Cardamom Planters ... vs Deputy Commissioner Of Sales Tax ... on 7 August, 1989

Equivalent citations: 1989 AIR 2202, 1989 SCR (3) 719, AIR 1989 SUPREME COURT 2202, 1989 (4) SCC 179 (1989) 3 JT 398 (SC), (1989) 3 JT 398 (SC), (1989) 3 JT 398 (SC) 1989 (4) SCC 179, 1989 (4) SCC 179

Author: Sabyasachi Mukharji

Bench: Sabyasachi Mukharji

PETITIONER:
CARDAMOM PLANTERS ASSOCIATIONBODINAYAKANUR

Vs.

RESPONDENT:
DEPUTY COMMISSIONER OF SALES TAX (LAW)BOARD OF REVENUE (TAXE

DATE OF JUDGMENT07/08/1989

BENCH:
RANGNATHAN, S.
BENCH:
RANGNATHAN, S.
MUKHARJI, SABYASACHI (J)

CITATION:
1989 AIR 2202 1989 SCR (3) 719
1989 SCC (4) 179 JT 1989 (3) 398
1989 SCALE (2)233

ACT:
The Kerala (Surcharge on Taxes) Act 1957--Section 3-Levy of surcharge on Sales Tax--Society composed of Cardamom growers-Whether liable for levy of Surcharge in respect of sales effected on behalf of members of society.

HEADNOTE:
The appellant--assesse is a Society registered under the Societies Registration Act. Its members are Cardamom growers in the State of Kerala. The Society conducts the business as an auctioneer under a licence issued to it under the Cardamom Act (Act 42 of 1965) read with the Cardamom (Licensing and Marketing) Rules, 1977, one of the Conditions of this licence being that as an auctioneer it shall not charge more

than one percent of the sale price as commission for the services rendered by it. It is common ground that the society has obtained the relevant licence and the individual members/growers of Cardamom had no such licence. The mode of the business was that planters left their produce with the Society and the Society after mixing the produce of all the growers, put the same to auction. The Society collected 1% as commission out of the sale proceeds from each of the planters. Besides cardamom, the Society sold other goods also.

The Kerala General Sales Tax Act 1963 imposes sales tax on every dealer whose total turnover for any year exceeds a specified sum which differed from year to year. In 1957 the Kerala Legislature introduced a surcharge on sales tax. Section 3 of the Kerala Surcharge on taxes Act 1957 prescribes that the tax payable under the Kerala General Sales Tax Act 1963, shall, in the case of a dealer whose turnover exceeds Rs.30,000 a year, be increased by a surcharge at the rate of 5% of the tax payable for that year. The provisions of the Kerala General Sales Tax Act were made applicable to the levy and collection of the said surcharge. Kerala Act 40 of 1976 stepped up the .rate of surcharge. The important feature of the latter Act is that unlike sales tax, which the dealer was entitled to get reimbursed from the purchaser of the goods sold by him, the surcharge had to be borne by the dealer himself, as

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Sub-Section (2) of Section 3 of the Surcharge Act prohibited the dealer from collecting the surcharge payable by him. Further the dealer might be liable for sales tax at different rates on the turnover of the different goods dealt with by him, he was to pay surcharge calculated on the amount of the sales tax payable by him in respect of his total dealings throughout the year.

The assessee's contention was that the Society sold goods only in its capacity as a commission agent for various principals and that on the general principle of agency, an agent like the assessee could be liable to surcharge only to the same extent as the principal whom it represented. On this plea, it could not be made liable for any surcharge in respect of the sales effected by it on behalf of the principals whose sales through the Society did not exceed the limits set out in Sec. 3(1) of the Surcharge Act.

The Tribunal had accepted the above contention of the appellant in the appeals against the assessment for the assessment years 1967-68 to 1969-70. The sales Tax assessments of the appellant for the assessment years 1973-74 to 1976-77 were completed by the Sales Tax Officer following the aforesaid order of the Tribunal. These assessments were set aside by the Dy. Commissioner of Sales Tax who took the view that the Society was liable to pay surcharge on its aggregate turnover in each of the assessment years. The appellant-assessee preferred appeals to the Appellate Tribu-

nal against the orders of the Deputy Commissioner. The Tribunal allowed the appeals following its order relating to the earlier assessment years. It accordingly set aside the orders of the Dy. Commissioner and restored the assessments made by the Sales Tax Officer for the assessment years 1973-74 to 1976-77. The Department moved revision petitions before the High Court against the order of the Appellate Tribunal. The High Court accepted the revision of the Department and set aside the order of the Tribunal. Hence these appeals by the assessee.

It was contended by the appellant (i) that the liability of an agent is co-extensive with that of principal and its liability cannot be higher than that of principal; (ii) that it is contrary to the principle underlying rule 9(k) of the Kerala General Sales Tax Act whereunder the turnover of sales or purchases made by a dealer through his agent in respect of which tax has been paid by the agent, is excluded from his taxable turnover and (iii) that the assessee has been placed in a financial predicament in that it has to pay he surcharge from out of the meagre commission of 1% limited by the statute.

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Dismissing the appeals, this Court,

HELD: The Surcharge Act does not envisage a fresh determination of the assessee's turnover at all. It prescribes nothing more than a simple arithmetical calculation of the prescribed percentage on the sales-tax determined as payable by the assessee for that year. It does not permit the computation of the surcharge, for whatever reason, on a part only of the tax determined as payable by the assessee for the year in question. It does not contemplate any dissection of the turnover into transactions on behalf of various principals by reference to their individual liability to pay either sales tax or surcharge. The contentions urged on behalf of the petitioner create a number of difficulties and or about a very simple procedure, evolved by the statute to meet the present situation- It brought the Commission agent within the definition of a dealer and made his aggregate turnover liable to tax. But it provided at the same time that the turnover so included and taxed in the hands of the agent should he excluded from the turnover of the principal, where he is separately assessed. [726C-D, 727E-F, 728C]

Rule 9(k) confers an exemption not on the Commission agent but on the Principal and does not help the assessee. [728D]

The rate of tax on any type of goods being uniform irrespective of the turnover, the turnover in regard to that item will get assessed only at one place: either in the hands of the principal or in the hands of the agent but not both. [728D]

A suggestion was mooted before us that the hardship to the assessee on this account is so substantial that this requirement should be held to he an unreasonable restriction

violating Article 19. This is a new contention involving investigation into facts which this Court is not inclined to permit the assessee to raise here for the first time. [728G-H]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 326164 of 1988.

From the Judgment and Order dated 3.7.1987 of the Kerala High. Court in T.R.C. Nos. 54 to 57 of 1983.

A.K. Ganguli and C.N. Sreekumar for the Appel- lant.

A.S. Nambiar and K.R. Nambiar for the Respond- ents.

The Judgment of the Court was delivered by RANGANATHAN, J. M/s. Cardamom Planters' Association, Bodinayakanur, (hereinafter referred to as 'the society') appeals from orders of the Kerala High Court upholding its liability to the levy of surcharge under the Kerala (Sur- charge on Taxes) Act, 1957, as amended in 1970. The Kerala General Sales Tax Act, 1963, imposes sales tax on every dealer whose total turnover for any year ex- ceeds a specific sum. The sum prescribed was initially Rs. 10,000 but was gradually stepped up to Rs.20,000 in 1971, Rs.25,000 in 1976, Rs.35,000 in 1980, Rs.50,000 in 1981, Rs.75,000 in 1982 and Rs.1 lakh in 1984. The expressions 'dealer', 'taxable turnover', 'total turnover' and 'turn- over' are defined in section 2 of the Act. The relevant portions of these definitions read as follows:

> Section 2 (viii) "Dealer" means any person who carries on the business of buying, selling, supplying or distributing goods, executing works contract, transferring the right to use any goods or supplying by way of or as part of any service, any goods directly or otherwise, whether, or for cash or for deferred payment, or for commission, remuneration or other valuable consideration and includes.
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> (b) XX XX
> XX
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> (c) a commission agent, a broker or a del credere agent or an auctioneer or any other merchantile agent, by whatever name called, who carries on the business of buying, sell-

ing, supplying or distributing goods (execut- ing works contract, transferring the right to use any goods or supplying by way of or as part of any service, any goods) on behalf of any principal."

Section 2 (xxiv) "taxable turnover" means the turnover on which a dealer shall be liable to pay tax as deter- mined after making such deductions from his total turnover and in such manner as may be

prescribed ...

Section 2 (xxvi) "total turnover" means the aggregate turnover in all goods of a dealer at all places of business in the State, whether or not the whole or any portion of such turnover is liable to tax .....

Section 2 (xx vii) "turnover" means the aggregate amount for which goods are either bought or sold, or supplied or distributed, by a dealer, either directly or through another, on his own ac- count or, on account of others, whether for cash or for deferred payment or other valuable consideration, provided that the proceeds of the sale by a person of agricultural or horti- cultural produce grown by himself or grown on any land in which he has an interest whether as owner, usufructuary mortgagee, tenant or otherwise,, shall be excluded from his turn- over.

Explanation (i)"Agricultural or horticultural produce" shall not include--

XXX XXX
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(ii) tea, coffee, rubber, cardamom or timber.

XXX XXX
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In 1957, the Kerala Legislature introduced a surcharge on sales tax. Section 3 of the Kerala Surcharge on Taxes Act, 1957 reads as follows:

> "The tax payable under the Kerala General Sales Tax Act, 1963, shall, in the case of a dealer whose turnover exceeds Rs.30,000 a year, be increased by a surcharge at the rate of five per centum of the tax payable for that year and the provisions of the Kerala General Sales Tax Act, 1963 shall, as the case may be, apply to the levy and collection of the said surcharge."

Kerala Act 40 of 1976 stepped up the rate of surcharge by amending section 3(1) to read as follows:

> (1) The tax payable under the Kerala General Sales Tax Act, 1963, shall, in the case of a dealer whose turnover--
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> (a) is not less than one lakh rupees but does not exceed ten lakhs rupees in a year, be increased by a surcharge at the ,rate of five per centum, and
>
> (b) exceeds ten lakhs rupees in a year, be increased by a surcharge at the rate of eight per centum, of the tax payable for that year and the provisions of the Kerala General Sales Tax Act, 1963, shall apply in relation to the said surcharge as they apply in relation to the tax payable under the said Act.

We may note here two important features of the latter Act. the first is that, unlike sales tax which the dealer is entitled to get reimbursed from the purchaser of the goods sold by him, the surcharge has to be borne by the dealer himself, for sub-section (2) of section 3 of the Surcharge Act prohibits the dealer from collecting the surcharge payable by him under sub-section (1) on pain of prosecution under sub-section (3). The second is that while a dealer might be liable to sales tax at different rates on the turnover of the different goods dealt in by him, he has to pay a surcharge calculated on the amount of the sales tax payable by him in respect of his total dealings throughout the year.

The assessee is a society registered under the Socie- ties' Registration Act. Its members are cardamom growers in the State of Kerala. Under the Cardamom Act (Act 42 of 1965), read with the Cardamom (Licensing & Marketing) Rules, 1977, no person is entitled to carry on business as auction- eer, dealer or exporter of cardamom except under and in accordance with the terms and conditions of a licence issued under the Act and Rules. One of the conditions of the grant of licence to a person as an auctioneer is that he "shall not charge more than one per cent of the sale price as commission for the services rendered by him". It is common ground that it is the society that has obtained the relevant licence for this purpose and that the individual cardamom growers who are members of the society have no such licence. The society conducts weekly cardamom auction sales at two places, Santhanpara and Bodinayakanur. The planters leave their produce with the society. The produce of all the growers is mixed together and put to auction. It is open to the planters to be present at the auction. If any planter desires to sell at a specific price he can express his opinion in advance to the association. If he wants to with- draw his lot put up for sale he could do so. Stitching charges and miscellaneous charges are to be paid to the society. The society collects 1% as commission out of the sale proceeds from each of the planters. Besides sale of cardamom, which constitutes the major part of its turnover, the society also sells other- goods such as gunnies, pesticides, sprayers, manure and the like.

It is contended on behalf of the appellants that the society has sold the goods only in its capacity as a commis- sion agent for various principals and that, on the general principles of agency, an agent like the assessee can be liable to surcharge only to the same extent as the principal whom it represents. Hence it cannot be made liable for any surcharge in respect of the sales effect by it on behalf of principals whose sales through the society do not exceed the limits set out in s. 3(1) of the Surcharge Act. The above contention was accepted by the Tribunal in the appeals against the assessments made on the society for the assessment years 1967-68 to 1969-70. The sales tax assess- ments of the society for 1973-74 to 1976-77 were completed by the 'Sales Tax Officer on the basis of the Tribunal's order. These assessments were, however, set aside by the Deputy Commissioner of Sales tax who was of the opinion that the society was liable to pay surcharge on its aggregate turnover in each of these years and he directed accordingly. The assessee preferred appeals to the Appellate Tribunal from the orders of the Deputy Commissioner. The Tribunal allowed the appeals by a common order dated 3rd November, 1982 following its order for the earlier assessment years. It set aside the revisional orders passed by the Deputy Commissioner and restored the assessments made by the Sales Tax Officer for the assessment years 1973-74 to 1976-77. The High Court, on revision by the Department, has set aside the orders of the Tribunal and restored the orders of the Deputy Commissioner. Hence these appeals.

We are unable to see any flaw in the High Court's rea- soning. The present assessee is clearly a dealer within the meaning of the statute, particularly in view of the inclu- sive part of the definition contained in clause (c). This is also the finding of the Tribunal and is also admitted by the assessee. Likewise, the provisions of S. 5 of the Sales Tax Act and S. 3 of the Surcharge Act, read with the definitions of the words 'turnover' 'taxable turnover' and 'total turnover', leave no doubt that the assessee's taxable turnover has to be determined by taking the aggregate price of all the goods sold by it. There is no statutory warrant for breaking-up the sales turnover of the assessee by reference to the turnover of the principals on whose behalf it deals. Also, a logical corollary of the assessee's argument would be that, even in respect of tax, the society can be assessed to sales tax only on the aggregate turnover relating to those of its principals who are liable to tax under section 5 of the Act. The High Court has rightly pointed out that the assessee had not claimed, for purposes of sales tax, that the turnover of goods dealt with by it on behalf of principals who did not have a taxable turnover should be excluded. If this be so, the High Court observes rightly, it is difficult to see on what principle the assessee can seek, in the matter of surcharge, the exclusion from its taxable turnover, of the turnover of principals who would not have been subjected to a surcharge if they had directly sold the goods entrusted by them to the assessee for sale. This is particularly so because the Surcharge Act does not envisage a fresh determination of the assessee's turnover at all. It prescribes nothing more than a simple arithmetical calcula- tion of the prescribed percentage on the sales tax deter- mined as payable by the assessee for that year. There can be no doubt about this figure. The statute does not permit the computation of the surcharge, for whatever reason, on a part only of the tax determined as payable by the assessee for the year in question.

On behalf of the assessee, objection has been taken to the levy of surcharge in the manner in which it has been levied on three grounds:

> 1. The general principle of law is that the liability of an agent is co-extensive with that of the principal and his liability to tax or surcharge, in respect of transactions put through on behalf of a principal, cannot be higher than that which the principal would have himself incurred had he directly sold the goods;
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> 2. It is contrary to the principle underlying rule 9(k) of the Kerala Sales Tax Rules under which "the turnover of sales or purchases made by a dealer through his agent in respect of which tax has been paid by the agent" is excluded from his taxable turnover;
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> 3. The assessee has been placed in a financial predicament because .all that the assessee can get out of the sales is the commission which cannot exceed 1% of the turn-

over and, since the statute has prohibited it from collecting any part of the surcharge from the purchasers or the principals the society, has to meet the surcharge liability out of its meagre commission earnings.

We are unable to see how these contentions can help the assessee to overcome the surcharge levy. The general principle of the law of agency, as rightly pointed out by the High Court, cannot prevail in the face of the statutory provisions. The assessee's contention, upheld by the Tribunal in its earlier order, is this:

> " ..... an agent is as many dealer as he has principals ... an agent can be assessed ... only on the aggregate of the turnover relating to principals who are liable to tax under section 5 and surcharge can likewise be levied only in respect of the turnover of the princi- pals where total turnover is not less than Rs.30,000."

This will also mean that, after the amendment of s. 3 of the Surcharge Act in 1976 that the agent will be liable to a surcharge at 8% in respect of the turnover on behalf of principals whose total turnover exceeds Rs. 10 lakhs, at 5% in respect of the turnover on behalf of principals having turnover of between Rs.1 lakh and Rs. I0 lakhs and no sur- charge in respect of the turnover on behalf of principals with turnovers of less than Rs. 1 lakh. This may be equita- ble but it clearly amounts to running a coach and pair through the statutory provisions. As already pointed out, these provisions clearly treat a commission agent as a dealer and make him liable to sales tax as well as surcharge in respect of his entire turnover. The Act does not contem- plate any dissection of this turnover into transactions on behalf of various principals by reference to their individu- al liability to pay either sales tax or surcharge. The question of statutory interpretation apart, it will easily be seen that the assessee's contention, which is equally applicable to the levy of both sales tax and sur- charge, would make the whole Act unworkable. A commission agent will be dealing on behalf of hundreds of constituents and each of his constituents may be dealing not only through him but also through several other agents. The transactions may not be confined to the territories of one State and may be spread over the entire Indian sub-continent. The sales through different agents may be of different goods attract- ing liability to tax at different rates. It may be that a principal whose sales through one commission agent may not come upto the limits of turnover for levy of tax or sur- charge may have been dealing through other agents and, if assessed directly, may have a turnover exceeding those limits. In this state of affairs, it will be absolutely impracticable, if not impossible, for a Sales Tax Officer having jurisdiction over one particular commission agent to make his sales tax assessment on the basis suggested by the assessee. That would require the collection of data, in the assessment of every commission agent, regarding the entire sales turnover of each of his constituents who may or may not be assessed by the officer assessing the particular commission agent. The assessment order on the commission agent would then have to be split up, as it were , into a number of parts each containing the determination of turn- over, tax and surcharge qua each of the constituents. These determinations require exercises which cannot be practically undertaken by an officer assessing a commission agent but can easily be undertaken by the different officers assessing the principals. That is why the statute evolved a very simple procedure to meet the situation. It brought the commission agent within the definition of a dealer and made his aggregate turnover liable to tax. But it provided at the same time that the turnover so included and taxed in the hands of the agent should be excluded from the turnover of the principal, where he is separately assessed. This is rule 9(k). Rule 9(k) confers an exemption not on the commission agent but on the principal and does not help the assessee. So far as sales tax is concerned, this rule provides com- plete protection against double taxation. The rate of tax on any type of goods being uniform

irrespective of the turn- over, the turnover in regard to that item will get assessed only at one place: either in the hands of the principal or in the hands of the agent but not both. The treatment of the commission agent as a dealer no doubt means that an agent will be taxed where his turnover exceeds the relevant limits even though some or all the principals who sold through him may have turnovers below those limits. But he is not really affected as he can collect the sales tax from the purchasers and thus reimburse himself.

The difficulty that has arisen in regard to the sur- charge stems principally from the requirement that the society has to pay it out of its funds and cannot reimburse itself either from its vendees or its principals. This difficulty has been further accentuated by the fact that, in regard to cardamom, its earnings are limited to a small commission which cannot be varied by it at its desire. These considerations cannot however justify a different interpre- tation as the statutory provisions are clear.

A suggestion was mooted before us that the hardship to the assessee on this account is so substantial that this requirement should be held to be an unreasonable restriction violating article 19. This is a new contention involving investigation into facts which we are not inclined to permit the assessee raise here for the first time. We may, howev- er, mention that during, the hearing of these appeals, we adjourned the appeals to enable the assessee to move the State in this behalf but we were told that its efforts were unsuccessful. We need hardly say that the assessee will be at liberty to pursue the matter, put forward its difficul- ties and seek to persuade the State Government to either reduce or dispense with the surcharge in regard to cardamom sales or to sanction an increase in the rate of commission chargeable by the assessee on its cardamom sales and, fail- ing such efforts, to challenge the validity of the levy for the future, if so advised, in appropriate proceedings. In the circumstances, we affirm the view taken by the High Court and dismiss these appeals. We, however, make no order as to costs.

Y. Lal Appeals dismissed.