

CASE NO.:
Appeal (civil) 902 of 1999

PETITIONER:
M/S. MYCON CONSTRUCTION LIMITED

Vs.

RESPONDENT:
STATE OF KARNATAKA & ANR.

DATE OF JUDGMENT: 07/05/2002

BENCH:
Shivaraj V. Patil & Bisheshwar Prasad Singh

JUDGMENT:

WITH
C.A.Nos. 7575-77/1999, C.A.Nos. 950-957/2000

AND

C.A. Nos.1111/2000

J U D G M E N T

Bisheshwar Prasad Singh, J.

In this batch of appeals by special leave common questions arise for consideration and therefore the appeals have been heard together and are being disposed of by this common judgment. The questions which arise for consideration are whether sub-section 6 of Section 17 of the Karnataka Sales Tax Act, 1957 (hereinafter referred to as "the Act") as amended by Act No. 5 of 1996 is unconstitutional, and secondly, whether the amendment brought in Clause (i) of sub-section 6 of Section 17 of the Act by Act No.7 of 1997 retrospectively is also unconstitutional. The High Court of Karnataka has answered both these questions in the negative and against the appellants. The main judgment was rendered in the writ petition preferred by the appellant in Civil Appeal No.902 of 1999. The remaining matters were disposed of by the High Court following the aforesaid judgment.

To determine the questions that arise for consideration, it is necessary to notice the legislative history of sub-section 6 of section 17 of the Act. We may first notice Section 5B of the Act which provides for levy of tax on transfer of property in goods involved in the execution of works contract which reads as follows:-

"5-B. Levy of tax on transfer of property in goods (whether as goods or in some other form) involved in the execution of works contracts. Notwithstanding anything contained in sub-section (1) or sub-section (3) or sub-section (3-C) of Section 5, but subject to sub-section (4), (5) or (6) of the said Section, every dealer shall pay for each

year, a tax under this Act on his taxable turnover of transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract mentioned in column (2) of the Sixth Schedule at the rates specified in the corresponding entries in column (3) of the said Schedule."

Section 5B was introduced in the Act by Act No.27 of 1985 with effect from April 1, 1986 pursuant to the Constitution (46th Amendment Act, 1982) introducing Clause (29 A) in Article 366 of the Constitution.

By Act 4 of 1987 sub-section 6 of Section 17 of the Act was incorporated which as originally enacted read as follows :-

" Notwithstanding anything contained in sub-section (1) to (3), subject to such conditions and in such circumstances as may be prescribed, the Assessing Authority of the area may, if a dealer liable to tax under Section 5-B so elects, accept in lieu of the amount of tax payable by him during any year, under this Act, in respect of works contracts falling under serial number 6 of the Sixth Schedule, by way of composition, an amount at the rate of Two percent of his total turnover in respect of transfer of property in goods (whether as goods or in some other form) involved in the execution of such works-contracts."

Sub-section 6 of Section 17 of the Act was amended by Act No.4 of 1992 with effect from April 1, 1992 and the amended sub-section read as follows :-

"Notwithstanding anything contained in sub-section (1) to (3), but subject to such conditions and in such circumstances as may be prescribed, the Assessing Authority of the area may, if a dealer liable to tax under Section 5-B in respect of the works contract specified in column (2) of the table below so elects, accept in lieu of the amount of tax payable by him during the year under this Act, by way of composition an amount at the rates specified in the corresponding entries in column (3) of the Table on his total turnover relating to transfer of property in goods (whether as goods or in some other form) involved in the execution of such works-contract."

Again by Act No.5 of 1996 sub-section 6 of Section 17 was amended to read as follows:-

"Notwithstanding anything contained in Section 5-B, but subject to such conditions and in such circumstances as may be prescribed, the Assessing Authority of the area may, if a dealer liable to tax under Section 5-B so elects, accept in lieu of the amount of tax payable by him during the year under this Act, by way of composition an amount on the total consideration for the works contracts executed by him in that year in the State in respect of works contract specified in column (2) of the Sixth Schedule at the rates specified in the corresponding entries in Column (4) of the said

Schedule."

Sub-section 6 was further amended by Act No.7 of 1997 with effect from April 1,1997. Clause (i) of sub-section 6 of Section 17 of the Act as amended reads as follows:-

"(a) for the words and brackets "on his total turnover relating to transfer of property in goods (whether as goods or in some other form) involved in the execution of such works contract", the words "on the total consideration received or receivable by him in respect of such works contract executed by him in that year in the State", shall be deemed to have been substituted with effect from the first day of April, 1988:

(b) for the words, brackets and figure, "at the rates specified in the corresponding entries in column (4) of the said Schedule," the words, "at the rate of four per cent" shall be substituted."

The constitutional validity of sub-section 6 of Section 17 of the Act was challenged in several writ petitions filed before the High Court of Karnataka at Bangalore. The challenge was on the ground that in view of Entry 54 of List III of the Seventh Schedule read with sub-clause (b) of Clause (29A) of Article 366 of the Constitution of India, the tax under the Act is leviable only on transfer of property in goods (whether as goods or in some other form). Therefore, even under a scheme of composition of tax, the tax could not be levied on any goods other than goods in which there was transfer of property in execution of the works contract. The State had no legislative competence to levy sales tax on the total consideration of the works contract so as to include items or goods in which there was in fact no transfer of property. Reliance was placed on the decisions of this Court in Builders Association of India & Ors, etc. Vs. Union of India & Ors. (1989) 2 SCC 645 and Gannon Dunkerley and Co. Vs. State of Rajasthan (1993) 1 SCC 364. It was submitted that the judgment of this Court in State of Kerala Vs. Builders Association of India (1997) 2 SCC 183 ran counter to the ratio in Builders Association of India (supra), a judgment rendered by a Constitution Bench of this Court, and therefore the same had no binding effect. In any event that decision was distinguishable having regard to the facts and circumstances of that case and the provisions contained in the Kerala Act.

Secondly, it was contended that in any event sub-section 6 of Section 17, to the extent it had been given retrospective operation by Act 7 of 1997, was unconstitutional as it violated the rights guaranteed to the petitioners under Articles 14, 19 (1)(g) and Article 265 of the Constitution of India. The petitioners and others like them, who had opted for the composition scheme, as it stood prior to April 1, 1996, could not be saddled with additional burden of tax by the amended provision which was given effect retrospectively from April 1, 1988. In the facts and circumstances of the case the retrospective operation of the amended provision was arbitrary, violating the right guaranteed to the petitioners under Article 14 of the Constitution of India.

The State of Karnataka on the other hand relied upon the decision of this Court in the State of Kerala Vs. Builders Association of India (supra) and contended that the question was no longer res integra and the validity of sub-section 6 of Section 17 as amended must be upheld. As to the retrospective operation of the amended provision, it was submitted that the legislature had competence not only to enact a law prospectively, but also

retrospectively, subject to its being consistent with the constitutional provisions. It was submitted that the rights of the petitioners guaranteed under Article 14 and 19 were not breached at all. In fact the legislature always intended to levy tax on total consideration of works contract so far as assessment under the scheme of composition was concerned, and for this he relied upon the Budget speech of the Finance Minister wherein a reference was made to the levy at an average rate of 2% on the total turnover in lieu of all taxes payable under the Act. The legislative intent was not truly reflected in the amendment effected in the Act which gave rise to some controversy on the subject. To clarify and to give effect to the legislative intent, a circular was issued by the Commissioner but the same was quashed by the High Court. In these circumstances the State was left with no option, but to exercise its legislative power to legislate retrospectively with a view to remove the lacuna in the existing provision.

A batch of writ petitions, including the writ petition preferred by the appellant in Civil Appeal No.902 of 1999, was disposed of by a common judgment of a learned Judge of the High Court holding that the decision of this Court in State of Kerala Vs. Builders Association of India (supra) squarely answered the challenge and the question was no longer *res integra*. The challenge to the constitutional validity of sub-section 6 of Section 17 was accordingly repelled.

So far as the validity of Act No.7 of 1997 is concerned, the learned Judge upheld its validity holding that the legislature was competent to enact the law with retrospective effect. The High Court however noticed the stand of the State in its statement of objections filed in reply to the writ petition in which it was submitted that with a view to avoid hardship that may be caused by the retrospective operation of the amended provision, the Court in the interest of justice may direct that the works contractors may opt, if so advised, for regular assessment under Section 5B of the Act, even if they had earlier opted for assessment under the composition scheme. The learned Judge therefore, while dismissing the writ petitions, having regard to the stand of the State of Karnataka, reserved liberty to the petitioners to opt for regular assessment under Section 5B of the Act notwithstanding the fact that they had opted for composition under Section 17 (6) of the Act. For this purpose petitioners were required to make an application to the concerned assessing authority and the assessing authorities were directed to proceed to assess the petitioners and all others who were not before the court, under Section 5B of the Act, if they so opted.

Appeals preferred before a Division Bench of the High Court were also dismissed, since the Division Bench of the High Court found itself in complete agreement with the learned Judge and was also of the view that the judgment of this Court in the State of Kerala Vs. Builders Association of India (supra) fully covers the case. The judgment of the Division Bench is impugned before us by special leave in Civil Appeal No. 902 of 1999. In the remaining appeals the High Court followed its aforesaid judgment, and dismissed the writ petitions.

Mr. Raju Ramachandaran, Senior Advocate appearing on behalf of some of the appellants placed before us the judgment of this Court in State of Kerala Vs. Builders Association of India (1997) 2 SCC 183. We have carefully read the aforesaid judgment. Fairly Mr. Raju Ramachandaran submitted that he was unable to point out any distinction between the provisions of the Kerala Act and the Karnataka Act which may have a bearing on the question of interpretation. We have also considered the matter and we are also of the view that so far as the scheme of composition of tax is concerned, the relevant provisions of both the Acts even if not identical, are vastly similar. On the question of the constitutional validity of sub-

section 6 of Section 17 the same argument was advanced before this Court in the State of Kerala Vs. Builders Association of India (supra). In that case, the High Court had declared as unconstitutional sub-sections (7) and (7A) of Section 7 upholding the contention that they sought to levy tax at the rate of 2 % on the whole amount of the contract, or at a particular rate applied to the entire value of contract, and not merely upon the value of the goods transferred in the course of execution of the works contract as contemplated under sub-clause (b) of clause (29-A) of Article 366. The court noticed that the goods which were transferred in the course of execution of works contract may be "declared goods", liable to be taxed under the Central Sales Tax Act, 1956. The goods so transferred may also be taxable under different Schedules to the Kerala Act which prescribe different rates. In such a situation levy of tax on entire value of the contract meant levy of tax contrary to the provisions of the Central Sales Tax Act and the Kerala General Sales Tax Act. It also meant including the non-taxable components of works contract e.g. labour and services etc. For all these reasons, the High Court held that the said sub-sections were clearly beyond the legislative competence of the State Legislature. This court repelled the submission urged before it in the following words:-

"The first feature to be noticed is that the alternate method of taxation provided by sub-section (7) or (7-A) of Section 7 is optional. The sub-sections expressly provide that the method of taxation provided thereunder is applicable only to a contractor who elects to be governed by the said alternate method of taxation. There is no compulsion upon any contractor to opt for the method of taxation provided by sub-section (7) or sub-section (7-A). It is wholly within the choice and pleasure of the contractor. If he thinks it is beneficial for him to so opt, he will opt; otherwise, he will be governed by the normal method of taxation provided by Section 5(1) (iv). Sub-section (8) provides that the option to come under sub-section (7) or (7-A) has to be exercised by the contractor "either by an express provision in the agreement for the contract or by an application to the assessing authority to permit him to pay the tax in accordance with any of the said sub-sections". In these circumstances, it is evident that a contractor who had not opted to this alternate method of taxation cannot complain against the said sub-sections, for he is in no way affected by them. Nor can the contractor who has opted to the said alternate method of taxation, complain. Having voluntarily, and with the full knowledge of the features of the alternate method of taxation, opted to be governed by it, a contractor cannot be heard to question the validity of the relevant sub-sections or the rules. Sub-sections (8), (11) and (12) of Section 7 are incidental and ancillary to sub-sections (7) and (7-A) and cannot equally be faulted. Secondly, it is true that the goods transferred in the course of execution of the works contract may be chargeable at different rates under different Schedules appended to the Kerala Act; it may also be that some of them may be "declared goods", the levy of tax upon which is subject to certain restrictions specified in Sections 14 and 15 of the Central Sales Tax Act; it may also be that sale of some of the goods may also be subject to Central sales tax. It must yet be remembered that

the method of taxation introduced by sub-sections (7) and (7-A) is in the nature of composition of tax payable under Section 5 (1) (iv). The impugned sub-sections have evolved a convenient, hassle-free and simple method of assessment just as the system of levy of entertainment tax on the gross collection capacity of the cinema theatres. By opting to this alternate method, the contractor saves himself the botheration of book-keeping, assessment, appeals and all that it means. It is not necessary to enquire and determine the extent or value of goods which have been transferred in the course of execution of a works contract, the rate applicable to them and so on. For example, under sub-section (7), the contractor pays two per cent of the total value of the contract by way of tax and he is done with all the above-mentioned botheration. The rate of two per cent prescribed by sub-section (7) is far lower than the rates in Schedules 1, 2 and 5 referred to in Section 5(1)(iv)(a). In short, sub-sections (7) and (7-A) evolve a rough and ready method of assessment of tax and leave it to the contractor either to opt for it or be governed by the normal method. It is only an alternative method of ascertaining the tax payable, which may be availed of by a contractor if he thinks it advantageous to him. It must be remembered that the analogous system of alternate method of taxation evolved by certain State Legislatures in the matter of levy of entertainment tax has been upheld by this Court in Venkateshwara Theatre V. State of A.P. The rough and ready method evolved by the impugned sub-sections for ascertaining the tax payable under Section 5(1) (iv) of the Act cannot be said to be beyond the legislative competence of the State or violative of clause (29-A) of Article 366 either. The Constitution does not preclude the legislature from evolving such alternate, simplified and hassle-free method of assessment of tax payable, making it optional for the assessee. The object of sub-sections (7) and (7-A) is the same as that of Section 5(1)(iv); it is only that they follow a different route to arrive at the same destination."

We are of the considered view that principles laid down by this Court in the aforesaid decision squarely apply to the facts of this case having regard to the similarity of the provisions in the two Acts. We therefore find ourselves in complete agreement with the High Court and hold that sub-section 6 of Section 17 of the Karnataka Sales Tax Act is constitutionally valid and the challenge on the ground of lack of legislative competence of the State Legislature must be repelled. Learned Counsel then submitted that even while evolving a simplified method for assessment of tax, such as the scheme of composition in the instant case, the law cannot give an option to the assessee which is in the teeth of constitutional provisions. This argument does not survive in view of the principles laid down by the Supreme Court in State of Kerala Vs. Builders Association of India (supra). He made a faint attempt to draw a distinction between the Kerala Act and the Karnataka Act by reference to the background in which the provisions were enacted. He submitted that under the Kerala Act the composition scheme was introduced by the amendments in the years 1991 and 1992. So far as State of Karnataka is concerned sub-section 6 of Section 17 which gave option to the assessee to pay tax at a fix rate on the value of the goods, the property in which was transferred in the course of execution of works

contract came into effect in the year 1988 and continued till the year 1996. The appellants had taken benefit of the said scheme of composition by exercising their option for assessment under the composition scheme. They had therefore opted for something different from what is sought to be given to them under the amended provision which levies tax not merely on the value of goods transferred, but on the whole amount of the contract. He, therefore, submitted that having regard to the legislative background, amendment of sub-section 6 of Section 17 with retrospective effect by Act 7 of 1997 is clearly unconstitutional. The submission has no force. If the Legislature has legislative competence to enact a statute and the statute so enacted does not breach any constitutional provision, the same cannot be said to be unconstitutional merely because it is retrospective in operation. Moreover, in the instant case as explained in State of Kerala Vs. Builders Association of India (supra) the appellants had opted for assessment under the composition scheme. They were not compelled to exercise their option and otherwise they would have been assessed in accordance with the provisions of the Act particularly Section 5-B thereof. To remove any hardship to the assesseees by retrospective operation of the amended scheme of composition, the State Government itself submitted that the appellants and others like them may be given option to opt for assessment under Section 5-B of the Act even if they had earlier opted for assessment under sub-section 6 of Section 17. The High Court has in fact made such a direction. The appellants are therefore not prejudiced in any manner whatsoever.

Lastly, counsel submitted that while considering the question of retrospectivity, the High Court has passed its judgment on an erroneous assumption of facts, namely that the assessments so far made were on the basis of total consideration. The learned counsel submitted that this was not factually correct. We have perused the judgment and we find that though the submission of the counsel for the State to this effect was noticed, the judgment of the High Court is not based on this assumption. The judgment of the High Court would not have been different even if the fact was otherwise.

Mr. S.S. Javali, learned Senior Advocate, appearing for the appellants in Civil Appeals Nos.7575-77 of 1999 submitted that the appellants had opted under the composite scheme and enjoyed the benefit for almost 9 years. It would be unreasonable to relegate them to the same position that they occupied before they exercised the option for assessment under the composition scheme. He submits that considerations of equity must persuade this court to pass an appropriate direction so that the assessments made on the basis of the options already given are not affected in any manner. Having held that the retrospective operation of the amended provision is constitutional, and having noticed that the assesseees are at liberty to opt for regular assessment under Section 5-B of the Karnataka Sales Tax Act, it would not be appropriate to make such a direction on considerations of equity particularly while dealing with a taxing statute.

Learned counsel relied upon some observations made in Texmaco Ltd. & Anr. Vs. State of A.P. & Anr. (2000) 1 SCC 763. He also relied upon the judgment of this court in D. Cawasji & Co. Mysore Vs. State of Mysore and Anr. 1984 (supp) SCC 490. We have carefully perused the aforesaid judgments of this Court but we find nothing in the two judgments to support the case of the appellants. Those cases proceeded on altogether different considerations, which do not arise in the appeals before us. The principles laid down therein are of no assistance to the appellants. Having considered all aspects of the matter we find that there is no merit in these appeals.

We accordingly dismiss the appeals, but without any order as to costs.

.....J
(SHIVARAJ V. PATIL)

.....J
(BISHESHWAR PRASAD SINGH)

May 7, 2002.

JUDIS