ACC LTD. A

v.

STATE OF KERALA

(Civil Appeal Nos. 2678-2679 of 2010)

JULY 28, 2016 B

[DIPAK MISRA AND ROHINTON FALI NARIMAN, JJ.]

Kerala General Sales Tax Act, 1963 – s.5(2) – Appellant-assessee entered into agreement with Cochin Cement Ltd. (CCL) in terms of which CCL was to manufacture cement using raw materials supplied by appellant and such cement was to be marketed by appellant in its own brand name – Plea of appellant that its agreement with CCL was covered under s.5(2) and sale effected by CCL was first sale whereas appellant's sale was second sale, therefore appellant was entitled for exemption – Held: s.5(2) is an expression of the legislative intention that sales at the hands of the brand name holder and trade mark holder would be treated as the first sale – On perusal of the agreement entered into between the parties, it is not remotely suggestive of the fact that CCL is a brand name holder or trade mark holder – Sale at the hands of the appellant would therefore be treated as the first sale. C D E

Cryptom Confectioneries Pvt. Ltd. v. State of Kerala **(2014) 73 VST 498 (SC) – relied on**

Quinn v. Leathem (1901) AC 495; *Ambica Quarry Works v. State of Gujarat and others* **AIR 1987 SC 1073 : 1987 (1) SCR 562 – referred to** F

Case Law Reference

(2014) 73 VST 498 (SC)	**relied on**	**Para 6**
(1901) AC 495	**referred to**	**Para 9**
1987 (1) SCR 562	**referred to**	**Para 9** G

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2678-2679 of 2010.

From the Judgment and Order dated 31.03.2009 of the High Court of Kerala at Ernakulam in Sales Tax Revision Petition Nos. 76 and 81 of H

A 2008

WITH

C. A. NO. 5980-5981 OF 2010.

S. Ganesh, Sr. Adv., U. A. Rana, Ms. Mrinal Elkar Mazumdar, Himanshu Mehta, For M/s. Gagrat & Co., Advs. for the Appellant.

B C. K. Sasi, Jogy Scaria, R. Sathish, P. V. Dinesh, Advs. for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. The appellant entered into an agreement on 08.04.1993 with Cochin Cement Limited - a company registered under C the Companies Act, 1956. The relevant clauses of the agreement are as follows :-

"1. ACC shall sell to Cocem Cement Clinker Ex its Wadi Cement Works on regular basis at the supply rate of 300 T per day so as to enable Cocem to produce Ordinary Portland Cement or any D other type of cement as per the marketing need from time to time. The price of clinker will be linked to the price of cement in the Kerala market and will be reviewed every six months on this basis. The formula for such price adjustments will be as detailed in Annexure 'A' attached to and forming part of this Agreement. For the sake of easier operation of the contract it is agreed that a E specific quantify of clinker supplied by ACC for any six months period will have a co-relation with the price at which the cement will be handed over to ACC for sale during the said period of six months. Any shortfall on either side in the matter of supply of clinker from ACC and supply of cement by Cocem would have to F be made good at the already agreed rate prior to finalisation of price for the subsequent period.

XXXXX XXXXX

3. Cocem shall entrust to ACC all matters pertaining to quality assurances in respect of cement produced by Cocem. ACC shall G arrange to depute its personnel to the factory of Cocem with a view to ensure that quality of cement produced is as per the internal norms/standard of ACC. Fees to be paid by Cocem to ACC for this service shall be mutually agreed upon by the parties separately.

H

4. Cement produced by Cocem under ACC's brand same shall only be marketed by ACC and shall not complete with cement directly supplied to the Kerala market by ACC.

5. Clinker ground into cement shall be purchased by ACC at a mutually agreed price which will include the cost that ACC may incur in organising marketing and sale of cement manufactured by Cocem. Cocem will supply cement to different parties strictly as per the programme given by ACC. In respect of direct consumers of cement the billing may be done by Cocem directly to the party strictly in accordance with the direction given by ACC. Cement will be branded as 'ACC'. For use of ACC brand name and rendering marketing services Cocem will pay Rs. 75/- per tonne as charges. This charge will remain firm for 5 years and will be subjected to revision thereafter on mutual terms.

xxxxx xxxxx

7. Any complaints/claims arising out of quality of cement, damages, shortages, poor packing due to negligence on the part of Cocem would be debited to Cocem.

xxxxx xxxxx

11. Cocem shall not use ACC's Trade Marks/brand names in any form after the termination or expiry of this Agreement.

2. On the basis of the aforesaid Agreement, the appellant - assessee put forth his stand before the Assessing Officer that his case was covered under Section 5(2) of the Kerala General Sales Tax Act, 1963 (for brevity, "the Act") and, therefore, the sale effected by the Cochin Cement Limited should be treated as the first sale. The Assessing Officer, on the basis of Intelligence Report and other materials brought on record, came to the conclusion that the Cochin Cement Limited had been manufacturing the cement and handing over the same to the assessee. On a perusal of the impugned orders, it is noticeable that the report of the concerned intelligent officer has met with approval up to the revisional stage. To have a complete picture we may usefully reproduce the finding recorded by the assessing officer in the order of assessment:-

> "As per schedule to the agreement, Associated Cement Cos. is charging Rs. 150/- per ton for marketing and service charges and only after deducting that amount, Associated Cement Co. need pay the balance to Cochin Cement Ltd., after adjusting the price

A of clinker. During the course of inspection on 16.4.99 effected in the premises of Cochin Cement Ltd., at Ernakulam a copy of the report regarding cement marketing prepared by Sri S. R.Iyer, Senior Dy. General Manager, Cochin Cement Ltd, was recovered by Intelligence Squad No. 1, Ernakulam which reveals that cement manufactured by Cochin Cement Ltd. is fully marketed by B Associated Cement Co., in its brand name. It is also stated that the responsibility of clinker supply and also the marketing and selling the cement produced by Cochin Cement Ltd., lies with Associated Cement Co.

From the above, it is evident that Cochin Cement Ltd. is only a C manufacturer of cement and that too by using the raw material supplied by the Assessee with specified quality of ACC standard and entire cement manufactured are to be delivered at different depots of the Assessee. Only Assessee is marketing the cement and Cochin Cement Ltd. is not entitled to sell out even a single D bag of cement in the market over and above the programme given by the Assessee. Entire goods manufactured are delivered at Assessee's depots and is being marketed by Assessee in its brand name. And all the sales effected through depots of the Assessee have alone being assessed u/s 5(2) of KGST Act newly amended. Only those cement which has been manufactured by Cochin E Cement Ltd. and sold by Assessee in its brand name revealed and accounted in the Assessee's books of accounts has been brought to tax by this order. In other words, if Cochin Cement Ltd. is selling goods to others by itself, the question of coming those transaction into the books of accounts of the Assessee does F not arise at all. In the circumstances, the contention of the Assessee that Cochin Cement Ltd. is marketing cement to the customers by itself falls to the ground."

The said authority has further opined:-

"The question of brand name in this case arose in respect of goods G manufactured by Cochin Cement Ltd., and sold by the Assessee. It is, only for the sake of marketing that brand name is used by the Assessee in respect of cement manufactured by the Cochin Cement Ltd. A stranger Co., other than Assessee, the brand name is the brand name allotted to Associated Cement Co., under the Trade and Mercantile Act and those goods manufactured by a H

Co., other than Associated Cement Co., if sold by ACC under its brand name it will very well come under the purview of newly introduced section. Therefore, the contention that Cochin Cement Ltd., is brand name holder is a very feable augment. Sub.sec 2 of Sec. 5 reads "Notwithstanding anything contained in this Act in respect of goods other than tea sold in auction in the state, which are sold under a trade mark or brand name, the sale by the brand name holder or the trade mark holder within the state shall be the first sale for the purpose of this Act". The impugned transaction is a typical one coming under the above provision. The Cement sold by the Assessee is one which is manufactured by Cochin Cement Ltd. and from Cochin Cement Ltd Assessee purchased and cement so purchased sold under its brand name "ACC" and claimed exemption as second sale. But by virtue of above said provision, the Assessee's 2nd sale is treated as first sale."

3. Be it noted, the order of assessment has received the stamp of approval by the higher authorities as well as by the High Court. In this backdrop, we may proceed to analyse the statutory scheme. Section 5(1) of the Act, which is the charging Section, reads as follows:-

"Every dealer (other than a casual trade or agent of an non-resident dealer) whose total turnover for a year is not less than two lakh rupees and every casual trader or agent of a non-resident dealer, whatever be his total turnover for the year, shall pay tax on his taxable turnover of that year."

4. Mr. S. Ganesh, learned senior counsel appearing for the appellant, has laid immense emphasis on Section 5(2), which reads thus:-

"Notwithstanding anything contained in this Act in respect [of manufactured goods other than tea] which are sold under the trade mark or brand name, the sale by the brand name holder or the trade mark holder within the state shall be the first sale for the purposes of this Act."

5. The learned senior counsel would contend that the Cochin Cement Limited is the brand name holder of the present appellant and, therefore, the sale at its hand has to be treated as first sale for the purposes of this Act. In this regard, we think it appropriate to refer to Section 5(2A) and 5(2B) of the Act, which read thus:-

A "5(2A) Where a dealer liable to tax under sub-section (1), sells any goods to a trade mark or brand name holder for sale a trade mark or brand name, no such dealer shall be liable to pay tax under the said sub-section, if he produces before the assessing authority a declaration in the prescribed form from that trade mark or brand name holder.

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5(2B) Where a trade mark or brand name holder consumes the goods purchased by under-section 2(A), in the manufacture of other goods or uses or disposes of such goods in any manner otherwise than by way of sale within the State or despatches such goods to any place outside the State, otherwise than by way of inter-state sale, such trade mark or brand name holder shall be liable to pay tax on the turnover relating to such purchase for the year irrespective of the quantum of his total turnover."

C

6. On a conjoint reading of the aforesaid provisions, it is discernible that the Legislature has clearly expressed its intention to treat the sale by the brand name holder or the trade mark holder as the first sale. In the case of ***Cryptom Confectioneries Pvt. Ltd. Vs. State of Kerala***[1], Section 5(2A) came up for consideration and a two-Judge Bench, analysing the anatomy of the provision, has laid down thus:-

D

"The aforesaid sub-section commences with a non obstante clause i.e., irrespective of Section 5(1) of the Act or any other provision under the Act. The said sub-section speaks of a sale made by a brand name holder of the trade mark holder within the State. The Legislature deems that such a sale by the brand name holder or the trade mark holder shall be the first sale within the State. In our opinion this is the only possible construction that can be given to sub-section (2) of section 5 of the Act. Keeping in view the aforesaid provision, let us once again trace the transaction between the appellant and the licensee, namely, M/s. Bristo Foods Pvt. Ltd."

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7. On a scrutiny of the facts of the said case, it is manifest that the issue that squarely fell for consideration is whether the sale at the hands of the appellant therein would be treated as the first sale. Dealing with the stand of the appellant, this Court stated:-

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"According to the appellant/ assessee who is a branded name

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[1] (2014) 73 VST 498 (SC)

holder, M/s Bristo Foods Pvt. Ltd., has licence and is permitted to use the branded name "CRYTM". The licensee manufactures the goods, namely, confectioneries and effect supply of sale to the brand name holder. It is the brand name holder, who effects the sale of the confectioneries which are to be taxed as item 39 of the First Schedule to the Act within the State. Therefore, it is the brand name holder, who has to be pay tax under section 5(2) of the Act. If for any reason M/s Bristo Foods Pvt. Ltd. has paid the tax while effecting the supply of the manufactored commodity to the appellant/assessee, the appellant/assessee and M/s Bristo Foods Pvt. Ltd. can approach the authorities for claiming the refund of the tax paid by them."

8. On a careful appreciation of the aforesaid decision, we find the factual matrix therein is explicitly the same as is in the present case. However, Mr. S. Ganesh, learned senior counsel, would submit that in the said case, there has been no consideration of the concepts like brand name holder and trade mark holder and, therefore, the said decision should not be treated as a precedent. On the basis of the aforesaid submission, Mr. Ganesh contends that the said decision requires reconsideration and this Court should refer it to a larger Bench. Mr. Ganesh further submits that the ratio of the decision has to be understood in the background of the facts of the case and a decision is an authority for what is actually decides, not what logically follows from it. According to him, as the relevant provisions have not been construed, it cannot be regarded as a binding precedent.

9. Needless to say, the proposition canvassed by Mr. Ganesh neither invites a dispute nor calls for a debate. It is so the said proposition has been stated in ***Quinn v. Leathem***[2] which has been followed in ***Ambica Quarry Works v. State of Gujarat and others***[3]. But such is not the case here. First of all, in the earlier decision Section 5(2) was considered and a view has been expressed and, therefore, it cannot be said that a provision has not been referred to or not considered. Hence, it is a binding precedent.

10. The second issue, which has been ambitiously projected by Mr. Ganesh, is that the decision, even if a binding precedent, requires reconsideration as the relevant terms employed in Section 5(2), have not

[2] (1901) AC 495
[3] AIR 1987 SC 1073

A been appositely considered. What is limpid is that Section 5(2) is an expression of the Legislative intention that the sales at the hands of the brand name holder and trade mark holder would be treated as the first sale. On a perusal of the agreement entered into between the parties, it is not remotely suggestive of the fact that Cochin Cement Limited is a brand name holder or trade mark holder. Hence, the ambitious submission B of Mr. Ganesh has to melt as a glacier, and we say so. Ergo, the decision in ***Cryptom Confectioneries Pvt. Ltd.*** does not require reconsideration.

11. In view of the aforesaid analysis, the appeals, being devoid of merit, are dismissed. There shall be no order as to costs.

C Ankit Gyan Appeals dismissed.