

Jilmon John vs Commercial Tax Officer (Works Contract)

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Court : Kerala

Decided On : Sep-29-2021

Judge : Honourable Mr.Justice S.V.Bhatti,Honourable Mr.Justice Viju Abraham

Appeal No. : WA/1013/2015

Appellant : Jilmon John

Respondent : Commercial Tax Officer (Works Contract)

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE S.V.BHATTI & THE HONOURABLE MR.JUSTICE VIJU ABRAHAM WEDNESDAY, THE 29TH DAY OF SEPTEMBER 2021 / 7TH ASWINA, 1943 WA NO. 710 OF 2015 AGAINST THE ORDER/JUDGMENT IN WPC 24838/2013 OF HIGH COURT OF KERALA, ERNAKULAM

APPELLANT/S: M/S.CHEERANS STRUCTURALS ENGINEERS & CONTRACTORS CHALISSERY P.O., PALAKKAD, REPRESENTED BY ITS MANAGING PARTNER, SHIRILSON MATHEW. BY ADVS. SRI.RAJU JOSEPH (SR.) SRI.K.T.POULOSE KORATTY
RESPONDENT/S: 1 THE COMMERCIAL TAX OFFICER(WORKS

CONTRACT) DEPARTMENT OF COMMERCIAL TAXES, PALAKKAD-678001. 2 THE STATE OF KERALA REPRESENTED BY ITS SECRETARY TO TAXES DEPARTMENT, GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM-695001. 3 CO-OPERATIVE ACADEMY OF PROFESSIONAL EDUCATION (CAPE) CO-BANK TOWERS, VIKAS BHAVAN P.O., THIRUVANANTHAPURAM-695001, REPRESENTED BY ITS DIRECTOR.

BY ADV GOVERNMENT PLEADER THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 29.09.2021, ALONG WITH WA.1376/2018 ,WA.1013/2015 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: -2-

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE S.V.BHATTI & THE HONOURABLE MR.JUSTICE VIJU ABRAHAM WEDNESDAY, THE 29TH DAY OF SEPTEMBER 2021 / 7TH ASWINA, 1943 WA NO. 1013 OF 2015 AGAINST THE ORDER/JUDGMENT IN WPC 6563/2012 OF HIGH COURT OF KERALA, ERNAKULAM APPELLANT/S: JILMON JOHN MADATHIL HOUSE, MANAKKADU P.O., THODUPUZHA, IDUKKI DISTRICT. BY ADVS. SRI.HARISANKAR V. MENON SMT.MEERA V.MENON SRI.MAHESH V.MENON RESPONDENT/S: 1 COMMERCIAL TAX OFFICER (WORKS CONTRACT) IDUKKI AT KATTAPPANA, 685508. 2 COMMISSIONER OF COMMERCIAL TAXES THIRUVANANTHAPURAM-695001. 3 STATE OF KERALA REPRESENTED BY SECRETARY TO GOVERNMENT, TAXES DEPARTMENT, KERALA GOVERNMENT SECRETARIAT,THIRUVANANTHAPURAM-695001. BY ADV GOVERNMENT PLEADER (B/O) SR ADV RAJU JOSEPH FOR THE APPELLANT., SR GP SHAMSUDHEEN V.K. THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 29.09.2021, ALONG WITH WA.1376/2018, 710/2015 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: -3-

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE S.V.BHATTI & THE HONOURABLE MR.JUSTICE VIJU ABRAHAM WEDNESDAY, THE 29TH DAY OF SEPTEMBER 2021 / 7TH ASWINA, 1943 WA NO. 1376 OF 2018 AGAINST THE ORDER/JUDGMENT IN WPC 26557/2012 OF HIGH COURT OF KERALA, ERNAKULAM APPELLANT/S: 1 THE COMMERCIAL TAX OFFICER (WORKS CONTRACT) IDUKKI AT KATTAPPANA 685 508. 2 THE COMMISSIOENR OF COMMERCIAL TAXES THIRUVANANTHAPURAM. 3 STATE OF KERALA REPRESENTED BY THE SECRETARY TO GOVERNMENT,TAXES DEPARTMENT,KERALA GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM. BY ADV GOVERNMENT PLEADER RESPONDENT/S: RAJU JOSEPH THURACKAL HOUSE, MUTHALKODAM, THODUPUZHA, IDUKKI DISTRICT, 685 605. BY ADV ADV.HARISANKAR V.MENON(BY ORDER) THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 29.09.2021, ALONG WITH WA.1013/2015 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: -4-

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE S.V.BHATTI & THE HONOURABLE MR.JUSTICE VIJU ABRAHAM WEDNESDAY, THE 29TH DAY OF SEPTEMBER 2021 / 7TH ASWINA, 1943 WA NO. 824 OF 2015 AGAINST THE ORDER/JUDGMENT IN WPC 8691/2014 OF HIGH COURT OF KERALA, ERNAKULAM

APPELLANT/S: M/S.CHEERANS STRUCTURALS ENGINEERS & CONTRACTORS CHALISSERY P.O., PALAKKAD, REPRESENTED BY ITS MANAGING PARTNER SHIRILSON MATHEW. BY ADVS. SRI.RAJU JOSEPH (SR.) SRI.K.T.POULOSE KORATTY RESPONDENT/S: 1 THE COMMERCIAL TAX OFFICER (WORKS CONTRACT) DEPARTMENT OF COMMERCIAL TAXES, PALAKKAD-

678 001. 2 THE STATE OF KERALA REPRESENTED BY ITS SECRETARY TO TAXES DEPARTMENT, GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM-695 001. BY ADV GOVERNMENT PLEADER(B/O) THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 29.09.2021, ALONG WITH WA.1013/2015 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: -5-

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE S.V.BHATTI & THE HONOURABLE MR.JUSTICE VIJU ABRAHAM WEDNESDAY, THE 29TH DAY OF SEPTEMBER 2021 / 7TH ASWINA, 1943 WA NO. 875 OF 2015 AGAINST THE ORDER/JUDGMENT IN WPC 19135/2012 OF HIGH COURT OF KERALA, ERNAKULAM

APPELLANT/S: SALI P. MATHAI BENJO ELECTRICAL WORKS, PULIMANACKAL HOUSE, MANAKAD P.O., THODUPUZHA, IDUKKI DISTRICT. BY ADVS. SRI.HARISANKAR V. MENON SMT.MEERA V.MENON RESPONDENT/S: 1 COMMERCIAL TAX OFFICER (WC) IDUKKI AT KATTAPPANA-685508. 2 COMMISSIONER OF COMMERCIAL TAXES THIRUVANANTHAPURAM-695001. 3 STATE OF KERALA REPRESENTED BY SECRETARY TO GOVERNMENT, TAXES DEPARTMENT, KERALA GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM-695001. BY ADV GOVERNMENT PLEADER (B/O) THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 29.09.2021, ALONG WITH WA.1013/2015 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: -6-

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE S.V.BHATTI & THE HONOURABLE MR.JUSTICE VIJU ABRAHAM WEDNESDAY, THE 29TH DAY OF SEPTEMBER 2021 / 7TH ASWINA, 1943 WA NO. 882

OF 2015 AGAINST THE ORDER/JUDGMENT IN WPC 19445/2012 OF HIGH COURT OF KERALA, ERNAKULAM APPELLANT/S: AGI ABRAHAM AMBATTU HOUSE, NEAR KSRTC, PERUMBAVOOR P.O., ERNAKULAM DISTRICT. BY ADVS. SRI.HARISANKAR V. MENON SMT.MEERA V.MENON SRI.MAHESH V.MENON RESPONDENT/S: 1 COMMERCIAL TAX OFFICER (WORKS CONTRACT AND LUXURY TAX) MATTANCHERRY-682003. 2 COMMISSIONER OF COMMERCIAL TAXES THIRUVANANTHAPURAM 695051. 3 STATE OF KERALA REPRESENTED BY SECRETARY TO GOVERNMENT, TAXES DEPARTMENT, KERALA GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM-695001. BY ADV GOVERNMENT PLEADER (B/O) THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 29.09.2021, ALONG WITH WA.1013/2015 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: -7-

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE S.V.BHATTI & THE HONOURABLE MR.JUSTICE VIJU ABRAHAM WEDNESDAY, THE 29TH DAY OF SEPTEMBER 2021 / 7TH ASWINA, 1943 WA NO. 1005 OF 2015 AGAINST THE ORDER/JUDGMENT IN WPC 11790/2012 OF HIGH COURT OF KERALA, ERNAKULAM APPELLANT/S: M/S. BIJU AUGUSTINE AGED 61 YEARS KUMPUCKAL HOUSE, KALIYAR PO, THODUPUZHA, IDUKKI DISTRICT. BY ADVS. SRI.HARISANKAR V. MENON SMT.MEERA V.MENON RESPONDENT/S: 1 COMMERCIAL TAX OFFICER (WC) IDUKI AT KATTAPPANA 685 508. 2 COMMISSIONER OF COMMERCIAL TAXES THIRUVANANTHAPURAM 695 001. 3 STATE OF KERALA REPRESENTED BY SECRETARY TO GOVERNMENT, TAXES DEPARTMENT, KERALA GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM 695 001. BY ADV GOVERNMENT PLEADER THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 29.09.2021, ALONG WITH WA.1013/2015 AND CONNECTED

CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: -8-

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE S.V.BHATTI & THE HONOURABLE MR.JUSTICE VIJU ABRAHAM WEDNESDAY, THE 29TH DAY OF SEPTEMBER 2021 / 7TH ASWINA, 1943 WA NO. 1006 OF 2015 AGAINST THE ORDER/JUDGMENT IN WPC 11856/2012 OF HIGH COURT OF KERALA, ERNAKULAM APPELLANT/S: P.C.SHAJI PEEDIKAPARAMBIL HOUSE, THODUPUZHA, IDUKKI DISTRICT. BY ADVS. SRI.HARISANKAR V. MENON SMT.MEERA V.MENON SRI.MAHESH V.MENON RESPONDENT/S: 1 COMMERCIAL TAX OFFICER(WC) IDUKKI AT KATTAPPANA-685508. 2 COMMISSIONER OF COMMERCIAL TAXES THIRUVANANTHAPURAM-695001. 3 STATE OF KERALA REPRESENTED BY SECRETARY TO GOVERNMENT, TAXES DEPARTMENT, KERALA GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM-695001. BY ADV GOVERNMENT PLEADER THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 29.09.2021, ALONG WITH WA.1013/2015 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: -9-

JUDGMENT

[WA Nos.710/2015,1013/2015, 1376/2018,, 824/2015,

S.V.BHATTI,J.

Appellants are the petitioners in the in W.P.(C) No.24838/2013 and batch of cases. The writ appeals are filed against the judgment dated 20.12.2014 raise a simple point on the interpretation of proviso to Section 8(a) of the Kerala Value Added Tax Act, 2003 (for short 'KVAT Act, 2003') and consider the consequential challenge to proviso to Section 8(a) as illegal, ultra virus and unconstitutional. The question of construction paving way for the alleged challenge to proviso to Section

8(a) of KVAT Act 2003 appears to be simple, but the simple question posed by the appellants reminds this Court of the following quote from the Interpretation of Statutes - 5th -10- Edition by Vepa P. Sarathi.

The net result is that the legislative object and intent must somehow be gathered by the court. But sometimes, there is obvious ambiguity in the meaning of a statute either because of the poverty of the language of the draftsman or want of imagination in not providing for conceivable situations, or due to an inept use of language. "Lack of legislative simplicity or clarity leads to interpretative complexity and confusion." I am the parliamentary draftsman I compose the Countrys laws, And of half the country's litigation I am undoubtedly the Cause. A Cynic describes the Draftsman as assigning the above lines to himself and expects the legal profession to be grateful to such Draftsman.

2. The circumstances relevant to the above narrative

are stated thus: Writ Appeal No.710/2015 has been treated as a representative appeal for the purpose of factual narration and legal grounds raised by the appellants. This Court, after perusing the pleadings in the other matters, is of the view that referring to the details, circumstances and grounds of challenge in W.A. No.710/2015 filed against W.P.(C) No.24838/2013 would be sufficient for disposing of the batch of appeals. -11- 2.1 Chapter III of Act 2003 deals with incidence and levy of tax. Section 6 provides for levy of tax on sale or purchase of goods. Section 7 provides for trade discount etc, on deemed to be sale in certain cases. In the batch of appeals, we are concerned with Section 8 of KVAT Act, 2003 which provides for payment of tax at compounded rates by a few specified classes of dealers registered under the KVAT Act, 2003. The State Legislature through Finance Act, 2008 in Section 5 thereof, introduced a few amendments to KVAT Act 2003 and Sub- section (4) deals with the proposed amendment to Section 8 of Act 2003, which reads thus:

5. Amendment of Act 30 of 2004 - In the Kerala Value Added Tax Act 2003 (30 of 2004),- xxx xxx xxx (4) in section 8, -

(a) for clause (a), the following clause shall be substituted, namely: "(a) (i) any works contractor not being a dealer registered under the provisions of the Central Sales Tax Act, 1956 -12-

(Central Act 74 of 1956), and who is not an importer may, at his option, instead of paying tax in accordance with the provisions of the said section, pay tax at three per cent of the whole contract amount;

(ii) any works contractor not falling under clause (i) above

may, as his option, instead of paying tax in accordance with the provisions of the said sections, pay tax at eight per cent of the whole contract amount: Provided that notwithstanding anything contained in sub- clause (ii) above, the compounded tax payable by any works contractor under this clause in respect of works contracts awarded by Government of Kerala, Kerala Water Authority or Local Authorities shall be four per cent of the whole contract amount:

2.2 The State Legislature through the Kerala Finance Act, 2009 in Section 7 subsection (4) introduced the following amendment to Section 8 of KVAT Act, 2003. Amendment of Act 30 of 2004.-In the Kerala Value Added Tax Act, 2003 30 of 2004). . .

(4) in section 8.- -13-

(i) in clause (a)-

(a) for sub-clause (ii), the following sub-clause shall be substituted. namely:-

"(ii) any works contractor not falling under clause (i) above may, at his option, instead of paying tax in accordance with the provisions of the said section, shall pay tax at three per cent of the contract amount after deducting the purchase value of goods excluding freight and gross profit element consigned into the State on stock transfer or purchased from outside the State and for the purchase value of goods so deducted shall

pay tax at the scheduled rate applicable to such goods." 2.3 To sum up the above, substitution by way of an

amendment is briefly stated hereunder: The State Legislature through Finance Act, 2008 introduced an amendment to clause (a) of Section 8 resulting in the substitution of sub-clauses (i) and (ii), and the proviso was introduced. Through Finance Act, 2009 the State Legislature, -14- by way of substitution, amended Section 8(a)(ii) alone and the proviso remained intact. Thereby, Section 8 as stands after amendment through Finance Act, 2009 reads thus; 8. Payment of tax at compounded rates:- Notwithstanding anything contained in Section 6-

(a) (i) any works contractor not being a dealer registered

under the provisions of the Central Sales Tax Act, 1956 (Central Act 74 of 1956), and who is not an importer may, at his option, instead of paying tax in accordance with the provisions of the said section, pay tax at three per cent of the whole contract amount;

(ii) any works contractor not falling under clause (i) above

may, at his option, instead of paying tax in accordance with the provisions of the said section, shall pay tax at three per cent of the contract amount after deducting the purchase value of goods excluding freight and gross profit element consigned into the State on stock transfer or purchased from outside the State and for the purchase value of goods so deducted shall pay tax at the scheduled rate applicable to such goods.

Provided that notwithstanding anything contained in sub- clause (ii) above, the compounded tax payable by any works -15- contractor under this clause in respect of works contracts awarded by Government of Kerala, Kerala Water Authority of Local Authorities shall be four per cent of the whole contract amount: Hence the cause for filing the present batch of cases is that the proviso to Section 8(2)(ii) is illegal etc, and liable to be declared accordingly. W.A. No.710/2015

3. The appellants prayed for the following reliefs in W.P.(C) No.24838/2013,

(a) issue a writ of certiorari or any other appropriate writ or order quashing Ext.P3 certificate to the extent it directs to deduct tax at 4% being illegal and unconstitutional;

(b) to declare that the retaining and enforcing of the

proviso to Clause (ii) to Section 8(a) of the Kerala Value Added Tax Act, 2003 even after the substitution of sub clause (ii) of Section 8 (a) by the amendment made by the Kerala Finance Act 2009 after 01.04.2009 is discriminatory, illegal and unconstitutional;

(c) Alternatively to declare that the proviso to clause (ii) to Section 8(a) of the Kerala Value Added Tax Act, 2003 is -16-

illegal and ultra vires Articles 14 and 19(1) (g) of the Constitution of India. In so far as it is prejudicial to the works contractors who undertakes works awarded by the Government of Kerala, Kerala Water Authority and Local Authorities in comparison to private contractors;

(d) issue a writ of mandamus or any other writ, order or direction, to the 1st respondent to instruct the awarder to deduct tax only at 3% while making payments to the petitioner; and

(e) to issue such other orders or directions as this

Hon'ble Court may deem fit in the facts and circumstances of the case. 3.1 The petitioner challenges proviso to section 8(a)(ii) of Act 2003 on the ground that the proviso, as it stands upon amendment to sub-clause (ii) to Section 8(a) of the KVAT Act through Finance Act 2009, is discriminatory and unconstitutional, for the reason that, by giving effect to the amendment, the works executed by the appellant awarded by the State Government, Kerala Water Authority (KWA) or local -17- authorities pay tax higher than the tax payable by the other works contractors under sub-clause (ii). The proposed recovery of compounded tax is contrary to the stipulated rate of compounded tax at 3% in sub-clause (ii). 3.2 The

petitioner contends that the Kerala Finance Act, 2009 stipulated the rate of tax payable under clause (ii) at 3% on works contracts awarded to private contractors without making any amendment to proviso to sub-clause (ii) of Section 8(a) of Act 2003. The result of not making amendment to proviso is that contractors executing the works awarded by Government, KWA and other contractors have become liable to pay 4% tax which is higher than the tax payable by Government of India awarded contractors, private contractors, Airport Authorities of India contractors etc. This differential rate of tax payable by the contractors executing government works and the contractors executing works contracts entrusted by other agencies is hit by Article 14 of the -18- Constitution of India. 3.3 The respondent filed counter and justified the levy and demand of Value Added Tax (VAT) under the proviso to sub-clause (ii) of Section 8(a) of KVAT Act for the works contracts awarded by the State Government, KWA or local authorities. The respondents state that the understanding of Section 8, as it stands today, by the appellants and similarly situated works contractors who have moved this Court, is completely erroneous and on account of such misunderstanding the writ remedy questioning the proviso to Section 8(a)(ii) has been availed by the appellant. Further, as per the newly introduced compounding provision, private contractors bringing goods from outside the State and having CST registration have to pay tax at scheduled rates on such goods on the purchase value. In the case of a government contractor, there is no such provision but these contractors executing the works allotted by Government etc., pay -19- compounded tax at 4% on the whole contract amount. The contention of Government contractors, in the representation made to the Government, was that their tax is deducted at source by the Government and hence they have no further tax liability and also they do not want to file quarterly returns, and, on goods brought from outside the State, to pay tax at the scheduled rate on purchase from their pocket. The Government and the Legislature, considering the above representation of the contractors, retained the proviso with regard to government contracts having CST registration. For others coming under Section 8(a), i.e., contractors executing government works, only 8% tax is applicable. The proviso is applicable only to government contractors coming under Section 8(a)(ii). There is no additional burden on government contractors while paying VAT. 3.4 The compounded rate of tax at 4% is attracted if (i) the

dealer is registered under the CST Act; (ii) the dealer -20- effected import of goods which are not exempted goods under the Act 2003; (iii) the dealer undertook the contract work awarded by the Government Departments, local authorities or KWA. With the attraction of the above three ingredients, a dealer is liable to pay tax at 4% on the works contract amount. The proviso satisfies where, what and how the incidence has arisen. Therefore, the sum and the substance of the respondents reply is that even with the substitution made by Finance Act, 2009 to clause (ii) of Section 8(a) proviso is relevant, it is not arbitrary and unconstitutional. It is argued that the constitution of proviso does not decide the legislative competence, but decides the extent of applicability of proviso. On the other hand, the Legislature, in its wisdom and purpose of operating compounding rate of tax, continued to retain proviso to Section 8(a)(i) and (ii) of the Act. 3.5 The batch of cases has been disposed of by the learned Single Judge through the common judgment dated -21-20.12.2014.

4. We have heard learned Senior counsel Mr Raju Joseph, Adv. Harishankar for appellants and learned Special Government Pleader Mr Mohammed Rafiq for respondents.

5. The learned counsel appearing for the appellants

prefaced the arguments by contending that the appellants challenge proviso to clause (ii) of Section 8 of Act 2003 as arbitrary, discriminatory and unconstitutional. The challenge raised before the Court is not for the purpose of reading down proviso to clause (ii) of Section 8 of the Act. The observation of the learned Single Judge, in this behalf, is not in line with the challenge laid by the appellants. The legal argument against the proviso is that the proviso does not have independent standing with the substitution of clause (ii) of Section 8(a) of Act 2003 through Finance Act 2009. The proviso cannot expand the scope of the main section. The appellants, being a contractor, executing works contracts for and on behalf of -22- agencies referred to in proviso are made to pay 1% more tax than what is being paid by the contractors executing works contracts for other agencies such as the Government of India, Airport Authority of India etc. The proviso, therefore, is resulting in discrimination between the same class of contractors, i.e,

contractors executing works contract, hence is violative of Article 14 of Constitution of India. The functions of the proviso are well settled, and by applying the first tool of construction of a proviso, i.e., the normal function of a proviso is to except something out of the enactment or to qualify something enacted therein, but for the proviso would be within the purview of the enactment the unworkability of the proviso or discrimination in the implementation is made out. Therefore, the argument proceeds that the proviso, instead of acting to except the rigour of the enacting provision, is independently acting in a discriminatory way. 5.1 The appellant, for the purpose of guiding the Court -23- on the interpretative tool for construing a proviso, relies on the judgments reported *Dwarka Prasad v. Dwarka Das Saraf*¹; *Maulavi Hussein Haji Abraham Umarji v. State of Gujarat* ²; and *Ali v. State of Kerala*³; *Hindustan Ideal Insurance Co. Ltd v. Life Insurance Corporation of India*⁴; *S Sundaram Pillai v. V R Pattabiraman* ⁵; and *Kerala State Housing Board v. Ramapriya Hotels (P) Ltd*⁶. 5.2 The argument proceeds on the ground that, by interpreting proviso to clause (ii) of Section 8(a) of Act 2003 in accordance with the well-established principles of law, the legal effect could be that the proviso is controlling the enacted provision and the benefit given to contractors executing works contract of the Government is, firstly, not continued, and secondly, these contractors are made to pay 1% more tax on the works contract being executed by them.

6. Special Government Pleader Mr. Mohammed Rafiq

1 1976 (1) SCC 1282 2004 (6) SCC 6723 2003 (11) SCC 6324

-24- argues that the competence of the State Legislature to legislate on matters dealing with value-added tax is not in dispute. In other words, the appellants admit that the legislature is competent to legislate and also make necessary amendments etc as are deemed necessary from time to time. According to him, Section 6 deals with levy of tax on sale or purchase of goods. Section 8 provides for compounding rate of tax in respect of contractors executing works contracts of Government, KWA or local authorities. The State Legislature through Finance Act, 2008 has provided for payment of tax by the contractors executing works contract in the following method:

(i) any works contractor not being a dealer registered under

the provisions of the Central Sales Tax Act, 1956 (Central Act 74 of 1956), and who is not an importer may, at his option, instead of paying tax in accordance with the provisions of the said section, pay tax at three per cent of the whole contract amount;

(ii) any works contractor not falling under clause (i) above -25-

may, as his option, instead of paying tax in accordance with the provisions of the said sections, pay tax at eight per cent of the whole contract amount: Provided that notwithstanding anything contained in sub- clause (ii) above, the compounded tax payable by any works contractor under this clause in respect of works contracts awarded by Government of Kerala, Kerala Water Authority or Local Authorities shall be four per cent of the whole contract amount: 6.1 The Legislature, by taking note of the

representation received from the contractors executing works contract of Government and a few similar agencies, has substituted clause (ii) in Section 8(a) of Act 2003. The expression used by the Legislature, both in the Finance Act 2008 and Finance Act 2009, needs to be appreciated by this Court, firstly, to understand the very object of or the facility which the State Legislature intended to provide to the contractors executing works contracts of Government, local bodies etc. He lays emphasis particularly on the words for clause (a), the following clause shall be substituted. At the first -26- instance, the entire clause has been substituted and proviso was introduced. Through Finance Act 2009, only sub-clause (ii) was substituted by way of amendment. The effect of amendment is limited to substitution of sub-clause (ii) and the legislature in its wisdom retained proviso to sub-section (ii). The sequence of events clarifies the wisdom of legislature in retaining the proviso and its presumption is that the legislature is conscious of the relevant circumstances in enacting or amending a provision.

7. As noted above, we do not propose to reproduce the

sections once again to appreciate the contention of the Special Government Pleader. It would suffice to take note, at this juncture of our judgment, that the Special Government Pleader argues that at the amendment was by way of substitution, and at the second instance through Finance Act 2009 as well, the amendment was by way of substitution. In the cases covered by substitution, the effect is understood by replacing the old -27- clause/subclause/proviso with the new clause/subclause/proviso, as the case may be. According to him, the challenge raised by the appellants is without understanding the area of operation of sub-clause (ii) of Section 8(a). Section 8(a) deals with contractors not being a dealer registered under CST Act 1956 and as an importer, instead of paying tax in accordance with the provisions of the said section, is allowed to pay tax at 3% of the whole contract amount. Clause (a)(i) is not applicable. Clause (a)(ii) deals with the contractors who do not fall under clause (i) of Section 8(a). At his option, instead of paying tax in accordance with the provisions of said sections, pay tax at 8% of the whole contract amount. Therefore, the rate of tax payable by the persons covered by subclause (ii) is 8%. When it comes to contractors who are executing works contracts for and on behalf of the Government of Kerala, KWA, local authority, 4% of the whole contract amount is the tax payable. The Finance Act, 2009 has -28- substituted sub-clause (ii). According to sub-clause (ii), as it stands, tax is payable at 3% of the contract amount after deducting the purchase value of goods and for the purchase value of goods so deducted, shall pay tax at the scheduled rate applicable to such goods. Therefore, subclause (ii) deals with payment of tax in two slabs: one, at 3% on the specified goods, and another, tax at the scheduled rate applicable to such goods deducted by the contractor. Therefore, the rate of tax payable in subclause (ii) is more than what is provided for by proviso. 7.1 He further contends that Section 8 deals with payment of compounding rate of tax, subject to satisfying the criteria stipulated by Section 8. Section 8 is an option available to the dealer for payment of tax under the Act. Within Section 8 several independent stages of application are provided for. The dealer, having opted to pay tax at a compounded rate, cannot be allowed to argue that the compounded rate now -29- applied to the contractor executing the works contract for and behalf of Government, KWA or local authorities is illegal, arbitrary and unconstitutional. He argues with force that the writ petition suffers from a

contradiction in terms. According to him, the interpretative tool is applied by the Court for appreciating and construing a provision of law. The proviso, whichever way is construed, still can remain on the statute book for it is within the competence of the State Legislature. The interpretation of proviso, according to him, will not lead to any of the situations as arbitrary, discriminatory or beyond the competence of State Legislature in continuing to retain proviso to subclause (ii) of section 8 of Act 2003. He relies on the reported judgment of the Supreme Court in *Union of India v. VKC Footsteps India Pvt. Ltd*⁷; *State of Kerala v. Builders Association of India*⁸; and *R K Garg v. Union of India*⁹.

8. The learned counsel appearing for the appellants

7 2021 SCC Online SC 706 8 (1997) 2 SCC 183 9 (1981) 4 SCC 675 -30- have not made any submissions on the judgment under appeal. On the other hand, as is evident from the tenor of their arguments, the counsel desired this Court accept the writ prayer, by appreciating the arguments now put forward by them in support of their respective pleas. 8.1 This Court is of the view that the judgments relied on by both the counsel need not be referred to in extenso and burden the judgment with all the citations. In our considered view, reference to the judgment of the Supreme Court in *VKC Footsteps India Pvt. Ltd* would be sufficient to appreciate the law on constitution of a proviso in different circumstances.

79. Provisos in a statute have multi-faceted personalities. As interpretational principles governing statutes have evolved, certain basic ideas have been recognized, while heeding to the text and context. Justice GP Singh, in his seminal text, *Principles of Statutory Interpretation* formulates the governing principles of interpretation which have been adopted by courts while construing a statutory proviso. The first rule of interpretation is that: -31-

"The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. As stated by

LUSH, J.: "When one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject matter of the proviso. In the words of LORD MACMILLAN: "The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. The proviso may, as LORD MACNAGHTEN laid down, be "a qualification of the preceeding enactment which is expressed in terms too general to be quite accurate". The general rule has been stated by HIDAYATULLAH, J., in the following words: "As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a provisc is not interpreted as stating a general rule". And in the words of KAPUR, J.: "The proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment." (emphasis supplied) -32-

80. But then these principles are subject to other principles of

statutory interpretation which may supplement or even substitute the above formula. These other rules which have been categorized by Justice GP Singh are summarized as follows:

(i) A proviso is not construed as excluding or adding

something by implication: "Except as to cases dealt with by it, a proviso has no repercussion on the interpretation of the enacting portion of the section so as to exclude something by implication which is embraced by clear words in the enactment."

(ii) A proviso is construed in relation to the subject matter of

the statutory provision to which it is appended: "The language of a proviso even if general is normally to be construed in relation. the subject-matter covered by the section to which the proviso is appended.

In other words normally a proviso does not travel beyond the provision to which it is a proviso. "It is a cardinal rule of interpretation", observed BHAGWATI, J., "that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other."

(iii) Where the substantive provision of a statute lacks clarity, -33-

a proviso may shed light on its true meaning: "If the enacting portion of a section is not clear, a proviso appended to it may give an indication as its true meaning. As stated by LORD HERSCHELL: "Of course a proviso may be used to guide you in the selection of one or other of two possible constructions of the words to be found in the enactment, and show when there is doubt about its scope, when it may reasonably admit of doubt as to having this scope or that, which is the proper view to take of it."

(iv) An effort should be made while construing a statute to

give meaning both to the main enactment and its proviso bearing in mind that sometimes a proviso is inserted as a matter of abundant caution: "The general rule in construing an enactment containing a proviso is to construe them together without making either of them redundant or otiose. Even if the enacting part is clear effort is to be made to give some meaning to the proviso and to justify its necessity. But a clause or a section worded as a proviso, may not be a true proviso and may have been placed by way of abundant caution."

(v) While ordinarily, it would be unusual to interpret the

proviso as an independent enacting clause, as distinct from its main enactment, this is true only of a real proviso and the draftsman of the statute may have intended for the proviso -34-

to be, in substance, a fresh enactment: "To read a proviso as providing something by way of an addendum or as dealing with a subject not covered by the main enactment or as stating a general rule as distinguished from an exception or qualification is ordinarily foreign to the proper function of a proviso. However, this is only true of a real proviso. The insertion of a proviso by the draftsman has not always strictly adhered to its legitimate use and at times a section worded as a proviso may wholly or partly be in substance a fresh enactment adding to and not merely excepting something out of or qualifying what goes before."

81. Perhaps the most comprehensive and oft-cited precedent

governing the interpretation of a proviso is the decision of this Court in *S. Sundaram Pillai v. V.R. Pattabiraman*, Justice S Murtaza Fazal Ali speaking for a three judge Bench of this Court held: "43. ...To sum up, a proviso may serve four different purposes:

(1) qualifying or excepting certain provisions from the main enactment:

(2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to the enactment workable: -35-

(3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive make enactment itself; and

(4) it may be used merely to act as an optional addenda to

the enactment with the sole object of explaining the real intendment of the statutory provision" 8.2 The argument of appellants is that the proviso with the substitution introduced by Finance Act 2009 does not have

independent standing. Therefore, the proviso ought to be held

as a proviso. The proviso to subclause (ii) of Section 8 expands the scope of enacting statute in subclause (ii). The petitioner, being a contractor executing government works, is made to pay 1% more tax than the contractor who is discharging works contracts in respect of the Government of India, Airport Authorities of India etc. Therefore, the proviso is arbitrary and discriminatory. 8.3 The argument of respondents is that the proviso was -36- introduced by the Finance Act, 2008. When it was introduced, it had a purpose and the Legislature meant to except the government contractors from payment of tax, payable by subclause (ii) of clause (a) of Section 8 of the Act. The substitution by Finance Act 2009 does not, in any way, change the position. The substituted subclause (ii) deals with a higher rate of tax payable by the contractors executing works contracts other than government, local body, KWA etc. The interpretation of proviso, in the case on hand, firstly, could be either excepting the situation covered by subclause (ii), and secondly, can also act independently and would deal with the compounding rate of tax payable by the contractors executing works of government, local bodies and KWA. In the case on hand, the proviso continues to operate as an excepted circumstance to the enacting sub-clause (ii) and no ground to apply in any other way is neither possible nor permissible. 8.4 We are of the view that the legal argument now -37- introduced by the appellants prima facie is on account of the misunderstanding of the flow of payment of rate of tax by various individuals covered by Section 8(a)(i)(ii) and proviso of Act, 2003. As already explained, subclause (i) deals with one type of contractor, namely dealers registered under the CST Act.. Subclause (ii), as it stands now, deals with contractors executing works contracts but not falling under clause (i). 8.5 Proviso was dealing with the contractors executing works contracts of government, KWA and the local bodies. The contractors covered by the proviso, in the considered view of this Court, would continue to be relevant inasmuch as subclause (ii) does not include the contractors who are before the Court in the batch of appeals. The proviso, in the case on hand, could be interpreted both as a situation providing for the excepting of the application of subclause (ii) and/or, as noted by the Supreme Court, can also be treated as an independent provision. Either way, if it is construed as -38- excepting something out of the enactment or qualify something enacted in subclause (ii) then the proviso is independently having scope and

applicability in respect of contractors executing government works. The argument of the appellants, though not intended to import something into the enacting part, is definitely attempting to delete what is expressly provided by the proviso. The Court cannot read anything into a statutory provision that is plain and unambiguous. Similarly, a statute is an edict of the Legislature, the language employed in a statute is the determinative factor of legislative intent. Apart from the above, while interpreting a provision the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the Legislature to amend, modify or repeal it, if deemed necessary. The golden rule of construing statutes has been thus stated: The grammatical and ordinary sense of the words is to be -39- adhered to unless that would lead to some absurdity or repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency. We are in complete agreement with the reasons recorded by the learned Single Judge for rejecting the challenge laid by the appellant against the proviso to subclause

(ii) of Section 8(a) of Act 2003.

8.6 The learned Senior Counsel appearing for appellants has submitted that the writ petitions were filed challenging the show cause notice issued by the authority. The challenge of the appellants since is not accepted, it is made clear that the appellants are subjected only to the tax payable under the proviso but not at any other rate. Special Government Pleader Mr Mohammed Rafiq submits that it is always open to the dealer to file a reply/explanation to the show cause notice and the issue would be considered in accordance with law. The -40- challenge is, to some extent, on account of the contribution by the draftsman and to some extent in understanding the scope and area of operation of proviso by the appellants. For the above reasons and discussions we do not see merit in the grounds urged by the appellants and are rejected accordingly. The appeals fail, and accordingly dismissed. No order as to costs. Sd/- S.V.BHATTI JUDGE Sd/- VIJU ABRAHAM JUDGE jjj/JS