
(1982) 11 KAR CK 0003

Karnataka High Court

Case No: Writ Petition No. 19459 of 1980

Goa Co-operative
Marketing and Supply
Federation Limited

APPELLANT

Vs

State of Karnataka and
Others

RESPONDENT

Date of Decision: Nov. 12, 1982

Acts Referred:

- Karnataka Sales Tax Act, 1957 - Section 5, 5 (3), 6 B

Citation: (1983) 1 KarLJ 257 : (1983) 53 STC 405

Hon'ble Judges: M.P. Chandrakantaraj, J

Bench: Single Bench

Advocate: N.S.S. Gupta and Khanna, for the Appellant; M.R. Vanaja, High Court Government Pleader and K. Srinivasan, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Chandrakantaraj Urs, J.

This writ petition is disposed of at the stage preliminary hearing after notice to the respondents and after hearing the counsel for parties, by the following order.

2. The petitioner is the Goa Co-operative Marketing and Supply Federation Limited. The society was registered under the Maharashtra Co-operative Societies Act, 1960 (hereinafter referred to as the society), as an apex co-operative federation in the Union Territory of Goa. The prayers in the petition are :

(a) for an order declaring that the petitioner-society was not liable to pay any sales tax in respect of cement handled by and delivered to the allottees under an agreement dated 14th September, 1978, between the petitioner and the Joint Controller of Cement, Government of India, New Delhi;

(b) for an order restraining the respondents from recovering any amount from the petitioner-society by way of sales tax u/s 5 of the Karnataka Sales Tax Act (hereinafter referred to as the Act);

(c) for an order declaring that the petitioner-society was not liable to pay any additional tax u/s 6-B of the Act; and

(d) for an order directing the respondents to refund additional tax recovered under the Act since 14th September, 1978.

3. Strangely enough, there is no prayer for striking down section 6-B of the Act, nor is there a prayer for quashing any assessment proceedings or demand notices issued by the 4th respondent, Commercial Tax Officer, Second Circle, Mangalore. In fact, as set out hereinafter the real grievance of the petitioner is against the demand notice dated 3rd July, 1980, whereby the Assistant Commissioner of Commercial Taxes (Assessment), Mangalore, has called upon the petitioner to pay additional tax at 12 1/2 per cent on Rs. 5,81,826.24 being the sales tax and surcharge payable in accordance with the return filed by the petitioner for the relevant period, demanding a sum of Rs. 72,728.27.

4. Briefly stated the facts leading to this petition are as follows : The society was appointed as handling and clearing agents by the Joint Cement Controller, Government of India, New Delhi, as per his letter dated 14th September, 1978, a true copy of which is produced as annexure A to the petition, on certain terms and conditions, to distribute imported cement to allottees in the Karnataka State. The relevant terms and conditions will be adverted to in the course of this order in dealing with the contentions of petitioner. The society has averred that cement is a controlled commodity under the Imported Cement control Order, 1978, and the distribution of cement is done by the Cement Controller through the State Trading Corporation (hereinafter referred to as the Corporation). The Corporation as the sole agent of controller while the goods are on the high seas raises its invoices on the society in its capacity as the handling agent which in turn is required to open a letter of credit on 30 days sight basis in favour of the corporation. The allotment of cement is made by the cement controller and the price is also fixed by him. The society as the handling agent, as claimed, is neither a stockist nor a trader, but it merely organises the labour for handling of the cargo from the ships to the docks and thereafter load the same into trucks or wagons at the docks to the allottees who are dealers in cement. The society is required to sell the cement so imported under the said agreement at the docks to the dealers at the price fixed by the controller. The society is paid only the clearing and handling charges at the agreed rate. The society has further asserted that it registered itself as dealer in Karnataka under compulsion of the 4th respondent, Commercial Tax Officer, Second Circle, Mangalore, and in fact it was not so required under the law to register itself as dealer as it does not answer to the definition of "dealer" in the Act in section 2(1)(k) of the Act. Strangely enough, the society does not dispute that it is not seeking refund of the sales tax which it has already collected from the dealers (buyers) and deposited with the 4th respondent and that the declaration that it is

not liable to pay sales tax is confined to future transactions only. The society also admits that in the State of Karnataka the cement is exigible to sales tax at the point of its first sale in terms of section 5(3) of the Act. As is seen from the demand notices, some of which are produced as annexures to the petition, the society has filed its monthly returns for the relevant period and paid sales tax on its turnover at 10 per cent including the surcharge, in the sum of Rs. 5,81,826.24. No appeal against the assessment appears to have been filed before the appropriate appellate authority under the Act. In fact there is no mention of the same in the pleadings anywhere at all.

5. The society has urged that it is not required to pay any additional sales tax u/s 6-B of the Act because it is confiscatory in nature, as the petitioner society could not earn profits exceeding Rs. 3 per tonne while the additional tax charged u/s 6-B of the Act is over Rs. 4 per tonne which not being transferable to the consumer is a burden on the society affecting its right to carry on business of its choice under article 19(1)(f) and (g) of the Constitution of India. It is further urged by the society that it is not liable to pay any additional tax because no sale is effected by the petitioner-society while delivering cement to the allottees chosen by the Cement Controller of India. It is further urged that the society does no more than handling and clearing on behalf of the Cement Controller of India and the Corporation and therefore it is not a seller which is required to pay the sales tax, the surcharge or the additional tax under the Act.

6. The 1st and the 2nd respondents are the State of Karnataka by its Chief Secretary and the Secretary for Finance. The 3rd respondent is the Commissioner of Commercial Taxes in the State of Karnataka. The 4th respondent is the commercial Tax Officer, Second Circle, Mangalore. By an application the society impleaded the Corporation as the additional respondent. While respondents Nos. 1 to 4 are represented by the Government Pleader, the Corporation has been represented by Mr. K. Srinivasan, who has objected to be impleaded as a respondent and he also has been heard in the matter.

7. Respondents 1 to 4 have filed their statement of objections. It is stated in the statement of objections that the society is a dealer within the meaning of that term in section 2(1)(k) of the Act and the assertion by the society that it does not fall within the definition is stated to be untenable. The respondents rely upon the language of the definition of "dealer" occurring in section 2(1)(k) of the Act. It is further contended for the respondents that this Court having held section 6-B of the Act as valid and within the competence of the State Legislature, the petitioner cannot be permitted to challenge the same on the ground of it being confiscatory. Reliance has been placed by the respondents on the decision of the Supreme Court in the case of [S. Kodar Vs. State of Kerala](#), wherein the provision corresponding to section 6-B of the Act in the Tamil Nadu Additional Sales Tax Act came up for consideration and the Supreme Court ruled that additional tax not being shown to be confiscatory cannot be held to be violative of article 19(1)(g) or (f) of the Constitution. That decision has been followed in some other subsequent decisions of this Court and section 6-B of the Act is held to be constitutionally valid.

8. In the light of the pleadings, the only two questions fall for consideration and they are :

(1) Whether the petitioner has demonstrated that the additional tax required to be paid by it is demonstrably confiscatory in character and therefore the demand should be struck down by this Court ?

(2) Notwithstanding the fact that such a levy u/s 6-B of the Act is within the legislative competence of the State, the petitioner-society is not required to pay that levy ?

9. The only argument advanced by the petitioner-society is that its commission for handling and clearing being restricted to Rs. 3 per tonne and the additional tax at 10 per cent of the sales tax and surcharge payable being more than Rs. 4 per tonne, the additional tax assumes the character of being confiscatory. I am unable to accede to this contention. The charges for handling and clearing even according to the terms of the agreement between the Joint Controller of Cement and the petitioner was a matter of contract between them and at the point of time the agreement was entered into, the society was aware of the provisions of the Act particularly section 6-B of the Act. It was also aware that its turnover was likely to exceed Rs. 10 lakhs and therefore attracted section 6-B of the Act. It was in a position to negotiate for higher handling charges in order to make profit under the agreement. Not having done that it cannot now complain that its profit is reduced to loss in business transactions and that cannot be taken as a ground to demonstrate the confiscatory nature of the taxing statute which would render such tax constitutionally invalid. Strangely, a perusal of the agreement as per annexure A dated 14th September, 1978, clearly provides that the cement imported would be sold to the handling agents on the high seas by the corporation at the controlled price as fixed by the Government of India less the handling expenses referred to in para 1 of the letter (see para 3). Para 4 also provides that the sale by the corporation to the handling agents will be made on 30 days credit basis against irrevocable letter of credit or letter of authority or other suitable guarantees accepted by the corporation. In other words, even in terms of annexure A the agreement binding the society as the selling agent clearly indicates that the title in the imported cement passes on to the society on the high seas and the nomenclature that the society shall be the clearing and handling agents, in that circumstance, is merely descriptive and does not disclose the correct position of the parties under the agreement. If the petitioner is the owner of the cement having paid for the same on the high seas and admittedly being the first seller in the State of Karnataka, it is bound to pay sales tax in accordance with sub-section (3) of section 5 of the Act. Therefore, the question of agent not being a dealer which itself is not the correct legal position in terms of section 11 of the Act, is ill-founded. If the transaction of the society in the State of Karnataka is liable to sales tax and surcharge on its turnover, it is equally liable to additional tax u/s 6-B of the Act which is also a charging section under the Act. That the society did not provide for sufficient profits in its agreement with the Cement Controller cannot be made a ground, as I have already pointed out, to escape the tax which is otherwise attracted. For the above reason the various contentions advanced by the petitioner are liable to be rejected as being without substance.

10. In any event, the assessments concluded against the petitioner-society were all orders of assessments which were appealable u/s 20 of the Act. Not having exhausted the statutory remedies under the Act, the petitioner cannot invoke the jurisdiction under article 226 of the Constitution merely in the guise of challenging the constitutional validity of section 6-B of the Act. The constitutional validity of section 6-B of the Act is indeed not challenged.

11. I have already given the reasons why the argument of the society cannot be accepted that the levy is confiscatory in character.

12. For these reasons, there is no merit in the contentions of the petitioner and therefore this writ petition is rejected. The petitioner was directed to furnish the bank guarantee for the sum demanded by the 4th respondent, the 4th respondent is now free to enforce the bank guarantee and also collect such additional tax which may be found to be due and which is not covered by the bank guarantee already furnished.

13. There will be no order as to costs.