Kilikar Vs Sales Tax Officer, Special Circle, Mattancherry and another

Court: High Court Of Kerala

Date of Decision: July 10, 1967

Acts Referred: Constitution of India, 1950 â€" Article 14, 19(1)(f), 276
Kerala General Sales Tax Act, 1963 â€" Section 22, 3, 61

Citation: (1968) KLJ 57

Hon'ble Judges: M.S Menon, C.J; S. Velu Pillai, J

Bench: Division Bench

Advocate: V. Rama Shenoi, R. Raya Shenoi in O.P. 282/65 and Appellant in Writ Appeal 6/66, M.I. Joseph in Writ Appeal 139/66, P. Subramoman Potti, S.A. Nogendran in Writ Appeal 155/66, for the Appellant; M.J. Menattoor Government Pleader, for the Respondent

Final Decision: Dismissed

Judgement

M.S. Menon, C.J.
These cases raise a common question, the validity of section 3 of the Kerala Surcharge on Taxes, Act 1957. They

were heard together and a common judgment will suffice. Section 3 of the Kerala Surcharge on Taxes Act, 1957, as it stands at present reads as

follows:

(1) The tax payable under the Kerala General Sales Tax Act, 1963, shall, in the case of a dealer whose turnover exceeds thirty thousand rupees in

a year, be increased by a surcharge at the rate of five per centum of the tax-payable for that year and the provisions of the Kerala General Sales

Tax Act, 1963, shall, as the case may be, apply in relation to the said surcharge as they apply in relation to the tax payable under the said Act:

Provided that where in respect of declared goods as defined in clause (c) of section 2 of the General Sales Tax Act, 1956, the tax payable by such

dealer under the Kerala General Sales Tax Act, 1963, together With the surcharge payable under this sub-section, exceeds two percent of the sale

or purchase price, the rate of surcharge in respect of such goods shall be reduced to such an extent that the tax and the surcharge together shall not

exceed two per centum of the sale or purchase price.

(2) Notwithstanding anything, contained in sub-section, (1) of section 22 of the Kerala General Sales Tax Act, 1963, no dealer referred to in Sub-

section (1) shall be entitled to collect the surcharge payable under the said sub-section.

(3) Any dealer who collect the surcharge payable under sub-section (1) in contravention of the provisions of subsection (2) shall be punishable

with fine which may extend to one thousand rupees and no court below the rank of a Magistrate of the first class shall try any such offence

2. Five contentions were urged on behalf of the assessees. They are (i) Section 3 should be considered as repealed by the Kerala General Sales

Tax Act, 1963, which came into force on 1-4-1963.

(2) Section 3 is ultra vires of article 14 of the Constitution.

(3) Section 3 is ultra vires of article 19(i)(f) and (g) of the Constitution:

3. Section 3 embodies an item of income taxation and is thus beyond the legislative competence of the State, and

4. Section 3 imposes a tax on ""professions, trades, callings and employments"" and hence the tax imposed cannot exceed the limit of Rs.250/- per

annum fixed by article 276 of the Constitution.

4. Contention No. (1) The fact that the Kerala General Sales Tax Act, 1963, is an Act to consolidate and amend the law relating to the levy of a

general tax on the sale or purchase of goods in the State, as stated in the preamble, does not by itself mean that every enactment which has a

relation to the subject covered by that Act would stand impliedly repealed when it came into force on 1-4-1963. There is a specific section in that

Act, Section 61, which deals with the subject of repeals. That section repeals only one enactment, namely, the General Sales Tax Act, 1125, The

non-mention of the Kerala Surcharge on Taxes Act, 1957, in section 61 should it self be indicative of the fact that the Legislature did not intend

that enactment to be repealed, and under such circumstances we will not be justified in inferring any case of an implied repeal. There is also the fact

that the legislature chose to amend section 3 of the Kerala Surcharge on Taxes Act, 1957, subsequent to the Kerala General Sales Tax Act, 1963,

by the Kerala Surcharge on Taxes (Amendment and Validation) Act, 1966.

5. Repeal by implication is not favored and is never accepted except in case where such a conclusion is all but inevitable. As pointed out by

Sutherland:

The presumption against implied repeals is classically founded upon the doctrine that the legislature is presumed to envision the whole body of the

law when it enacts new legislation, and, therefore, it a repeal of the prior law is intended to expressly designature the offending provisions rather

than to leave the repeal to arise by necessary implication from the later enactment

5. It is also settled law that a repeal by implication can be considered to have been effected only when the provisions of a later enactment are so

inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together. The test was laid down as follows by Smith J.

in Kutner v Philips (1891) 2 Q.B. 267:

Now a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an

earlier one, that the two cannot stand together, in which case the maxim, Leges posteriors contraries abrogate applies. Unless two acts are so

plainly repugnant to each other, that effect cannot be given to both at the same time, a repeal will not be implied, and special Acts are not repealed

by General Acts unless there is some express reference to the previous legislation, or unless there is a necessary inconsistency in the two Acts

standing together.

And applying the test we have no hesitation in holding that Section 3 of the Kerala Surcharge on Taxes Act, 1957, and the Kerala General Sales

Tax Act 1963, can co-exist, and that the latter does not effect any implied repeal of the former provisions.

6. Contention No. 2 Article 14 of the Constitution provides that the State shall not deny to any person equality before the law or the equal

protection of the laws within the territory of India. The contention that this provision has been violated based on the assumption that the surcharge

imposed by section 3 is discriminatory in character.

7. The tax under the Kerala General Sales Tax Act, 1963, as well as the surcharge u/s 3 of the Kerala Surcharge on Taxes Act, 1957, are geared

to the taxable turnover of the dealer concerned. It is submitted that the exemption from the surcharge, however, is geared to the total turnover of a

dealer, the exemption being confined to those whose total turnover is Rs.30,000/- or less per year, and that the gearing of the exemption to the

total turnover instead of to the taxable turnover produces a differential treatment which is violative of article 14 of the Constitution.

8. The exemption from safes tax under the Kerala General Sales Tax Act, 1963, is also geared to the total turnover, the exemption being confined

to those whose total turnover is less than Rs.10,000/- per year. Section 5 of the Act which deals with the exemption speaks of the total turnover

and not of the total taxable turnover of a dealer.

9. Exemption limits are inevitable in a tax like the one before us. We are not prepared to say that the differential treatment involved in the fixation of

an exemption limit is a discrimination which is either unreasonable, or devoid of a nexus between the provision incorporated and the object sought

to be achieved by the enactment.

10. Article 14 of the Constitution no doubt enacts a prohibition which in terms is strict and absolute. The doctrine of classifications however, has

been incorporated by judicial decision, and as pointed out in Seervai"s Constitutional Law of India, the article, as interpreted by the courts, should

run in some such words as these:

The state shall not deny to any person equality before the law or equal protection of the law provided that nothing herein contained shall prevent

the State from making a law based on or involving a classification founded on an intelligible differential having a rational relation to the object sought

to be achieved by the law

And so read there can be no doubt that section 3 of the Kerala Surcharge on Taxes Act, 1957, is not violative of article 14 of the Constitution.

11. Contention No. 3: This contention is based on article 19(1)(f) and (g) of the Constitution which provides that all citizens shall have the right to

acquire, hold and dispose of property and to practice any profession, or to carry on any occupation, trade or business. Tax laws too are subject to

the fundamental rights under article 19(1)(f) and (g) and a challenge to them those provisions is not precluded in appropriate cases. The challenge,

however, is of a very limited character and has to be confined to those cases where it can be said that under the guise of imposing a tax the law

effects a confiscation of property. As pointed by Seervai in the treatise mentioned above:

The reasonableness of a taxing statute would be wholly beyond the competence of a Court for it involves an evaluation of factors which the Court

is neither entitled, nor competent, to evaluate. The objects to be taxed, the persons to be taxed, the amount of the tax to be levied the political

social and economic policies which a tax is designed to subserve, are all matters of political and legislative judgment, and they have been entrusted

to the legislature and not to the courts. As long as a tax retains its avowed character and does not confiscate property to the State under the guise

of a tax, the reasonableness of a tax cannot be questioned. (Page 292)

It is not possible for us to hold that section 3 effects a confiscation of property or that it transcends its avowed character of a provision imposing a

surcharge on sales tax. It follows that this contention also should fail.

12. Contention No. (4): Section 3 imposes a tax on the sale or purchase of goods. It cannot be considered as an item of income taxation as

contended by the assessees. In other words the tax imposed by section 3 comes under entry 54 in List II (State List) of the Seventh Schedule to

the Constitution Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92 A of List I- and not under

entry 82 in List I (Union List) of the Seventh Schedule to the Constitution - Taxes on income other than agricultural income.

13. In the O.P. from which Writ Appeal No. 139 of 1966 arises the petitioner contended that the use of the words ""by the levy of a surcharge on

such taxes"" in the preamble to the Kerala Surcharge on taxes Act 1957, indicated that what the Legislature wanted was to impose a tax on the

sales tax and not on the sale of goods, and that the surcharge was, therefore, not warranted by entity 54 in List II (State List) of the Seventh

Schedule to the Constitution. Mathew J. said:

I am unable to agree with this contention. The object of the Act, as is clear from the preamble, is only to increase the tax on the sale or purchase of

goods and the fact that its quantum is determined with reference to the sales tax imposed would not alter the character. Counsel for petitioner

submitted that since no surcharge could be realized by the dealer from the purchaser there is no meaning in the contention of the state that it is a tax

on the sale of goods. It may be noted that surcharge is to be imposed on a dealer if the turnover exceeds Rs.30,000/- a year. It is a tax on the

aggregate of sales effected by the dealer during the year in question. The surcharge therefore is really an enhancement of the sales tax when the

turnover of the dealer exceeds Rs.30,000/- a year, and is a tax on the aggregate of sales effected by the dealer during the year 1966 KLT 809

We are in agreement with this view.

14. A sales tax is nothing else than a sales tax so long as the base of the tax is nothing other than a sale of goods. In Konduri Buchirajalingam v

State of Hyderabad. (1958) 9 S.T.C. 397, the Supreme Court observed as follows:

It is then said that the sales tax is ""essentially an indirect tax and therefore cannot be demanded of the appellant without allowing him to recoup

himself by collecting the amount of the tax from the persons with whom he deals. This court has already decided in the case of Tata Iron & Steel

Co., Ltd. v. The State of Bihar, (1958) 9 S.T.C. 267, that in law a sales tax need not be an indirect tax and that a tax can be a sales tax though the

primary liability for it is put upon a person without giving him any power to recoup the amount of the tax payable, from any other party.

15. Contention No. (5) The contention is based on article 276 of Constitution under which taxes on professions, trades, callings and employments

shall not exceed two hundred and fifty rupees per annum. In order to attract the article the tax must be a tax on professions, trades, callings and

employments, as we have already indicated the tax with which we are concerned is a sales tax coming under entry 54 in List II (State List) of the

Seventh Schedule to the Constitution. It is impossible to say that it is in any sense a tax on professions, trades, callings and employments within the

meaning of those expressions as used in article 276 of the Constitution. In the light of what is stated above we must dismiss the original petition as

well as the three writ appeals before us. We do so, but in the circumstances of the case without any order as to costs.