such challenge, it will never result in a positive mandamus being issued in favour of the petitioner. If a writ of mandamus is issued, it virtually amounts to compelling the respondent-authorities to commit the same illegality or infraction of law in the case of petitioner also, A writ of mandamus is never issued on such premise. Viewing the matter from any angle, it is found that the petitioner cannot seek for issue of a writ of mandamus as sought for and the prayer for issue of a mandamus also inevitably fails.

22. On a comprehensive examination of the petition pleadings, conduct of the petitioner, contents of the policy and the actions of the respondent-authorities, it

emerges that the petitioner is not at all a bona fide person seeking for any valid relief; that the petition is more misusing the process of this Court only to stall the recovery of quantified tax that the petitioner had collected from the customers on behalf of the state but failed to remit it to the state treasury, the petition is totally devoid of merits and in such circumstance, this writ petition deserves to be dismissed with exemplary costs, which is quantified at Rs. 1,00,000/- [Rupees one lakh only].

23. Coming to the conduct of the respondent-authorities, it is obvious their conduct is also not free from doubt and lacks fairness. It is firstly to be noticed that when the petitioner had failed to remit the tax collected from the customers on behalf of the government for as long a period as two years i.e. 2002-03 and 2003-04, and even when the petitioner had been filing monthly returns indicating that such taxes were being collected by the petitioner and had not been remitted along with the returns and it has not been indicated that it has been deposited or remitted to the treasury, it was the duty of the officials of the commercial tax department to have immediately taken steps to realize such amount from the petitioner, as otherwise it is a risk to the revenue, as the petitioner, if should ultimately fail and plead inability to pay the amount, the amount collected on behalf of the state would never reach the coffers of the state. I find gross negligence on the part of the officials of the respondent-department almost amounting to collusion with the petitioner in not realizing the collected tax timely from the petitioner, but resorted to a knee-jerk action in issuing the garnishee notices and demand notices two years after the event. Even here, it is to be noticed that the garnishee notices were never productive, in the sense, the bank account sought to be attached did not yield even a fraction of the amount sought to be realized under that and this Court can take judicial notice of the fact that the petitioner who claims to run a luxury hotel of five-star status and resort, and has continued the business would have commensurate fund to pay the admitted tax liability. The officials of the department have deliberately failed in realizing the amount due from the petitioner and if the version as submitted by the learned Additional Government Advocate, that the petitioner is in arrears of Rs. 20.30 crore is to be believed, then it shows the continued apathy, inaction and possible collusion of the officials of the commercial taxes department with the petitioner. It is a matter of utmost public concern, rather a grave threat to the revenue, if the officials of the department act in such a remiss manner and the amount collected by way of tax by the persons like petitioner not reaching the coffers of state. The petitioner, who has collected taxes on behalf of the state, has nevertheless not remitted it to the state treasury. The tax in the present case is an indirect tax not borne by the petitioner, but passed on to the customers/consumers and the officials of the department conveniently closing their eyes from realising amount due to the state. There is much more than what meets the eyes in such situations. It is necessary that the system is set right and such erring, negligent or even possible corrupt officials of the department are weeded out.

24. In such circumstance, the Secretary to Government, Finance Department and the Commissioner of Commercial taxes in Karnataka, are directed to cause a proper enquiry into such state of affairs particularly to ascertain who are the officers/officials of the department who are responsible for not realizing the tax due from the petitioner for the years 2002-03 and 2003-04 and even upto date and as to their conduct in not realizing the amount due to the state and take commensurate action, if it is found that there is any violation or misconduct on their part. A follow-up report is to be placed before the Registry of this Court in this regard within a period of six months from today. On and after submission of such report, the report may be placed before this Court for further orders.

25. In the result, this writ petition is dismissed with cost of Rs. 1,00,000/- [Rupees one lakh only] payable by the petitioner to the respondent-state of Karnataka.