Supreme Court of India
State Of Kerala & Anr vs Bulders Association Of India & Ors on 28 November, 1996
Author: B J Reddy
Bench: B.P. Jeevan Reddy, Suhas C. Sen

PETITIONER:
STATE OF KERALA & ANR.

Vs.

RESPONDENT:
BULDERS ASSOCIATION OF INDIA & ORS.

DATE OF JUDGMENT: 28/11/1996

BENCH:
B.P. JEEVAN REDDY, SUHAS C. SEN

ACT:

HEADNOTE:

JUDGMENT:

THE 28TH DAY OF NOVEMBER, 1996 Present:

Hon'ble Mr. Justice B.P. Jeevan Reddy Hon'ble Mr. Justice Suhas C. Sen A.S. Nambiar, Sr.Adv. and M.T. George. Adv. with him for the appellants.

K.M. Vijayan, Sr. Adv., K.V. Mohan, E.M.S. Anam, (Roy Abraham) Adv. for Ms. Baby Krishnan, Advs. with him for the Respondents J U D G M E N T The following Judgment of the Court was delivered:

J U D G M E N T B.P. JEEVAN REDDY, J.

Leave granted.

Section 5 of the Kerala General Sales Tax Act levies tax on sale or purchase of goods. Clause (iv) of sub-section (1) of Section 5 provides for levy of tax on transfer of goods involved in the execution of the works contract. Sub- clause (a) of clause (iv) of clause (iv) deals with a situation where "transfer is in the form of goods". IN such a case, the rates and the point of levy are specified in the First, Second or Fifth Schedule to the Act. Sub-clause (b) deals with a situation where the "transfer of

goods involved in the execution of works contract.....is not in the form of goods but in some other form". In such a case, the rate is specified in the Fourth Schedule to the Act. There are two provisos to clause (iv) which we need not refer to for the purpose of this case. Section 7 provides for payment of tax at compounded rates. We are concerned herein with sub- sections (7), (7A), (7B), 11 and 12 which were inserted along with certain other provisions by Act 23 of 1991 and Act 8 of 1992. Sub-section (7) provides:

> "Notwithstanding anything contained in sub-section (1) of Section 5, every contractor (engaged?) in civil works of construction of buildings, bridges, roads, dams and canals including any repair or maintenance of such civil works may at his option, instead of paying tax in accordance with clause (iv) of that sub-section, pay tax at the rate of two per cent on the whole amount of contract and which shall be deducted from the payments made by the awarder at every time including advance payment and shall remit to Government in such manner as may be prescribed".

Sub-section (7A) provides for a similar option to pay at a uniform specified rate in case of contractors not covered by sub-section (7). Sub-section (7A) reads:

> "(7A) Notwithstanding anything contained in sub-section (1) of section 5 every contractor not covered by sub-section 5 every contractor not covered by sub- section (7) may at his option, instead of paying tax in accordance with the said section, pay tax on the whole amount of contract at the rate of seventy per cent of the rates shown in the Fourth Schedule against such contract, less any tax paid by him under this Act on the purchase of any goods used in such contract, the transfer of which to the works contract was effected without any processing or manufacture;

[Proviso omitted as not relevant for the purpose of this case.] Sub-section (7B) provides that the tax under clause

(iv) of sub-section (1) of Section 5 and under sub-sections (7) and (7A) of this section shall be deducted from the payment made by the awarder at every time including advance payment and remit it to Government within seven days in the prescribed manner. Sub-section (ii) required every contractor who opts for payment of tax in accordance with sub-section (7) or sub-section (7A) of Section 7 to "file the returns showing all the contracts he has undertaken along with certificates from the awarders, showing the whole amount of contract and the details of tax deducted and remitted to Government". The sub-section further says that if the particulars so furnished are found to be correct and complete, the assessing authority may summarily make an assessment on that basis. Sub-section (12) provides that "after the close of the year or at the completion of the works contract and on receipt of final statement of accounts and return, if the tax on purchases is found to be in excess of the tax payable under the compounded rates, no refund of such excess tax paid shall be made".

Rules have been made under and pursuant to the aforesaid sub-sections. We are concerned with two such rules, viz., Rule 22A and Rule 30A. They read as follows:

"22A. Payment and recovery of tax in works contract:-

(1) In the case of works contract on which tax is payable in accordance with the provisions of the Act whether an option under sub-section (8) of Section 7 is made or not, the tax shall be paid either by the contract in accordance with the rules or by the awarder.

(2) Wherever payment is made by the awarder to the contractor either in lump sum for the whole contract or in installments, the awarder shall withhold an amount equal to the tax due in accordance with the provisions of the Act from such payment or payments and shall remit it to the assessing authority with whom the contract is registered, as a dealer and if he is not so registered to the assessing authority having jurisdiction over the place of works contract, within seven days of the amount so withheld along with a statement in Form No.21C.

30A(1). Notwithstanding anything contained in rule 30, every contractor engaged in civil works of construction of building, bridge, road or dam may opt to pay tax in accordance with sub-section (7) of section 7 in respect of each such contract.

Explanation--A composite and indivisible contract for construction of building shall be construed as a civil work of construction of building even if it involves works relating to electrical, sanitary, painting, flooring and the like."

[Sub-rules (2) to (7) - omitted as unnecessary].

[Rule 22-A has been substantially amended later in 1994 but we are not concerned with the amended rule. We will deal only with the rule as it stood when it was considered, and struck down, by the High Court.] The validity of sub-sections 7,(7A), (7B), 11 and 12 of Section 7 and of Rules 22A 30A of the Kerala General Sales Tax rules was challenged in a batch of writ petitions filed in the Kerala High Court by several builders/contractors. A learned Single Judge dismissed the writ petitions. On appeal, however, the Division Bench has struck down the aforesaid provisions on the ground that they are violative of clause (29A) of Article 366 of the Constitution All the writ petitioners, who are respondents in this batch of appeals, are contractors who have not opted to the composition system provided by sub-section (7) or (7A). This fact has been repeatedly ad expressly stated by Sri K.M. Vijayan, learned counsel for the respondents writ petitioners. If so, we are unable to appreciate how and why did they impugn the validity of the said sub-sections are the Rules made thereunder. It is obvious that respondents- writ petitioners are shifting their stand in this Court. But for their impugning the validity of the said provisions, the High Court would not have gone into or considered their validity. We have perused the judgment of the learned Single Judge dismissing the writ petitions and of the Division Bench allowing the writ appeals filed by respondents-writ petitioners. Both the Judgments clearly state that the writ petitioners challenged the validity of the above provisions in addition to challenging the validity of Section 5(1)(iv). Though the respondents-writ petitioners have not pressed their challenge to the validity of the above provisions before us, it has yet become necessary to consider the issue relating to their validity in view of the

fact that the said provisions have been struck down by the High Court, the correctness whereof is being questioned in these appeals preferred by the State of Kerala.

Clause (29A) was inserted in Article 366 of the Constitution by the Constitution [Forty-Sixth Amendment] Act, 1982. It reads:

> "(29A) `tax on the sale or purchase of goods' includes--
>
> (a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
>
> (b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract." The main ground upon which the High Court has held sub-

sections (7) and (7A) of Section 7 to be void is that they levy tax at two percent on the whole amount of the contract [sub-section (7)] or at a particular rate applied to the entire value of contract [sub-section (7A)] and not merely upon the value of the goods transferred in the course of execution of the works contract as contemplated by sub- clause (b) of clause (29A) in Article 366. The Court also noticed that the goods which are transferred in the course of execution of a works contract may be `declared goods'; they may be goods which are liable to be taxed under the Central Sales Tax Act; the goods so transferred may also be taxable under different Schedules to the Kerala Act which prescribe different rates. In such a situation, it is held, levying tax on the entire value of the contract means levy of tax contrary to the provisions of the Central Sales Tax Act and the Kerala General Sales Tax Act. It also means, the Court held, taking the non-taxable components of works contract, e.g., labour and services etc. For all these reasons, it is held, the said sub-sections are clearly beyond the legislative competence of the State legislature. With great respect, we are unable to agree. The first feature to be noticed is that the alternate method of taxation provided by sub-section (7) or (7A) 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 (7A). 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 (7A) 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 (2), (11) and (12) of Section 7 are incidental and ancillary to sub-sections (7) and (7A) 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 (7A) 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 theaters. 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 percent 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 percent 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 (7A) evolve a rough and ready method of assessment of tax and leave it to the contractor either to opt to 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 legislature in the matter of levy of entertainment tax has been upheld by this Court in Venkateswara Theatre v. State of Andhra Pradesh [1993 (3) S.C.C.677]. 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 (29A) of article 366 either. The Constitution does not preclude the legislature from evolving such alternate. Simplified and hasle-free method of assessment of tax payable, making it optional for the assessee. The object of sub-sections (7) and (7A) is the same as that or Section 5(1)(iv); it is only that they follow a different route to arrive at the same destination. Several taxing enactments contain provisions for composition of tax liability which may sometimes be in the interest of both the Revenue and the assessees. It must also be remembered that in the field of taxation, the legislature must be allowed greater `play in the joints', as it is called. Allowance must also be made for "trial and error" by the legislature, as has been held in R.K. Garg v. Union of India [1981 (4) S.C.C.675]:

"Law relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been s aid by no less a person than Holmes, J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straight jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The Court should feel more inclined to give judicial deferene to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved.....The Court must always remember that `legislation is directed to practical problems, that the economic mechanisms is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry' that exact wisdom and nice adaptation of remedy are not always

possible and that `judgment is largely a prophecy based on meagre and uninterpreted experience'. Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The Courts cannot, as pointed out by the United States Supreme Court in Secy. of Agriculture v. Central Roig, Refining Co., (1950) 94 L.ed.3811, be converted into tribunals for relief from such crudities and inequities..... If any crudities, inequities or possibilities of abuse come to light the legislature can always step in and enact suitable amendatory legislation.

That is the essence of pragmatic approach which must guide and inspite the legislature in dealing with complex economic issues."

In our opinion, the above passages from the judgment of the Constitution Bench furnish a complete answer to the objections against the validity of the said provisions.

Accordingly, the judgment of the Division Bench declaring sub-sections (7), (7A, (7B), 11 and 12 of Section 7 as unconstitutional and void, is liable to be set aside and is set aside herewith.

In these appeals, Sri Vijayan concentrated his attack upon the validity of Rules 22A and 30A alone. His submission is that Rule 22A provides for deduction of tax at source even in respect of amounts payable to contractors who have not chosen to opt to the composite method of taxation provided by sub-section (7) or (7A) of Section 7. He submits that such a provision providing for collection of tax even before the making of an assessment is contrary to the Act besides being unreasonable and arbitrary. We are of the opinion that this contention is based upon a misapprehension of the scope and purpose of Rule 22-A. Sub-rule (1) of Rule 22A says that whether a contractor opts to be governed by sub-sections (7) and (7A) or whether he is governed by Section 5(1)(iv) of the Kerala Act, tax shall be paid either by the contractor in accordance with the Rules or by the person who awards the contract. No one can have any objection to sub-rule (1) since it only says that where tax is payable, it shall be paid either by the contractor or by the awarder according to law. Now, coming to sub-rule (2), it is equally applicable to all the contractors whether they are governed by Section 5(1)(iv) or by sub-section (7) or (7A) of Section 7. What the sub-rule says is that wherever payment is made by the awarder to the contractor, "the awarder shall withhold an amount equal to the tax due" and remit the same to the assessing authority. It is evident that sub-rule (2) does not provide for deduction of tax at source like the one provided by Section 194-C of the Income Tax Act, 1961. Sub-rule (2) merely says that where tax is due from a contractor, the awarder shall withhold an amount equal to the due while making payment to the contractor. In the case of a contractor who has not opted for the alternate method of taxation and is governed by Section 5(1)(iv), this sub-rule means that where tax is due from him according to law and the awarder is apprised of the said fact, the awarder comes under an obligation to deduct the amount equal to the tax due and remit it to the assessing authority. It needs to be emphasised that the sub-rule speaks of "tax due". Of course, so far as the contractor who has opted for the alternate method of taxation under sub-section (7) or (7A) of Section 7 is concerned, the deduction at the prescribed rate would be at the time of any and every payment by awarder to him, for in his case tax is due at the flat rate prescribed in the relevant

sub-section even at the inception of the contract and at all times, until the tax due is satisfied. We fail to see how can any objection be taken to the sub-rule. Sub-rule (3) is really explanatory in nature. It says that notwithstanding anything contained in sub-rule (2), any contractor who pays tax regularly in accordance with the Rules, shall be entitled to payment of the full contract amount without any deduction by the awarder, if he produces a certificate issued by the assessing authority to the effect that no tax is due from him. All these provisions are designed to ensure due realisation of the tax due. No exception can be taken thereto. The attack upon Rule 30-A is equally untenable. It merely provides the procedure according to which the option to come under the alternate method of taxation provided by sub-section (7) or (7A) of Section 7 is to be exercised. The Division Bench was, therefore, in error in declaring the said rules as invalid.

For the above reasons, the appeals are allowed and the writ petitions filed by the respondents in the High Court are dismissed. The respondents shall pay costs of the appellants, which are assessed at Rupees twenty thousand consolidated.