

A. and M. Distributors Vs. State of Karnataka and anr.

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Court : Karnataka

Decided On : Dec-08-2005

Reported in : ILR2006KAR1131; (2008)11VST656(Karn)

Judge : D.V. Shylendra Kumar, J.

Acts : Karnataka Sales Act, 1957 - Sections 20, 28 and 28(3A)

Appeal No. : Writ Petition No. 46940 of 2001

Appellant : A. and M. Distributors

Respondent : State of Karnataka and anr.

Advocate for Def. : T.K. Vedamurthy, HCGP

Advocate for Pet/Ap. : B.P. Gandhi and ;Narendra Gandhi, Advs.

Disposition : Petition allowed

Judgement :

ORDER

D.V. Shylendra Kumar, J.

1. Writ Petition by a dealer registered under the provisions of the Karnataka Sales Act, 1957 (for short 'the Act') complaining of an order dated 10-12-2001 (copy at Annexure-A) levying penalty in a sum of Rs. 1,96,961/- under the provisions of

Section 28(3-A)(iv)(a) of the Act.

2. The petitioner though had the statutory remedy of appeal to get over this order if it was not valid by preferring an appeal in terms of provisions of Section 20 of the Act, nevertheless, chose to approach this Court complaining of the validity of the very provision under which the penalty was levied contending that it is an unconstitutional provision, beyond the legislative competence of the State legislature and therefore the petitioner need not be compelled to avail of the statutory remedy etc.,.

3. Initially, after the issue of notice to the respondents on 19-12-2001, the matter had been admitted on 12-4-2002 and certain interim order had also been granted in realisation of penalty amount, the petitioner having deposited 50% of the amount in question, the recovery of balance amount had been stayed by this Court.

4. Respondents have entered appearance through Sri Vedamurthy, Learned Government Pleader. Statement of objections have also been filed.

5. Sri B.P. Gandhi, Learned Counsel for the petitioner before making submissions regarding the validity of the provision has taken me through the show cause notice issued for the purpose of passing the order at Annexure-A as also the very order and the very provisions of Section 28(3-A)(iv)(a) of the Act.

6. Submission of Learned Counsel for the petitioner is that the respondent No. 2 did not have jurisdiction to pass an order of this nature; that the respondent No. 2 even without any basis and even without the factual requirements for invoking the provisions of Section 28(3-A)(iv)(a) of the Act being not in existence, has issued the show cause notice; that not only issue of show cause notice but also earlier act of sealing the business premises of the petitioner as on 30-10-2001 was an act not authorised in law; that the follow up action by issue of show cause notice dated 9-11-2001 (copy at Annexure-B) is also not proper assumption of jurisdiction and consequently the impugned order dated 10-12-2001 (copy at Annexure-A) is also equally bad; that the entire proceedings has to be quashed as also the order levying penalty.

7. Submission of Sri Gandhi, Learned Counsel for the petitioner is that the respondent No. 2 is not authorised under the provisions of the Act to seal any premises; that the respondent No. 2 has virtually interfered with the business of the petitioner to the detriment and disadvantage of the petitioner; that no proper opportunity was ever been given to the petitioner to demonstrate that the petitioner has not indulged in any activity to evade any liability of sales tax under the Act; that even assuming the respondent No. 2 could have exercised powers under Section 28(3-A)(iv)(a) of the Act, he has not followed the proper procedure required under this Section i.e., the provision for levy of penalty; that unless the provision is adhered to in accordance with law, the order cannot be sustained.

8. An examination of the proposition notice dated 9-11 -2001 (copy at Annexure-B) issued under Section 28(3-A)(iv)(a) of the Act indicates that the irregularity noticed by the respondent No. 2 was one of the petitioner not having obtained what is known as 'branch certificate' for the godowns located in the basement floor and second floor of the building wherein the business premises of the petitioner was located and had been so certified to be the place of business by the authorities. The respondent No. 2 had presumed therefore ipso facto the entire goods held in the undeclared godown should be subjected to penalty under the provisions of Section 28(3-A)(iv)(a) of the Act and had also computed the penalty leviable in respect of the goods that were stored in the basement floor and second floor at the rate of 12.6% of the value of such goods and that is how had proposed levy of penalty of Rs. 1,96,961/-.

9. Under the impugned order, the petitioner had replied to this show cause notice in terms of reply dated 20-11-2001 (copy at Annexure-C). It is, inter alia, averred in the reply that the petitioner had 30 days time to inform the respondents about its branch offices opened afresh; that its goods stocked in the basement floor and second floor of the premises are all goods which are accounted for and the petitioner had supporting documents to show that the goods had been acquired by the petitioner in accordance with law and had come into possession of the petitioner and not by evasion of any duty liability and that the petitioner is unable to produce the same as the respondent No. 2 had sealed the entire premises and had also seized the documents which would have supported the version of the

petitioner and therefore the petitioner is unable to place it along with the reply etc.,.

10. The respondent No. 2 on an examination was of the view that the premises had been searched and documents etc., were seized on credible information and having regard to the background of the petitioner who had been a chronic evader of payment of tax, it was obvious that the petitioner had got into possession unaccounted goods; that the petitioner not having satisfactorily explained by supporting documents, the possession of such large quantity of unaccounted goods, it is inevitable that it should be viewed strictly and maximum penalty should be levied and therefore had passed the order confirming the proposition notice.

11. Sri Vedamurthy, Learned Government Pleader appearing for the respondents supports the order; that though the petitioner had been accorded opportunity, the petitioner having not made good his case, it was inevitable for the respondent No. 2 to confirm the proposition notice and no interference is called for; that the petitioner could have availed of the statutory remedies.

12. The proposition notice and the confirmation order, on the face of it, suffers from irregularities and illegalities when it is tested in the light of the provisions of Section 28(3-A)(iv)(a) of the Act which reads as under:

28, Powers to order production of accounts and powers of entry, inspection and seizure-

[3-A](i). xxxx

(ii) xxxx

(iii) xxxx

(iv) If the empowered Officer or the Officer to whom the matter is referred under Clause (i), upon such verification is of the opinion that the particulars furnished at the time of verification are incorrect and incomplete for which sufficient cause is not furnished, he may levy a penalty, which- a) shall not be less than one half of the amount of tax leviable and not exceeding the amount equivalent to the amount of tax leviable in respect of the goods stocked, if a dealer registered under the Act

accepts that he is the owner of the goods.

13. This provision which occurs as part of Section 28 of the Act which is a provision conferring powers for search and seizure is one to give teeth to the provisions by way of providing for levy of penalty where a dealer who is in possession of certain goods is unable to satisfactorily explain the valid acquisition of possession of such goods, in the sense that, the goods are tax paid goods and goods which are not properly accounted for and therefore a presumption that a dealer has indulged in evasion of payment of sales tax and if so the provision which can take care of such conduct on the part of the dealer and also to compensate the State for the loss of the revenue. The provision as it stood at the relevant point of time provided for levy of penalty ranging from 50% to 100% of the amount of sales tax liability evaded. The provision being a penal provision, comes into play only when there is evasion of payment of sales tax and not otherwise. The provisions provide a fiction where an Officer is not satisfied about the proper accounting of the goods by the dealer, the Officer empowered can by the presumption of evasion whereupon he can proceed to levy penalty as provided for.

14. The provisions of Section 28(3-A)(iv)(a) of the Act work in two stages. The first stage is to call upon the dealer to produce supporting documents or to account for the goods. Thereafter, the Officer concerned has to examine such documents with reference to actual quantity of the goods and if the officer finds that the documents do not fully support or account for the entire goods, the initial presumption may be drawn that there is something lacking or suspicious and the officer may issue a further show cause notice indicating that unless the dealer is able to satisfactorily explain that part of the goods which has not been properly accounted for on the presumption that it is attributable to the goods acquired by act of evasion proposes to levy penalty as per the provision of this Section.

15. At the second stage, it is open to the dealer to come up with such explanation which can satisfy the officer to indicate that the goods have been acquired not through any illegal means or any method whereby some possible tax liability has been evaded, but by any other mode whereupon there is no loss of revenue to the State under the Act. If such is the position, perhaps the officer may drop the

proceedings at that stage or if the officer is not satisfied, proceed to levy penalty.

16. In the present case, the respondent No. 2 has proceeded to confirm the proposition notice being not satisfied with the explanation offered.

17. Submission of Sri B.P. Gandhi, Learned Counsel for the petitioner is that the petitioner had never been given a proper opportunity to explain its case; that the supporting documents had all been seized and therefore it is a clear case of total violation of the requirement of provisions envisaged under the very provision.

18. I also notice that the respondent No. 2 had not in the first instance called upon the petitioner to produce the documents in support of the case and thereupon examine them and then record the status for non-accounting for goods amounts to a possible or definite waiver on the part of the petitioner.

19. Having regard to the scheme of penalty provisions, it is inevitable that the concerned officer should record a finding with regard to the unaccounted part of the goods; that it is presumed to be goods acquired by any act where under payment of tax has been evaded, in which event, penalty is necessarily justified.

20. In the present case, such findings are conspicuously absent and on the other hand, the respondent No. 2 has proceeded to confirm the show cause notice which in the first instance had been wrongly issued only for the reason that the goods had been stored in an unauthorised premises and not that the goods had not been properly accounted for with supporting documents. Viewing from any angle, the order is not sustainable being wholly independent of the provisions of Section 28(3-A)(iv) of the Act.

21. If the order itself is not sustainable, the further question of examining the validity of Section 28(3-A)(iv) of the Act does not arise as the petitioner's grievance is redressed once the order is set aside.

22. The next question is as to whether the matter ends here or liberty should be reserved to the respondents to take proper action in accordance with the provisions as the order is found fault with by mis Court only for non-compliance with the procedural requirement and not on the merits of the matter.

23. In fact, the Officer also had not touched upon the merits of the matter in a proper manner as is contemplated under the provisions of the Act as the Officer never examined the supporting documents which the petitioner claims to be in possession or could have produced,

24. In the circumstances, while the impugned order bearing No. JC.1NT.SZ.AC.IX.INS-77/2001-02, dated 10-12-2001 (copy at Annexure-A) is quashed by the issue of a writ of certiorari, liberty is expressly reserved to the respondents to take such action as is necessary and permitted in law and in compliance with the requirements of Section 28(3-A)(iv)(a) as it prevailed at the relevant point of time.

25. Writ Petition allowed.

26. Rule made absolute. No costs.

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