LIS (Registered), Palakkal Court Vs State of Kerala and Another

W.A. No. 2429 of 2006 and W.P. (C) No"s. 2513 and 5154 of 2007

Court: High Court Of Kerala

Date of Decision: March 23, 2007

Acts Referred:
Kerala General Sales Tax Act, 1963 â€" Section 2#Kerala Tax on Paper Lotteries Act, 2005 â€" Section 10, 19, 2, 2(1), 22

Citation: AIR 2007 Ker 178 : (2008) 17 VST 432

Hon'ble Judges: K.S. Radhakrishnan, Acting C.J.; M.N. Krishnan, J

Bench: Division Bench

Advocate: M.K. Damodaran and P.K. Vijayamohanan, for the Appellant; V.V. Ashokan, Spl. G.P. (Taxes), for the Respondent

Judgement

K.S. Radhakrishnan, Actg. C.J.

1. Petitioner was served with a notice dated 15-5-2006 from the office of the Assistant Commissioner (Assmt.) Special Circle-I (KGST)

Ernakulam directing it to furnish complete details of lottery tickets purchased and sold during the year 2005-06 and for the month of April and

May, 2006. In response to the notice petitioner sent a reply dated 15-5-2006 along with the details of lottery tickets of the Government of Kerala

purchased from District Lottery Office, Ernakulam and Kottayam. It was also pointed out in the reply that lottery tickets purchased from

Government of Karnataka were not available since they had to be arranged from its Bangalore Office. Latter the petitioner was served with a

notice dated 18-5-2006 from the office of the second respondent pointing out that the petitioner had sold various lottery tickets purchased from

outside the State and prizes were awarded to various customers in the State of Kerala, for which no tax under the Kerala Tax on Paper Lottery

Act was remitted. Petitioner was informed that it had violated Sections 7 (registration), 8 (filing of returns) and 10 (payment of tax in advance) of

the said Act. It was informed that the petitioner is liable to be punished under Sections 22 and 23 of the Act. Petitioner was also informed that they

are proposing to impose a penalty of rupees one lakh u/s 22 and rupees one thousand per day for the delay incurred in remitting the tax from 1-4-

2005 till the amount is paid and 50% of tax i.e., Rs. 45,62,5,000/- together with 2% interest per annum from 1-4-2005 till the date of payment,

Petitioner was called upon to file its objection to the said notice with supporting records.

2. Petitioner replied to the said notice vide Ext. P2 reply dated 5-6-06 stating that petitioner used to purchase tickets from the Lottery Department

of Kerala as well as from the Karnataka State. Purchase of lottery tickets from Karnataka is done by the office of the petitioner functioning at

Bangalore and no tickets are taken away to Kerala for sale or distribution among the members in the State of Kerala. Further, it was also stated

there was no sale or distribution of lottery tickets by petitioner to his members or to anybody else and tickets from the Karnataka State are kept

under safe custody at Bangalore. Further it was also stated that as per Sub-section (2) of Section 6 of the Act tax has to be levied from promoters.

Petitioner is not a promoter of Karnataka State for sale of lottery tickets in the State of Kerala. It was therefore stated that there is no question of

registration u/s 7 of the Act and therefore Sections 8 and 10 would not apply and therefore petitioner is not liable to be proceeded with under

Sections 22 and 23 of the Act.

3. The second respondent then passed an order dated 25-10-2006 stating that as per the data available in that office petitioner had sold lottery

tickets from outside the State and prizes were awarded to various customers in almost all districts of Kerala and hence it was proved that the

petitioner had violated Sections 7, 8 and 10 of the Act. Further it was also stated that the mere physical possession of the tickets by the petitioner

did not alter the character of sale and if the lottery tickets earmarked to a particular allottee won the draw, it is he who is eligible for the prize

money and not the petitioner. Further, it was also stated that the bulk commission received by the petitioner from the purchase of tickets was not

shared with the participants of the scheme. Referring to the definition of sale under Sub-clause (xxi) of Section 2 of the KGST Act 1963 it was

stated that every transfer whether in pursuance of a contract or not of the property in goods by one person to another in the course of trade or

business would satisfy the definition. Further it was also stated that there is no need for any physical transfer of goods and since sale is not defined

under Kerala Tax on Paper Lotteries Act, the definition under KGST Act has to be looked into. Further it was also stated that the dealer is a

person who purchases lottery tickets in bulk getting commission for that and allotting those tickets to its principals and hence petitioner is a person

who is doing the activities of a promoter who is liable to get registration under the Act and that the entire activities of the dealer has got the

character of a promoter. Holding so, it was ordered that an amount of Rs. 27,37,50,000/-is due from the petitioner. Petitioner was also served

with another order dated 25-10-2006 imposing a penalty of Rs. 6,36,71,500/- due to non-remittance of tax and filing of returns.

4. Petitioner is aggrieved by those orders and has filed WP(C) No. 30558 of 2006. Apart from the challenging the legal validity of the above

mentioned orders petitioner has also challenged the constitutional validity of Kerala Tax on Paper Lotteries Act, 2005. Petitioner has also sought

for a declaration that the State of Kerala has no power to impose tax on transaction taken place in the State of Karnataka. Learned single Judge

found no reason to entertain the writ petition and noticed that petitioner has got an effective alternative remedy of filing an appeal against the orders

impugned, consequently dismissed the writ petition, against which WA No. 2429 of 2006 has been preferred. Petitioner has also filed WP(C)

5154 of 2007 seeking a writ of certiorari to quash the revenue recovery notices issued to it and also for a declaration that the respondents have no

right to enforce those orders through proceedings under the Revenue Recovery Act. When the matter came up for admission learned single Judge

referred the matter for being heard along with WA. No. 2429 of 2006.

5. Sri M.K. Damodaran learned senior counsel appearing for the petitioner submitted that the second respondent has completely misunderstood

the scope and ambit of the Kerala Tax on Paper Lotteries Act, 2005. Counsel submitted, petitioner is not legally bound to take registration u/s 7 of

the Kerala Tax on Paper Lotteries Act, 2005 since it is not a promoter within the definition clause contained in Section 2(i) of the Act and the

State of Karnataka has not appointed the petitioner for selling its lottery tickets in the State of Kerala. Counsel submitted, so far as the lottery

ticket of the State of Kerala is concerned, petitioner has already taken registration, but so far as the lottery ticket of the Karnataka State is

concerned petitioner has got an office at Bangalore and lottery tickets are kept in the Bangalore Office with the list of members sent to subscribers

both in Karnataka and Kerala as also other States and at no point of time the tickets are brought to the State of Kerala for sale. Counsel

submitted, second respondent has completely misunderstood the scope of the scheme under which the petitioner is functioning. Counsel submitted,

the taxable event for levy of tax takes place at Karnataka and is governed by the provisions of the Karnataka Tax on Lotteries Act, 2004 and not

the Kerala Tax on Paper Lotteries Act, 2005. Counsel submitted, in the event of organizing, conducting lottery in Karnataka the power to levy tax

under Entry 62, List 2 of the 7th Schedule rests with the State of Karnataka and the attempt to characterise the purchase of lottery ticket of

Karnataka as deemed sale within the State of Kerala is illegal. Counsel also referred to the Constitution Bench decision of the Supreme Court in

Sunrise Associates Vs. Govt. of NCT of Delhi and Others, and submitted that lotteries are not ""goods"" for the purpose of sales tax laws and are

only actionable claims excluded from the definition of ""goods"" under the Sale of Goods Act and the sales tax statutes. Further it is also stated that

no sales tax can be imposed on sale or purchase of lottery tickets and that u/s 6 of the Act levying and collection of tax are not on sale but on

draw.

6. Sri. V.V. Ashokan, learned Spl. Govt. Pleader (Taxes) submitted placing reliance on the counter affidavit filed by the respondents that the

petitioner conducts business of sale of lottery tickets of Karnataka State as well as in the State of Kerala and hence bound to take registration.

Karnataka State is not directly doing any lottery business in the State of Kerala nor has they appointed any person for selling their lottery tickets in

the State of Kerala, but the petitioner has to be treated as a promoter of the lottery tickets of the Karnataka State in the Kerala State and therefore

bound to take registration under the Kerala Act. Learned Government Pleader also referred to Sections 19, 22, 23, 24, 25 and 29 and placed

emphasis on the words ""or other person"". Even if the petitioner does not fall within the definition clause, counsel submits the petitioner would fall

within the expression ""other person"" and therefore it is bound to take registration failing which, it is open to the assessing authority to invoke

Sections 22 and 23 of the Kerala Act and take other coercive proceedings. Learned Govt. Pleader placed reliance on the judgment of the

Supreme Court in The State of Bombay Vs. R.M.D. Chamarbaugwala, in support of his contention. Counsel also submitted that the State is

competent to make legislation in those matters and it squarely comes under Entry 62 of List II of the 7th Schedule, within the legislative

competence of the State Legislature.

7. Petitioner is a registered partnership firm. Its main business is in undertaking the responsibility of purchasing lottery tickets on behalf of its

members who subscribe certain amount, the interest of which is utilized for purchase of lottery tickets, the number of ticket purchased on behalf of

each member depends on the amount deposited by each member. Petitioner earn a commission of 27% on bulk purchase of lottery tickets, a part

of which is utilized for meeting the expenses for running the business and for repayment etc. Petitioner purchases the Government lottery tickets

and each member of the petitioner is given the privilege of "" testing his luck in prize winning, from lottery tickets earmarked for him. Lottery tickets

purchased are kept in safe custody of the petitioner even after the completion of the draw and as per the terms and conditions of the agreement

with its members. If any member wins the prize, the petitioner will assist him for realizing the prize awarded to him.

8. Petitioner purchases tickets from the Lottery Department of Kerala as well as from the concerned authority of Karnataka State. Purchase of

lottery tickets from Karnataka is done by the petitioner''s office at Bangalore and no tickets are brought to Kerala for sale or distribution among

the members in the State of Kerala. Petitioner has obtained registration under the Act for purchase of lottery tickets from the Kerala State.

Petitioner has not been appointed as promoter by the State of Karnataka for organizing, conducting or promoting the Karnataka lottery tickets in

the State of Kerala and hence there is no question of taking registration u/s 7(1) of the Kerala Act since the petitioner is not a promoter as defined

u/s 2(1) of the Act.

9. The respondent has however, taken the view that as far as lottery tickets purchased from the State of Karnataka are concerned since petitioner

is getting commission from the State of Karnataka and that most of the members of the scheme are from the State of Kerala petitioner has to be

treated as promoter of the lottery tickets of the Karnataka State in the State of Kerala and hence it falls within the definition of Section 2(i) of the

Kerala Act, in the event of which, it is bound to take registration u/s 7 of the Act. The Kerala Tax on Paper Lotteries Act, 2005 has been enacted

to provide for the levy and collection of tax in the State of Kerala on the conduct of paper lotteries and for matters connected therewith or

incidental thereto. The word promoter has been defined u/s 2(i) which is extracted hereunder for easy reference.

2(i). ""Promoter"" means the Government of India or Government of a State or a Union Territory or any country who had entered into a bilateral

agreement or a treaty with the Government of India for organizing, conducting or promoting a lottery and includes, any person appointed for selling

lottery tickets by the Government in the State of Kerala on its behalf, where such Government is not directly selling lottery tickets in the State

The definition clause contains two parts, first part of the definition clause takes in the Government of India or Government of a State or a Union

Territory or any country who had entered into a bilateral agreement or a treaty with the Government of India for organizing, conducting or

promoting a lottery and the second part of the definition clause takes in any person appointed for selling lottery tickets by the Government in the

Stats of Kerala on its behalf, where such Government is not directly selling lottery tickets in the State. The definition clause uses the word ""means

where it wants to exhaust the significance of the term defined and the word ""include"" when it intends that while the term defined should retain its

ordinary meaning, its scope should be widened by specific enumeration on certain matters which its ordinary meaning may or may not comprise so

as to make the definition enumerative but not exhaustive. When the expression ""means"" is employed, the definition is hard and fast and no other

meaning can be assigned to the word or expression defined that is put down in the definition. A definition in the form ""means and includes"", will be

considered as exhaustive.

10. Indisputedly the petitioner would not fall in the former category of the definition clause and it is the case of the State that the petitioner falls in

the latter part of the definition clause. Latter part takes in ""any person"" appointed for selling lottery tickets by the Government in the State of Kerala

on its behalf. State of Karnataka has not appointed the petitioner for selling its lottery tickets in the State of Kerala on its behalf.

11. Petitioner has made available a letter dated 1-3-07 issued from M/s. Mysore Sales International Limited stating that the State of Karnataka

has appointed MSIL as its sole selling dealer of the lottery tickets, and nobody else has been appointed as its sole selling dealer. Petitioner has also

made available a letter dated 11-2-2005, a copy of which has been handed over to the Government Pleader as well, received from MSIL, which

would show that the petitioner has been appointed as one of the main dealers under the Mysore Sales International Ltd. Paragraph 7 of the letter

says that tickets supplied to the Main Dealer are to be sold in physical form and not to-be sold through internet or any other electronic media.

Further, the tickets supplied to the main dealer are to be sold in the State of Karnataka only and shall not be sold outside the State especially in

Lottery Free Zone.

12. The facts in this case would clearly show that petitioner has never been appointed by the State of Karnataka on its behalf for selling lottery

tickets in the State of Kerala. Consequently, petitioner would not fall within the definition clause of promoter u/s 2(i) of the Act. Section 7 of the

Act deals with registration of promoters. Every promoter selling lottery tickets shall get himself registered under the Act in such manner and on

payment of such fees and security within such period as may be prescribed. Since the petitioner has not been appointed by the State of Karnataka

in the State of Kerala for selling lottery tickets it is not a promoter and therefore petitioner is not bound to take registration u/s 7 of the Act. Only

the promoter need submit returns u/s 8 of the Act. So also only a promoter need pay tax in advance. Tax can be levied and collected u/s 6 of the

Act only from a promoter.

13. Petitioner has taken a definite stand it has got an office in the State of Kerala as well as in the State of Karnataka at Bangalore. So far as the

sale of Kerala State lottery tickets it has taken registration under the Act in the State of Kerala. But so far as the Karnataka lottery tickets are

concerned, that is being operated from Bangalore, as a dealer under Mysore Sales International Ltd. which is the sole selling dealer appointed by

the State of Karnataka. Being a dealer under MSIL petitioner is not authorised either by the Government of Karnataka or by MSIL to sell the

lottery tickets of Karnataka State in the State of Kerala. Respondent has taken up the stand that since the petitioner purchases lottery tickets from

the State of Karnataka and the same is earmarked to its members, most of them are in the State of Kerala, it must be taken that the principle of

principal and agent would apply and the petitioner is acting as an agent to collect amount from them and purchases lottery tickets and earmarked

those lottery tickets to each one of its subscribers under the scheme. Respondents have taken up the stand that such a scheme would amount

selling of lottery tickets in the State of Kerala and then the petitioner is deemed to be a promoter obliged to take registration under the Act.

14. We cannot accept that stand of the respondents. Facts would clearly indicate that petitioner has not been authorised by the Government of

Karnataka to sell the lottery tickets of Karnataka State in the State of Kerala and no materials have been produced by the respondents to show

that petitioner is selling lottery tickets of the Karnataka State in the State of Kerala. If it does so, it may be inferred that State of Karnataka would

take action, but that would not make it a ""promoter"" under the Act. The mere fact that some of the members of the scheme are residing in the State

of Kerala and Karnataka lottery tickets are earmarked to them would not mean that the petitioner is a promoter selling Karnataka State lottery

tickets in the State of Kerala.

15. We are also of the view that second respondent has committed an error in taking the view that by selling lottery tickets there is a transfer of

goods and that the entire activities of the dealer has got the character of a ""promoter"" and the only difference is the petitioner is not appointed by

the Government of Karnataka to sell the lottery tickets in the State of Kerala. Apex Court in Sunrise Associates Vs. Govt. of NCT of Delhi and

Others, has taken the view that sale of a lottery ticket also amounts to the transfer of an actionable claim and held as follows:

A lottery ticket has no value in itself. It is a mere piece of paper. Its value lies in the fact that it represents a chance or a right to a conditional benefit

of winning a prize of a greater value than the consideration paid for the transfer of that chance. It is nothing more than a token or evidence of this

right. The Court in H. Anraj, as we have seen, held that a lottery ticket is a slip of paper or memoranda evidencing the transfer of certain rights.

We agree....Even if the right to participate is assumed to be a separate right, there is no sale of goods within the meaning of sales tax statutes when

that right is transferred. When H. Anraj said that the right to participate was a beneficial interest in movable property, it did not define what that

movable property was. The draw could not and was not suggested to be the movable property. The only object of the right to participate would

be to win the prize. The transfer of the right would thus be of a beneficial interest in movable property not in possession. By this reasoning also a

right to participate in a lottery is an actionable claim....We are therefore of the view thatthe decision in H. Anraj incorrectly held thata sale of a

lottery ticket involved a sale of goods. There was no sale of goods within the meaning of Sales Tax Acts of the different States but at the highest a

transfer of an actionable claim. The decision to the extent that is held otherwise is accordingly overruled though prospectively with effect from the

date of this judgment.

We are of the view that the reasoning adopted by the second respondent in the impugned orders that the definition of goods in KGST has to be

looked into when we apply the Kerala Tax on Paper Lotteries Act is not sustainable. So far asthe Kerala Tax on Paper Lotteries Act is concerned

on purchasing a lottery ticket, the purchaser would have a claim to a conditional interest in the prize money which is not in the purchaser''s

possession and that the right would fall squarely within the definition of an actionable claim and would therefore be excluded from the definition of

goods"" under the Sale of Goods Act and the sales tax statutes. On facts we have found that the petitioner is not selling the Karnataka lottery

tickets in the State of Kerala and the petitioner has not been appointed by the Government of Karnataka on its behalf for selling its lottery tickets in

the State of Kerala. Consequently, petitioner would not fall within the definition of promoter u/s 2(i) of the Kerala Tax on Paper Lotteries Act,

2005. Consequently there is no question of petitioner taking registration under the Act and hence the levy of tax and imposition of penalty are

unauthorised and without jurisdiction.

16. We are of the view since we have found that the notices and orders issued by the second respondent are without authority of law or

jurisdiction the constitutional validity of the Kerala Tax on Paper Lotteries Act, 2005 calls for no consideration.

17. We also point out that the State Government is taking contrary stand with regard to the expression ""promoter"" under the Act. In the counter

affidavit filed on behalf of the State of Kerala in the context of W.P. (C) No. 33980 of 2006 dealing with the lottery tickets of Arunachal Pradesh,

the State Government has stated as follows:

In order to obtain registration under the Kerala Tax on Paper Lotteries Act, 2005, the applicants must satisfy that they have been appointed as a

promoter by the other State. Without such proof, no one can claim registration under the Act as of right. The definition clause ""promoter"" covers

only Government and the persons directly appointed by such Governments. The petitioner herein not being a direct appointee by the Government

of Arunachal Pradesh, he cannot style himself as a ""promoter"" should obtain registration under the provisions contained in the Kerala Act. Any

amount of mere assertion by anyone much less the Government of Arunachal Pradesh will serve any purpose to the petitioner to obtain registration

under the Kerala Act unless he is directly appointed by the State of Arunachal Pradesh to conduct the lottery organized by the State of Arunachal

Pradesh in the State of Kerala.

The above stand of the State Government in WP (C) No. 33980 of 2006 is in consonance with the view we have taken in the instant case.

18. We therefore allow W.A. No. 2429 of 2006 as well as WP (C) No. 5154 of 2007 and quash Exts. P3, P4 orders and the demand notices

issued pursuant thereto. In view of the decision in W.A. No. 2429 of 2006 holding that petitioner is not a promoter and that we have quashed the

demand notices, WP(C) No. 2513 of 2007 has become infructuous and the same is dismissed as infructuous.