

Ray Constructions Ltd. Vs. Intelligence Officer

Ray Constructions Ltd. Vs. Intelligence Officer

SooperKanoon Citation : sooperkanoon.com/720887

Court : Kerala

Decided On : Feb-10-2005

Reported in : 2005(2)KLT436; [2005]142STC323(Ker)

Judge : P.R. Raman, J.

Acts : Sales Tax Act; [Motor Vehicles Act, 1939](#) - Sections 2(16); [Motor Vehicles \(Amendment\) Act, 1988](#) - Sections 2, 2(18), 2(26) and 2(28); Kerala Tax on Entry of Goods into the Local Areas Act, 1984 - Sections 2(3); [Kerala Tax on Entry of Goods into Local Areas \(Amendment\) Act, 1994](#) - Sections 15; Motor Vehicle Entry Tax Act; Motor Vehicle Taxation Act; Tax on Entry of Goods into the Local Areas Rules, 1994 - Rule 4

Appeal No. : O.P. No. 32755 of 2002

Appellant : Ray Constructions Ltd.

Respondent : intelligence Officer

Advocate for Def. : S. Soman, Government Pleader

Advocate for Pet/Ap. : Arikkat Vijayan Menon,; Harisankar V. Menon and; Meera V

Disposition : Petition allowed

Judgement :

P.R. Raman, J.

1. Petitioner is a Public Limited Company engaged in the business of execution of works contract. He is also an assessee under the Sales Tax Act coming within the jurisdiction of the third respondent. Towards the execution of the work under taken by the petitioner at Air Cargo Complex, Karipur, Kozhikode, he hired an excavator belonging to one of its sister concerns, M/s. Ray Constructions, a partnership firm having its head office at Bombay. The said sister concern is also a Sub Contractor for the construction of some road works for the Indian Institute of Management, Kozhikode. The excavator in question was brought from Bombay belonging to the sister concern. After using the excavator at Karipur by the petitioner who was in the process of transport from Karipur to Kunnamangalam. For Return of the said excavator to his sister concern that the said excavator was carried in a trailer lorry bearing Reg. No. KA.08/777. While the said trailer reached near Kozhikode, the Intelligence Inspector attached to the first respondent intercepted the lorry and issued a notice directing the remittance of entry tax on the value of the excavator, since according to the officer, entry tax is leviable on the goods, viz., the excavator in question. Ext.P1 is a copy of the notice. The sister concern of the petitioner who owns the excavator filed an objection Ext.P2. In Ext.P2, it was inter alia contended that the excavator which was transported to the work site detained by the officer is not a motor vehicle as defined under Section 2(26) of the Motor Vehicles Act, 1988 and that this excavator does not have tyre wheels and is mounted only on chain and invited the officer for physical examination of the detained excavator. It is contended that because of the chain mounting, it cannot be plied on road and further its moving speed on other working surface is only 1.5 km./ Hr. For the reasons, it does not require any registration under the Motor Vehicles Act for levy of entry tax on excavators. It is contended that it will not attract any tax under the Kerala Tax on Entry of Goods into Local Areas Act, 1994. Thereafter the first respondent issued notice under date 14.2.2000 under Section 15 of the Entry Tax Act proposing to impose a penalty of Rs. 13,32,000/- being double the amount of tax alleged to have been evaded. Ext.P4 is the copy of the said notice produced in the case. In this notice the authority came to the conclusion that he is satisfied that the excavator is imported into the State of Kerala clandestinely with wilful intention to evade payment of entry tax due to the State. He also did not accept the

contention that the excavator is not a motor vehicle. He places reliance on the decision of this Court reported in Baiju Joseph v. State of Kerala, 1997 (1) KLT 671 - 1998 (6) KTR 1. Petitioner thereafter filed a writ petition before this Court as O.P.5592/2000 challenging the proceedings initiated under the Entry Tax Act. As per an interim direction, a bank guarantee was furnished by the petitioner for 6,66,000/- and got the excavator released on furnishing such guarantee. This Court disposed of the O.P. by Ext.P6 judgment. It took note of the contention of the petitioner that the excavator is moving on chain as in the case of a tank and is not fitted with wheels which is the essential distinguishing features of this excavator from other excavators and therefore the decision reported in Baiju Joseph v. State of Kerala, 1997 (1) KLT 671 = 1998 (6) KTR 1, as confirmed by the Apex Court and latter decision in Bose Abraham v. State of Kerala and Ors., 2001 (1) KLT 730 (SC) = 2000 (9) KTR Page 336 (SC) is not applicable to the facts of the case. This Court thought fit that the file will be transferred by the Intelligence Officer to the Sales Tax Officer for follow up action pursuant to Ext.P4 notice or for assessment and demand of tax, if entry tax is payable. Holding the view that the dispute is a bona fide dispute, this Court observed that the matter calls for an adjudication with regard to the liability for entry tax. The Sales Tax Officer was therefore directed to consider the contention of the petitioner and to decide the question as to whether the petitioner is liable for payment of entry tax and it was further directed that the Sales Tax Officer shall consider the imposition of penalty only after adjudication of the liability of the petitioner to pay entry tax. Therefore, by Ext.P8 order dated 24.10.2002, the Sales Tax Officer, the third respondent herein adjudicated the matter and held against the petitioner. Aggrieved thereby, the petitioner has preferred this Original Petition seeking to quash Ext.P8 order passed by the third respondent. Following Ext.P8 order, the petitioner was required by Ext.P10 notice to file return under Rule 4 of the Tax on Entry of Goods into the Local Areas Rules, 1994. The finding that he is liable to pay entry tax is challenged and the petitioner has impugned the notice Ext.P10 dated 25.10.2002 as well.

2. It is contended by the learned counsel appearing for the petitioner that the decision rendered by this Court in Baiju Joseph's case as confirmed by the Apex Court in Bose Abraham's case are distinguishable from the present case.

According to the petitioner, the said decision has no application in the factual situation arising in this case having due regard to the nature of the vehicle in question.

3. The question that arises for consideration is as to whether the excavator said to have brought by the petitioner is a motor vehicle and whether the vehicle is liable to be assessed under the Kerala Tax on Entry of Goods into the Local Areas Act and as to whether the decision reported in *Bose Abraham v. State of Kerala and Ors.*, 2001 (1) KLT 730 = 2001 (9) KTR 336, covers the case on hand.

4. Though the Kerala Tax on Entry of Goods into the Local Areas Act, 1984, is one coming under Entry 52 of List 2 of the 7th Schedule to the Constitution, the legislature by enacting the law did not choose to define the word 'motor vehicle' separately rather adopted the definition contained in the Motor Vehicles Act, 1988, Central Act, 59 of 1988. As per Section 2(3)(j) of the Kerala Tax on Entry of Goods into the Local Areas Act (hereinafter referred to as 'the Act'), 'motor vehicle' means a Motor Vehicle as defined in clause 28 of Section 2 of the Motor Vehicles Act, 1988 (Central Act, 59 of 1988). Thus the Legislature has adopted the definition contained in the Motor Vehicles Act by legislative reference instead of giving any separate definition. Therefore, the words 'motor vehicle' occurring in the Act will have to be understood with reference to the term as defined under the Motor Vehicles Act, 1988. The definition of the term 'motor vehicle' under Section 2(28) of the Motor Vehicles Act is as follows :-

'Section 2(28). Motor vehicle or vehicle means any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer, but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or a vehicle having less than 4 wheels fitted with engine capacity of not exceeding 35 cubic centimeters.'

5. The scope of a meaning of the term as defined under Section 2(28) of the Motor Vehicles Act to the extent, they are relevant for the purpose of this case, has since come up for consideration before the Apex Court in *Bolani Ores Ltd. v. State of*

Orissa, 1975 (2) SCR 138. After a thorough survey of the case law on the subject the Apex Court held as follows:

'The meaning of the word 'adapted' is Section 2 of the Act itself indicated in Entry 57 of List II of the 7th Schedule of the Constitution which confers a power on the State to tax vehicles whether propelled mechanically or not and uses the word 'suitable' in relation to its use on the roads. The words 'adapted for use' must therefore be construed as 'suitable for use'. At any rate, words 'adapted for use' cannot be larger in their import, by including vehicles which are not 'suitable for use' on roads. In this sense, the words 'is adapted for use' have the same connotation as 'is suitable or is fit' for use on the roads.'

6. Though the Apex Court considered the definition contained in Section 2(16) of the [Motor Vehicles Act, 1939](#), the definition contained in Section 2(28) of the 1988 Act is same as far as the main part of the definition is concerned which alone are relevant for the purpose of deciding the case. In the latter decision by the Apex Court in Bose Abraham's case 2001 (1) KLT 730=2001 (9) KTR 336, while approving the decision of this Court in Baiju Joseph's case, 1997 (1) KLT 671 = 1998 (6) KTR 1, took notice of the fact that the High Court had noticed the admissions of the appellants that the excavators and road rollers are suitable for use on roads, as referred to in paragraph 7 of the aforesaid judgment in the following terms:--

'We held that the excavators and road rollers are motor vehicles for the purpose of the Motor Vehicles Act and they are registered under the Act. The High Court has noticed the admission of the appellant that the excavators and road rollers are suitable for use on roads. However, the contention put forth is that they are intended for use in the enclosed premises. Merely because a motor vehicle is put to a specific use, such as being continued to an enclosed premises will not render the same to be a different kind of vehicle. Hence in our view, the High Court has correctly decided the matter and the impugned order does not call for any interference by us.'

7. In that case, apart from the admission made by the parties that the excavators in question are suitable for use on roads, the fact remains that the type of

excavator in respect of which it was held as a motor vehicle was an excavator loader mounted on four wheels is a mobile digging and loading machine. It was suitable to move from one place to another and the vehicle was fitted with four rubber tyres. It was capable for being driven at a speed of 30 km/hr. with other features like brakes, parking brakes etc. Therefore, it was found that the above provisions made are suitable for being used on the roads. It was on those special features of the vehicle and based on the clear finding of fact that they are suitable for being used on the roads that this Court in Baiju Joseph's case, 1997 (1) KLT 671 = 1998 (6) KTR 1, at paragraph 10 held that any reasonable person looking at these vehicles could think that the plying of the vehicles on the road would be one of the normal uses of the vehicle. Definite case of the petitioner is that the excavator in question is moving on chain as in the case of a military tank and not fitted with wheels which is the distinguishing features of the excavator from the other excavators which were held to be motor vehicles in Baiju Joseph's case. Further, this is an earth mover which cannot be used on roads as contact with roads would damage the chains of the machinery and the engine will in turn damage the road. These facts are not found against. Further, these are distinguishing features in the present excavator from the one decided in Baiju's case. The excavator relating to which the present dispute has arisen has a speed of 1.5 kms. as they could run only on chains as compared with the speed of 35 km/hr. in the case of other excavators in respect to which it was held as a motor vehicle in Baiju's case. Therefore the fact remains that the excavator in the present case cannot be taken through road on its chain without causing serious damage to the road. It is beyond reason to say that the excavator in the present case is adapted for use on the roads. Ext.P7 communication issued by the Commissioner of Commercial Taxes though addressed to a third party however would show that the earth mover machinery (excavator) run on chains were not considered as falling under the definition of the Motor Vehicles Entry Tax Act Therefore while taking the decision, one cannot lose sight of the distinguishing features as are present in the excavator with which we are concerned in deciding the exisibility to be taxed under the relevant provisions of the Act having due regard to the definition contained in Section 2(28) of the Motor Vehicles Act It remains a fact that there may be more than one type of excavator, the question is as to whether

the particular vehicle is a motor vehicle or not has to be decided having due regard to the features of the vehicle. In this connection the Apex Court in *Central Coal Flaid Ltd. v. State of Orissa*, AIR 1992 SC 1371, while considering as to whether the dumpers and rockers using rubber tyres are vehicles adapted for use on roads and are motor vehicles liable to taxation under the Motor Vehicle Taxation Act. In that context, Section 2(18) of the [Motor Vehicles Act, 1939](#) was considered in paragraph 8 of the judgment. It was held that pictures of various types of dumpers have also been sent to us which indicate prominently one factor that these dumpers run on tyres in marked contrast to chain plates like cater pillars or military tanks. By the use of rubber tyres, it is evident that they have been adapted for use on roads, which means they are suitable for being used as public roads. It is therefore clear that the question as to whether a particular vehicle is adapted for use on roads has to be decided taking note of the distinguishing features, if any, in respect of the vehicle and it cannot be generally held that all excavators irrespective of whether it is being adapted for use on roads or even could be transported or could even be moved on the road could be said to be a motor vehicle falling within the ambit of the definition.

8. From the foregoing facts, it has to be held that the excavator in question having due regard to its distinguishing features from the other excavators has to be held as not a motor vehicle falling under the definition of the term defined under Section 2(28) of the Motor Vehicles Act, 1988 and hence the said vehicle is not falling as a motor vehicle liable to tax under the Entry of Goods into the Local Areas Act, 1994.

9. Accordingly, the Original Petition is allowed. Exts.P6 and P10 are quashed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com