

(1986) 01 KL CK 0049

High Court Of Kerala

Case No: W. A. No. 160 of 1980

K.

APPELLANT

Vs

Devassy Vs Addl Sales Tax Officer
Mattancherry and Others

RESPONDENT

Date of Decision: Jan. 6, 1986

Acts Referred:

- Constitution of India, 1950 - Article 14, 19, 226, 265
- Kerala General Sales Tax Act, 1963 - Section 2(iii), 2(viii), 20, 22, 23

Citation: (1986) 23 KLJ 451

Hon'ble Judges: V.S. Malimath, C.J; K. Sukumaran, J

Bench: Division Bench

Advocate: C.S. Balagangadharan, for the Appellant; T. Karul akaran Nambiar, Government Pleader, for the Respondent

Final Decision: Allowed

Judgement

Sukumaran, J.

Section 20 of the Kerala General Sales Tax Act, 1963 (referred to hereafter as "the Act") calls for interpretation by this Court. The view of the learned single Judge as expressed in this case is reported in the decision, K.G. Devassy Vs. Additional Sales Tax Officer I and Others, . The correctness of that view is challenged in this writ appeal. We shall briefly allude to the short facts giving rise to the original petition before this Court.

2. Joseph was an assessee under the Act. He died on 14-7-1974. As on that date, a sum of Rs. 3,186,56 was outstanding from him by way of tax and interest, on the basis of final assessments made for 1971-72, 1972-73 and provisional assessment for 1973-74 This amount was demanded from Joseph but was not paid by him It was accordingly certified for being recovered under the Revenue Recovery Act This was however, done only on 19-9-1975 and as against the father of deceased Joesph. The

father was coerced to pay the amount on 29-10-1975 when confronted as he was with a threat of distress for the recovery of that sum. The aggrieved father is the petitioner in the original petition, which challenges the legality of highhanded official action.

3. Later, the petitioner was sought to be assessed as legal representative for 1973-74 and 1974-75 by the Department. The tax liability was fixed for 1973-74 in the sum of Rs. 1,060/- by order dated 25-10-1976. It was a case of "nil" assessment, for 1974-75.

4. It is agreed that in respect of the amount certified for revenue recovery, no notice of demand had been served on the petitioner, prior to the recovery of the said amount for him.

5. The contention in short was that the petitioner was not an assessee in default or an assessee from whom tax was payable, and consequently no recovery of tax from this was permissible under law.

6. The learned single Judge took the view that u/s 20 of the Act, the legal representative of a deceased dealer is deemed to be the "dealer" himself, that the knowledge of the dealer is ascribed to the legal representative and that notice issued to the dealer is deemed to have been issued to the legal representative. The learned Judge concluded:

The legal representative is therefore, for the purpose of Section 23 of the Act, deemed to be the deceased himself. If the deceased could have been in his life proceeded against, so can the legal representative be.

7. Though reliance was placed on the contention urged by the petitioner on the decision of a full Bench of the Mysore High Court reported in Raja Pid Naik Vs. Agricultural Income Tax Officer, Yadgiri and Another, that decision was sought to be distinguished with the following observation.

While Section 22(1) of the Hyderabad Agricultural income tax Act referred to in the Mysore decision fastened the liability of the deceased upon the legal representative, it did not say that the legal representative was deemed to be the deceased himself. That is done only under our section.

The Mysore High Court decision was treated as ""one which turns on the interpretation of a section which is not Pari materia and was therefore not applicable to the case."

8. We shall now consider the correctness of the view so expressed by the learned single Judge.

9. It is perhaps desirable to refer to the basic legal position in the context of the death of a person. Salmon on Jurisprudence neatly states:

Dead men are no longer persons in the eye of the law. They have laid down their legal personality with their lives, and are now as destitute of rights as of liabilities.....They do not even remain the owner of their property until their successors enter upon their inheritance.

(See Salmond on Jurisprudence. Twelfth Edition by P.J. Fitzgerald, Chapter 10, Page 301)

10. As and when successors enter upon the inheritance, rights will accrue, and liabilities will fasten to them. The exact extent of such rights and liabilities will depend upon, among others, the statutory provisions operating in the field.

11. Analogous situation even in the context of fiscal enactments have been subject-matter of anterior decisions. It is unnecessary for the purpose of the present case to refer to all of them, as they have been dealt with and discussed exhaustively in the Full Bench decision of the Mysore High Court. (1968) 69 J. T. R. 401 supra. Four Judges of that court, A. R. Somnath Iyer, C. J., K. S. Hegde J. [as he then was] B.M. Kalagate and Sadanadaswamy J J. drew a distinction between the concepts of an "assessee" and an "assessee in default" A legal fiction could transmute a legal representative into an assessee. Thus far and no further. The fiction did not make him an assessee in default: for, a legal representative to become an assessee in default, he should not only get transmuted as an assessee; thereafter, he should also have defaulted in effecting the payment in pursuance to a demand made on him as such assessee. In the absence of any such demand to the legal representative after he has assumed the role of the assessee, he could not be treated as an assessee in default. As Hegde J observed(at page 405):

The recovery in question cannot be made from the deceased assessee.....the assessee.....denotes a person liable to pay either because his income was assessed to tax or because he is a person liable to pay the tax assessed. If that is so. the said person cannot be considered as an "assessee in default" ur. Kss a demand notice..... has been served on him.

The views of the Full Bench are expressed at page 418.

Section 22(1) of the Hyderabad Act which imposed a similar liability on the petitioner, likewise made him an assessee. The tax due from his father became due from him and that tax was what became due in consequence of an assessment order made under the Act, within the meaning of section 23. But that tax became payable by the petitioner only on his father's death, and, so, the notices of demand served on the father did not dispense with its service on the son again. On the father's death, the petitioner became only an assessee and would not become an assessee in default until the tax is again demanded u/s 23, and is not paid within the time allowed by section 33. It is only then that the transformation of the petitioner from an assessee into an assessee deemed to be in default can happen u/s 33;

and later at page 419:

Section 22 (11 transmits the liability of the deceased assessee and not his default So, the character of an assessee in default which had fastened itself on the father did not descend upon the son. There can be a default only when there is a duty to pay, and so, the father's default was not the son's when the tax had not yet become payable by the son

(The case before the Mysore High Court was one with a reverse role, the father being the assessee and the son, as the legal representative. This circumstance, however, does not make any change in the legal position).

12. It is perhaps profitable to refer to other sections of the Act also, to gauge scope and ambit of Sections 20 and 23 of the Act in the present context. Section 20 is captioned: "assessment of legal representative." No doubt, that section deems the legal representative of a dealer as the dealer in the circumstances indicated therein. It must, however, be noted that under the main part of that section, the legal representative is only deemed to be the dealer for the purpose of the Act. The latter part of the section only casts a limitation on the liability of the legal representative, his liability being restricted "to the extent of the assets of the deceased in his hands" A dealer, u/s 2(viii), means only a person who carries on the business of buying, selling and the other activities referred to therein. Under the statutory fiction, the legal representative does not even become an "assessee" as defined in Section 2 (iii); (for under the Act in order to be an assessee he must be a person by whom tax or any other sum is payable under the Act or a person in respect of whom proceedings have been taken for the assessment of tax payable by him A dealer simplicitor does not incur a liability to pay tax. Before a tax liability is cast on him, he must be assessed in the manner referred to in Section 5 or other enabling provisions. u/s 23, the obligation to pay is in respect of the tax assessed or any other amount demanded under the Act, and such payment is conditioned by the various factors indicated in the section as regards the instalments and the time as specified in the notice of demand. It is only when default is made in paying the tax or other amount in accordance with the notice of demand, the whole amount outstanding on the date of default becomes immediately due. Of course, once the amount is due, various modes of recovery could be pressed into service for realisation of the tax or other amount due. The modes of recovery include initiation of proceedings under the Revenue Recovery Act and an application to a Magistrate, for recovering it as if it were a fine. Non-payment of the tax would entail a penalty u/s 23 (3). Other modes of recovery (such as by garnishee proceedings) are provided u/s 25. A person is liable to be prosecuted u/s 45A for failing to comply with a notice issued to him. It is thus evident that many serious consequences flow from the default in the payment of tax due. In other words, the default in payment is the criterion of the recoverability of the sum. On that aspect, that appears to be the core of the statutory scheme, the cream in the coconut, as it were. The amount cannot be

recovered from the deceased assessee It cannot be recovered from his legal representative, so long as no demand has been made as against him and no default has been committed by such a legal representative. Could it be then said that such consequences all fall on the legal representative the moment some dealer of whom be is a legal representative dies ? To expose the legal representative, to such serious penalties and liabilities may even render the section absolutely arbitrary in its effect and operation. In given circumstances, it may even generate atrocious consequences. The section may get exposed to a distinct and none-too distant peril of invalidation consequent on the infraction of the Equality clauses of the Constitution.

13. Even under the Act, the liability of a legal representative is restricted to the extent of the assets of the deceased coming into his hands. Whether a person is a legal representative or not is a question of status to be decided on the basis of factual and legal matters, such as the relationship with the deceased and the provisions of personal law governing the devolution of the property of the deceased. A person who is thought to be a legal representative may either disclaim his status as such, or dispute his having come across any asset whatever of the deceased. These aspects could be certainly adjudicated upon, if a notice of demand is issued to the person who is thought of as a legal representative by the Department. If it is assumed - as has been done by the Single Judge - that the legal representative could be fastened with a knowledge of a demand for payment of tax and such other proceedings that had taken place under the Act, it would produce arbitrary and unjust results of a very grave nature. Could it, however, be said that one who is proceeded against as the legal representative cannot have any say in such matters, before the Revenue official knocks at his doors and picks up his movables in purported realisation of the deceased assessee? Such an interpretation has to be avoided ordinarily, to stave away the section from the engulfing constitutional invalidity. The section would doubtless require a reading down in such circumstances.

14. We are clearly of the view that in the above circumstances, a notice of demand should have been served on legal representee and there must have been a default in complying with the requirements thereof in the payment of tax, before the legal representative becomes a person from whom the tax is recoverable. Without such an antecedent demand to the legal representative, the statutory fiction does not make the legal representative or one among the legal representatives of a deceased dealer, an assessee from whom tax is recoverable by utilising the mode of recovery provided u/s 23(2) of the Act.

15. Notwithstanding the fact that the deal at becomes an assessee and the liabilities fasten on him, he does not become an assessee in default, unless he defaulted the payment. Such a default cannot be posited vis-a-vis the legal representative, even before a demand is made. If no demand has been made as against him, no amount

could be recovered from him, although he is a legal representative and may have come across some assets of the deceased dealer.

16. There is no real distinction between the provisions contained in the Kerala Act and those of the Hyderabad Agricultural income tax Act which had been considered elaborately by the full Bench decision of the Mysore High Court, *supra*. There also, the term "assessee" is defined as a person whom agricultural income tax is payable; and u/s 22. (1), the liability is cast on the legal representative.

17. The strong reasoning and logic underlying the reasoning and decision of Justice Hegde and the three Judges in the Full Bench of the Mysore High Court as noted above, is indeed compulsive even in the present situation. The schemes of the two enactments are essentially and fundamentally the same, the verbal differences in the sections notwithstanding.

18. In view of our above discussion, we are of the view that the petitioner did not become an assessee to whom a demand had been made and consequently he could not be treated as one from whom the entire tax demand become payable u/s 23. The recovery of Rs. 3,18,656 under a coercive process, was therefore a recovery of amount from a citizen not in conformity with law Such a recovery violates Article 265 of the Constitution as also Articles 14 and 19. The State Government is bound to disgorge the unjust enrichment it had had under the recovery process, unauthorised as it is by the legal provisions and discountenanced as it is by the Constitutional mandates.

19. The above conclusion would ordinarily result in a direction to the State Government to refund a sum of Rs. 3,18,656 recovered from the petitioner. It is, however, seen that a sum of Rs. 1,060/- is actually due from petitioner himself on the basis of a final and binding assessment as against him In other words, a liability on his part to pay a sum of Rs. 1,060/- cannot be doubted, as matters stand at present. While exercising our powers under Article 226 of the Constitution, it is only proper that we take note of such liability on the part of the petitioner, and modulate the reliefs in the light thereof. It would then follow that the petitioner would be entitled to an actual refund of the difference of the sum recovered from him and the liability which he now owes to the Government. The petitioner thus be entitled to a sum of Rs. 2126.56 by way of refund. We direct the State Government to effect the refund of the above amount within a period of two months from today.

20. This judgment has not in any manner adjudicated upon the liability of the petitioner for payment of any tax or dues in his individual capacity. Nor shall the judgment preclude the taxing authority from resorting to steps open to it under law, to issue him a notice of demand, and to recover from him such amount as is permissible in the event of his having been found to be a legal representative in possession of such sufficient assets of the deceased in his hands as to make him answerable for the sum. In the result, we allow this appeal and set aside the

judgment of the learned Single Judge. The original petition will stand disposed of in the manner indicated above. We direct the parties to suffer their respective costs.