IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 2267 OF 2007

Malayala Manorama Co. Ltd. …Appellant

Versus

Asstt. Commissioner, Commercial Taxes & Anr. …Respondents

JUDGMENT

Swatanter Kumar, J.

1. M/s. Malayala Manorama Co. Ltd., Kottayam, purchased printing ink for Rs. 1,00,03,050/- from M/s. Quality Ink Manufacturing, Kottayam during the year 2001-2002. The ink so purchased was to be used for printing newspapers by the said firm. This firm filed Form No. 18 under the Kerala General Sales Tax Act, 1963 (for short 'the Act') for purchase of raw material for use in the manufacture of 'finished goods' i.e. newspaper and in terms of Section 5 (3) of the Act they were liable to pay only concessional tax at the rate of 3% for that period.

SUPREME COURT OF INDIA
JUDGMENT

2. There was no dispute at any point of time that this concern was engaged in printing of newspapers. However, the Department felt that no manufacturing was involved in the process of printing of newspapers and, as such, purchase of printing ink effected by issuing Form No. 18 was not the correct statement in terms of the statutory provisions of the Act. The case of the Department was that the declarations thus furnished by the firm were not accurate, according to law and there was misuse of statutory forms. This resulted in issuance of a notice for imposition of penalty under Section 45 (A) of the Act providing an opportunity to the firm to respond thereto and file its objections, if any. It was proposed to impose a penalty of Rs. 18,19,208/- on the said assessee, being double the amount of tax due on the purchase turnover.

3. The reply to the notice was filed by the assessee firm admitting that printing ink was purchased and that sub-section 3 of Section 5 does not stipulate that there should be manufacture of taxable goods. It was specifically pleaded that the provisions of Section 5 (3) of the Act were amended by the Finance Act, 2000 with effect from 01.04.2000 deleting the provision that manufacture items shall be taxable. The impact of the amendment was such that,

SUPREME COURT OF INDIA
JUDGMENT

according to the assessee firm, the issuance of notice was not proper. It was also stated that amended section does not contemplate any 'manufacturing' activity and the word used was 'production' and there is a clear distinction between the two. The assessee relied upon the judgment of this Court in the case of Aspinwall & Co. Ltd. v. Commissioner of Income Tax, Ernakulam [(2001) 7 SCC 525 : (2002) 125 Sales Tax Cases 101 (SC)] wherein it was held that 'manufacture' means use of raw materials for production of goods commercially different from raw materials used. When the end product is a commercially different product, it amounts to manufacturing.

4. The Assistant Commissioner, Commercial Tax, who had issued the notice, came to the conclusion that the concession has been extended to non-taxable goods also and formed an opinion that the concession is applicable only to 'goods' and newspaper was not a 'goods' within the meaning of Section 2 of the Act. While referring to another judgment of this Court in Collector of Central Excise v. Ballarpur Industries Ltd. [(1989) 4 SCC 566 : (1990) 77 Sales Tax Cases 282], the said Assistant Commissioner concluded that newspaper was not a 'goods' and, therefore, the

declaration was not appropriate and imposed a penalty of Rs. 14,66,256 for the year 2000-2001.

5. The assessee firm did not take recourse to the statutory remedies available under the Act but questioned the very correctness and legality of the issuance of the notice as well as the order passed by the Assistant Commissioner before the High Court of Kerala at Ernakulam, by filing a writ petition under Article 226 of the Constitution of India.

6. This writ petition was contested by the Department which filed detailed counter affidavit. It was specifically pleaded by the Department that for availability of statutory alternative remedy as well as for other reasons and facts stated in the reply, the writ petition itself was not maintainable. The Division Bench of the High Court while considering this primary objection raised by the Department before the High Court, came to the conclusion that as the facts were not in dispute and questions raised were purely legal and are to be tested in view of the judgment of this Court in the case of Printers (Mysore) Ltd. v. Assistant Commercial Tax Officer [(1994) 93 Sales Tax Cases 95 : (1994) 2 SCC 434], Whirlpool Corporation v. Registrar of Trade Marks [(1998) 8 SCC

SUPREME COURT OF INDIA
JUDGMENT

1] as well as the judgment in the case of State of H.P. & Ors. v. Gujarat Ambuja Cements Ltd. [(2005) 6 SCC 499 : (2005) 142 Sales Tax Cases 1], the writ petition was maintainable. However, while laying emphasis that the newspaper would not fall within the expression 'goods' under sub-section 3 of Section 5 of the Act, the High Court held that the notice issued was proper as Form No. 18 which gives benefit of concessional rate of tax was factually not correct. While dismissing the writ petition, however, the Bench issued a direction to the assessing authority to examine whether the imposition of penalty at double the rate is justified in the facts and circumstances of the case, within a period of two months from the date of receipt of the copy of the judgment. It is this judgment of the High Court which has been assailed in the present appeal under Article 136 of the Constitution of India.

JUDGMENT

7. Learned counsel appearing for the appellant with some vehemence argued that the High Court had specifically noticed the contention of the assessee firm that the initiation of the proceedings is based on a provision which had been repealed, non-existent and inapplicable, as such, the entire proceedings and imposition of penalty was unjustified, still the High Court did not

deal with this contention at all. It was a pure question of law and would even otherwise have effect on the merits of the case. Non-consideration of the contention and non-recording of any reasons in that regard on merit, would entirely vitiate the order. It is further argued that even the alternative submission as to whether the newspaper was covered under the definition of 'goods' and as to what is the effect of amendment of the provisions of Section 5(3) and particularly, the substitution of the word 'manufacture' by the word 'production' have not been correctly examined. The discussion of the High Court on the matter in issue had primarily proceeded with reference to the un-amended provisions and on an erroneous impression of law that despite amendment, the 'goods' will still not include 'newspapers'.

8. On the contra, Mr. Verma, learned senior counsel appearing for the Department fairly stated that the amended provisions and their effect have not been considered by the High Court in its judgment under appeal. Even, according to him, the discussion on amendments with particular reference to the word 'production' could have some impact on the alternative submission made by the assessee-respondent. However, he submitted that the matter

at best can be remanded to the High Court and the notice cannot be quashed as the contentions will still have to be examined by the competent authority/Courts.

9. Having heard the learned senior counsel appearing for the parties, we are of the considered view that the order under challenge requires interference by this Court. There is no dispute to the fact that the material amendments were carried out in the provisions of Section 5(3) of the Act with effect from 01.04.2002. The existing 1st proviso to Section 5(3)(i) was deleted as well as the expression 'or uses the same in the manufacture of any goods which are not liable to tax in this Act' in Section 5(3)(i) was also deleted. Despite these amendments, as it appears from the record before the Court, format of Form No. 18 has not been amended consequently. However, the fact of the matter remains that the High Court has not dwelt upon these legal issues which are the core issues involved in the present case. In our view, the discussion on the first issue would certainly have some bearing on the alternative argument raised on behalf of the appellant before us. Thus, it may not be possible for this Court to sustain the finding recorded by the High Court in that regard. Of course, we

are not ruling out all the possibilities of the High Court arriving at the same conclusion if it is of that view after examining the amendments as well as the submissions made on behalf of the appellant with regard to its alternative submissions. In light of this discussion, we pass the following order :

(a) The impugned order dated 2nd August, 2006 passed by the High Court is hereby set aside.

(b) The matter is remanded to the High Court for consideration afresh in accordance with law on both the aforesaid submissions while leaving all the contentions of the assessee and the Department open for the year 2000-2001, in relation to imposition of penalty under Section 45 (A) of the Act.

(c) The legality and validity or otherwise of the notice dated 16.01.2006 and 17.01.2006 shall be subject to the final decision of the High Court.

10. The appeal is accordingly disposed off without any order as to the costs.

.....J.
[DR. B.S. CHAUHAN]

SUPREME COURT OF INDIA
JUDGMENT

.....J.
[SWATANTER KUMAR]

New Delhi
July 8, 2010.

SUPREME COURT OF INDIA
JUDGMENT