M/S MASTER CABLES PVT. LTD. A

*v.*

STATE OF KERALA

MAY 9, 2007

[S.B. SINHA AND MARKANDEY KATJU, JJ.] B

*Kar Vivad Samadhan Scheme, 1998 (framed under the Finance Act, 1998):*

*Enactment of—Purpose—Is to achieve recovery of tax arrears by way of settlement.* C

*ss. 90(3), 90(1), 87(h) & 87(j)—Applicability of the Scheme, to State sales tax legislations—Held: The Scheme must be read as limited to those laws which the Parliament has the legislative competence to eanct and not which falls within the exclusive legisaltive field of a State, save and except where expressly so stated or inferred by necessary implicatio—If the contention that the provisions of the Scheme would also apply to tax laws created by the Stae is accepted, it being beyond the legislative competence, would amount to clourable piece of legislation—Consitution of Inida, 1950—Articles 246 and 286; Seventh Schedule, List II, Entry 54.* D E

**Aeppellant is engaged in business of manufacture and sale of insulated electrical cable. It is registered under the Kerala General Sales Tax Act, 1963. Assessment proceedings in respect of the Appellant were completed relying upon or on the basis of the books of accounts maintained by it. An inspection, however, was carried out in the premises of the Appellant on which certain amount of unacounted production and sale of goods was found. Appellant took recourse to the provision of the Kar Vivad Samadhan Scheme, 1998 framed under the Finnce Act, 1998. Declaration made by it thereunder was accepted. Declaration made by it thereunder was accepted.** F

**The question which arose for consideration is as to whether by reason os sub-section (3) of Section 90 of the Kar Vivadh Samadhan Scheme, the State legislation relating to the imposition of the sales tax by re-opening an assessment under the State Sales Tax laws shall be affected, having regard to Article 246 of the Constitutions of India.** G

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A It is contended by the appellant that having regard to the provisions of Sub-section (3) of Section 90 of the Kar Vivad Samadhan Scheme, the term "any other law for the time being in force" therein must be given a wide meaning so as to cover not only the direct tax or indirect tax envisaged thereunder but also the Sales Tax laws of the State in the light of the provisions of Clause (3) of Article 286 of the Constitution of India and sub-clauses (c) B and (d) of Clause 29 A of the Article 366 thereof.

Dismissing the appeal, the Court

HELD: 1.1. The Kar Vivad Samadhan Scheme was enacted with a view to acheive the purpose mentioned therein, viz., recovery of tax arrears by way C of sttlement. It applies provided that conditions precedent therefor are satisifed. "Immunity" is provided under Section 91 of the Scheme. What is conclusive is the order passed under Sub-section (1) of Section 90 of the Scheme determining the sum payable under the Scheme. The terms "direct tax enactment" or "indirect tax enactment" or "any other law for the time D being in force" therein refer only to those statutes under which the order had been passed. Immunity is in respect of instiution of any proceeding for prosecution of any offence under direct tax enactment or indirect tax enactment or from imposition of pentaly under any of such enactments. The terms "direct tax enactment" and "indirect tax enactment" have been defined under Section 87(h) and 87(j) of the Scheme. Admittedly, the case of the E appellant does not come within the purview thereof.

[Paras 7, 8, 9 and 10] [223-D, F; 224-A-B; E]

1.2. Amplitude of the provisions of the Scheme having been extended only to the enactments made by the Parliament, having regard to the F constitutional Scheme contained in Article 246 of the Constitution of India, the same cannot be extneded to assessment of sales tax under a State legislature. The legislative field to enact a law relating to sales tax is within the exclusive domain of a State Legislaure in terms of Entry 54, List II of the Seventh Schedule of the Constitution of India. The power and jurisdiction of the assessing authorities as also other authorities is required to be exercised G in terms of the provisions of the said Act. Power to tax carries with it power to do all things which are necessary and ancillary therefor including taking preventive measures in regard to evasion of tax. [Para 10] [224-E-G]

1.3. Once it is found that a statutory authority had the jurisdiction to reopen a proceeding or set aside the order of the assessing authority, only H the higher authorities can interfere therewith. Only because the appellant

**had taken recourse to the Scheme, the same would not attract either Sub-Section (3) of Section 90 of the Scheme or Section 91 thereof so as to cover a subject which is within the exclusive domain of the State Legislature. In that sense, the said Scheme must be read as limited to those laws which the Parliament has the legislative competence to enact and not which falls within the exclusive legislative field of a State, save and expect where expressly so stated or inferred by necessary implication. A Legislature is presumed to enact a law only within its domain of field of legislation. If the contention that the provisions of the Scheme would also apply to tax laws created by the State is accepted, it being beyond the legislative competance, would amount to colourable piece of legislation. [Para 11] [224-G-H; 225-A-B]**

**1.4. Reliance placed on Clauses (3) of Article 286 of the Constitution of India, is misplaced. In exercise of the said power, the Parliament has the requisite legislative competance but therefor a specific law is required to be enacted. The Act in question neither is referable to Clause (3) of Article 286 of the Constitution of India nor Sub-clauses (c) and (d) of Clause (29A) of Article 366 thereof. It provides only for tax on the sale or purchase of goods. [Para 12] [225-C-F-G]**

*Bengal Immunity Company Limited* **v.** *State of Bihar and Ors.,* **[1955] 2 SCR 603;** *Sushila Rani (Smt)* **v.** *Commissioner of Income Tax and Anr.,* **[2002] 2 SCC 697;** *Hira Lal Hari Lal Bhagwati* **v.** *CBI New Delhi,* **[2003] 5 SCC 257;** *State CBI* **v.** *Sashi Balasubramanian and Anr.,* **(2006) SCALE 541 and** *Alpesh Navinchandra Shah* **v.** *State of Maharashtra and Ors.,* **[2002] 2 SCC 777, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2407 of 2007.

From the Final Judgment and Order dated 3.08.2006 of the High Court of Kerala at Ernakulam in St. Revision Nos. 79 and 80 of 2006.

Huzefa Ahmadi, Ejaz Maqbool, Nakul Dewan, Vikash Singh and Taruna Singh for the Appellant.

T.L.V. Iyer, P.V. Dinesh and K.B. Sandeep for the Respondent.

Mohan Parasaran, ASG., D.L. Chidananda and B.V. Balramdas for UOI.

The Judgment of the Court was delivered by

**S.B. SINHA, J.** 1. Leave granted.

A 2. Legality of a notice issued by the Deputy Commissioner of Commercial Taxes, Kollam *vis-a-vis* the provisions of the Kar Vivad Samadhan Scheme, 1998 (for short "the Scheme") framed under the Finance Act, 1998 is in question in this appeal which arises out of a judgment and order dated 3.08.2006 passed by a Division Bench of the Kerala High Court.

B 3. Appellant is engaged in business of manufacture and sale of insulated electrical cable. It is registered under the Kerala General Sales Tax Act, 1963 (for short "the Act"). Assessment proceedings in respect of the assessment years 1995-96 and 1996-97 were completed relying upon or on the basis of the books of accounts maintained by it. An inspection, however, was carried out C in the premises of the appellant. Certain amount of unaccounted production and sale of goods was found.

4. Appellant admittedly took recourse to the provisions of the said Scheme. Declaration made by it thereunder was accepted.

D By an order dated 14.01.2003, the earlier assessment order was set aside. Appellant filed an appeal before the Kerala Sales Tax Appellate Tribunal. The matter was remitted to the Deputy Commissioner for its re-examination. By an order dated 20.05.2003, the assessment in respect of the Assessment Year 1996-97 was set aside. The said authority directed re-assessment for the year 1995-96 by an order dated 7.11.2003. Questioning the said orders, appeals E were filed by the appellant before the Tribunal which by reason of a common judgment dated 21.12.2005 were dismissed. Two Sales Tax revisions wee filed thereagainst before the High Court, which by reason of the impugned judgment have been dismissed.

F 5. Before we embark upon the contentions raised by the appellant, we may notice that by an order dated 15.01.2007, this Court observed:

> "The question which inter alia arises for consideration in this petition is as to whether by reason of sub-section (3) of Section 90 of the Kar Vivadh Samadhan Scheme, 1998, as contained in the Finance Act, 1998, the State legislation relating to the imposition of the sales tax G by re-opening an assessment under the State Sales Tax laws shall be affected or not, having regard to Article 246 of the Constitution of India. With a view to pronounce an authoritative judgment on the said issue, we are of the opinion that the Union of India should also be impleaded as a party."

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Pursuant thereto Union of India was impleaded as a party herein. It has filed a counter-affidavit.

6. Mr. Huzefa Ahmadi, learned counsel appearing for the appellant, in support of this appeal, submitted:

(i) Having regard to the provisions of Sub-section (3) of Section 90 of the Scheme, the term "any other law for the time being in force" must be given a wide meaning so as to cover not only the direct tax or indirect tax envisaged thereunder but also the Sales Tax laws of the State in the light of the provisions of Clause (3) of Article 286 of the Constitution of India and Sub-clauses (c) and (d) of Clause (29A) of Article 366 thereof.

(ii) In any event, the purported exercise of suo motu revisional power by the Deputy Commissioner must be held to be wholly without jurisdiction.

7. The Scheme was enacted with a view to achieve the purposes mentioned therein, viz., recovery of tax arrears by way of settlement. It applies provided the conditions precedent therefor are satisfied. Sub-section (3) of Section 90 of the Scheme, whereupon reliance has been placed, reads as under:

> "(3) Every order passed under sub-section (1), determining the sum payable under this Scheme, shall be conclusive as to the matters stated therein and no matter covered by such order shall be reopened in any other proceeding under the direct tax enactment or indirect tax enactment or under any other law for the time being in force."

8. "Immunity", however, is provided under Section 91 of the Scheme, which reads as under:

> "91. Immunity from prosecution and imposition of penalty in certain cases.
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> The designated authority shall, subject to the conditions provided in section 90, grant immunity from instituting any proceeding for prosecution for any offence under any direct tax enactment or indirect tax enactment, or from the imposition of penalty under any of such enactments, in respect of matters covered in the declaration under section 88."

A 9. What is conclusive is the order passed under Sub-section (1) of Section 90 of the Scheme determining the sum payable under the Scheme. The terms "direct tax enactment" or "indirect tax enactment" or "any other law for the time being in force" refer only to those statutes under which the order had been passed. Immunity, as noticed hereinbefore, is in respect of institution of any proceeding for prosecution of any offence under direct tax enactment B or indirect tax enactment or from imposition of penalty under any of such enactments. The terms "direct tax enactment" and "indirect tax enactment" have been defined under Sections 87(h) and 87(j) of the Scheme, which read as under:

C "(h) "direct tax enactment" means the Wealth-tax Act, 1957 (27 of 1957) or the Gift-tax Act, 1958 (18 of 1958) or the Income-tax Act, 1961 (43 of 1961) or the Interest-tax Act, 1974 (45 of 1974) or the Expenditure tax Act, 1987 (35 of 1987);

(j) "indirect tax enactment" means the Customs Act, 1962 (52 of 1962) D or the Central Excise Act, 1944 (1 of 1944) or the Customs Tariff Act, 1975 (51 of 1975) or the Central Excise Tariff Act, 1985 (5 of 1986) or the relevant Act and includes the rules or regulations made under such enactment;"

10. Admittedly, the case of the appellant does not come within the E purview thereof. Amplitude of the provisions of the Scheme having been extended only to the enactments made by the Parliament, having regard to the constitutional Scheme contained in Article 246 of the Constitution of India, in our opinion, the same cannot be extended to assessment of sales tax under a State legislature. The legislative field to enact a law relating to sales tax is within the exclusive domain of a State Legislature in terms of Entry 54, List F II of the Seventh Schedule of the Constitution of India. The power and jurisdiction of the assessing authorities as also other authorities is required to be exercised in terms of the provisions of the said Act. Power to tax, it is well-settled, carries with it power to do all things which are necessary and ancillary therefor including taking preventive measures in regard to evasion G of tax.

11. Once it is found that a statutory authority had the jurisdiction to reopen a proceeding or set aside the order of the assessing authority, only the higher authorities can interfere therewith. Only because the appellant had taken recourse to the Scheme, the same, in our opinion, would not attract H either Sub-section (3) of Section 90 of the Scheme or Section 91 thereof so

as to cover a subject which is within the exclusive domain of the State Legislature. In that sense, the said Scheme must be read as limited to those laws which the Parliament has the legislative competence to enact and not which falls within the exclusive legislative field of a State, save and except where expressly so stated or inferred by necessary implication. A Legislature is presumed to enact a law only within its domain of field of legislation. If the contention that the provisions of the Scheme would also apply to tax laws created by the State is accepted, it being beyond the legislative competence, would amount to colourable piece of legislation.

12. Reliance placed on Clause (3) of Article 286 of the Constitution of India, in our opinion, is misplaced. The said provision reads, thus:

> "(3) Any law of a State shall, in so far as it imposes, or authorises the imposition of,—
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> (a) a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce; or (b) a tax on the sale or purchase of goods, being a tax of the nature referred to in sub-clause
>
> (b), sub-clause (c) or sub-clause (d) of clause (29A) of article 366, be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify."

The said provision had to be enacted in view of the decision of this Court in *Bengal Immunity Company Limited.* v. *State of Bihar and Ors.*, [1955] 2 SCR 603.

Indisputably in exercise of the said power, the Parliament has the requisite legislative competence but therefor a specific law is required to be enacted. The Act in question neither is referable to Clause (3) of Article 286 of the Constitution of India nor Sub-clauses (c) and (d) of Clause (29A) of Article 366 thereof. It provides only for tax on the sale or purchase of goods.

13. Strong reliance has been placed by *Mr. Ahmadi on Sushila Rani (Smt)* v. *Commissioner of Income Tax and Anr.*, [2002] 2 SCC 697 and Hira Lal Hari Lal Bhagwati v. *CBI, New Delhi,* [2003] 5 SCC 257.

In *Sushila Rani* (supra), a question arose as to whether the authority had a power to correct clerical or arithmetical error. It was held:

A "10. The appellant in the course of the declarations filed specifically stated that any adjustment of refunds towards tax arrears of the appellant by the Department in the earlier years without following the mandatory procedure of Section 245 of the Act would still remain as tax arrears for the purpose of KVSS and it is on that basis the declarations were accepted by the Department. Having accepted the claim of the appellant on that basis, it will not be permissible for the respondents now to turn around and take a different stand.

11. Even assuming that the authorities under KVSS have inherent powers to correct an error of clerical or arithmetical nature, the same should be so obvious, apparent or patent as not to admit of any debate or discussion. In this case, the respondents have to establish adjustment of refund, which had been made against arrears after due notice to the appellant and which is denied by her, and hence admits of investigation of facts and serious debate on the question. Such an error cannot be stated to be an inadvertent error of clerical or arithmetical nature, so plain as to be rectified without much ado."

*Sushila Rani* (supra) has been followed in *Hira Lal Hari Lal Bhagwati* (supra) wherein it has been stated:

"18. The present case comes under the tax arrears payable under the indirect tax enactment. Section 89 of the Kar Vivad Samadhan Scheme, 1998 deals with particulars to be furnished in declaration and Section 90 of the Scheme deals with the time and manner of payment of tax arrears. Sub-section (2) of Section 90 provides that the declarant shall pay the sum determined by the Designated Authority within thirty days of the passing of an order by the Designated Authority and intimate the fact of such payment to the Designated Authority along with proof thereof and the Designated Authority shall thereupon issue the certificate to the declarant. Sub-section (3) of Section 90 of the said Scheme provides that every order passed under sub-section (1), determining the sum payable under this Scheme shall be conclusive as to the matters stated therein and no matter covered by such order shall be reopened in any other proceeding under the direct tax enactment or indirect tax enactment or under any other law for the time being in force . Sub-section (4) of Section 90 of the said Scheme provides that where the declarant has filed an appeal or reference or a reply to the show-cause notice against any order or notice giving rise to the tax

arrear before any authority or tribunal or court, then, notwithstanding anything contained in any other provisions of any law for the time being in force, such appeal or reference or reply shall be deemed to have been withdrawn on the day on which the order referred to in sub-section (2) is passed.

27. On a reading of the judgment in the case of Sushila Rani 1 , it is clear to us that if an assessee takes the option under this Scheme, he obtains immediate immunity under any proceeding under any and all laws in force. As such the present proceedings initiated under Section 120-B read with Section 420 of the Indian Penal Code are bad and ought to have been quashed with immediate effect."

We need not go into the correctness or otherwise of the said decisions.

14. We may, however, notice that in *State, CBI* v. *Sashi Balasubramanian & Anr.,* (2006) 10 SCALE 541, *Hira Lal Hari Lal Bhagwati* (supra) was distinguished by this Court inter alia opining that the prosecution was launched after a declaration was made.

In *Sashi Balasubramanian* (supra), this Court held:

"In any view of the matter, an immunity is granted only in respect of offences purported to have been committed under direct tax enactment or indirect tax enactment, but by no stretch of imagination, the same would be granted in respect of offences under the Prevention of Corruption Act. A person may commit several offences under different Acts; immunity granted in relation to one Act would not mean that immunity granted would automatically extend to others. By way of example, we may notice that a person may be prosecuted for commission of an offence in relation to property under the Indian Penal Code as also under another Act, say for example, the Prevention of Corruption Act. Whereas charges under the Prevention of Corruption Act may fail, no sanction having been accorded therefor, the charges under the Penal Code would not."

15. The question came up for consideration yet again before this Court in *Alpesh Navinchandra Shah* v. *State of Maharashtra and Ors.,* [2007] 2 SCC 777 wherein *Hira Lal Hari Lal Bhagwati* (supra) was distinguished by this Court stating:

"At the time of hearing, learned Counsel for the petitioner relied upon the case of *Hiralal Harilal Bhagwati* v. *C.B.I* (supra). According to learned Counsel for the respondent the said relied upon case was a case of duty evasion and appellant therein was booked by customs authority and therefore, customs duty was paid under KVSS and further in the criminal proceedings under Section 120B and 420 IPC initiated by CBI was quashed by this Court. Therefore, it is admitted that the above cited case is different from the present case as in the case in hand the detention order was issued under the COFEPOSA Act against the petitioner with objective to prevent to the nefarious activities in future. Therefore, the immunity granted by the Settlement Commission from fine, penalty and prosecution under the provisions of the Customs Act and IPC have no bearing on the order of detention passed under the COFEPOSA Act. Therefore, it is contended that the detention order issued by the Detaining Authority is very much legal and the same needs to be upheld.

The Settlement Commission was constituted with the aim and objective of settling the tax evasion issues and by virtue of disclosure by tax offender; they gain immunity from fine/penalty which is otherwise mandatory under the provisions of tax laws. But, such opportunity is only extended to one tax offender but not available to habitual smugglers. For the persons involved in smuggling activities, other than the provisions made for the prosecution under the Customs Act, 1962, an equal deterrent is emphasized under the provisions of the COFEPOSA Act, 1974 i.e. provisions for preventive detention. Such preventive detention prohibits smugglers from indulging in further smuggling activities. In the present case the investigation reveals the consistent involvement of the petitioner-detenue and his brother Kamlesh Navinchandra Shah in smuggling activities, therefore, the Detaining Authority on the basis of evidence placed before him felt it necessary to issue the detention orders in respect of both the detenues in order to prevent them from pre-judicial activities in future. Accordingly the impugned order is justifiable in the eyes of law and present Writ Petition deserves to be dismissed."

For the reasons aforementioned, the said decisions cannot be said to have any application so far as the first contention of Mr. Ahmadi is concerned.

16. The second contention of Mr. Ahmadi, in our opinion, is also

without merit. Appellant can raise all contentions before the authorities. The purported finding was arrived at for the purpose of resorting to the provisions of Section 35 of the Act which reads as under:

> "35. Powers of revision of the Deputy Commissioner *suo motu*—(1) The Deputy Commissioner may, of his own motion, call for and examine any order passed or proceedings recorded under this Act by any officer or authority subordinate to him other than an Appellate Assistant Commissioner which in its opinion is prejudicial to revenue and may make such enquiry or cause such enquiry to be made and, subject to the provisions of this Act, may pass such order thereon as he thinks fit.
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> (2) The Deputy Commissioner shall not pass any order under sub-section (1) if,
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> (a) the time for appeal against the order has not expired;
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> (b) the order has been made the subject of an appeal to the Appellate Assistant Commissioner or the Appellate Tribunal or of a revision in the High Court; or
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> (c) more than four years have expired after the passing of the order referred to therein.
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> 2A. Notwithstanding anything contained in sub-section (2), the Deputy Commissioner may pass an order under sub-section (1) on any point which has not been decided in an appeal or revision referred to in clause (b) of sub-section (2), before the expiry of a period of one year from the date of the order in such appeal or revision or before the expiry of the period of four years referred to in clause (c) of that sub-section whichever is later.
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> (3) No order under this Section adversely affecting a person shall be passed unless that person has had a reasonable opportunity of being heard."

17. We do not see any reason as to why the observations contained therein shall not be treated to be *prima facie* ones and, thus, all contentions of the parties shall remain open.

18. We have no doubt, in our mind, that the appropriate authority would consider the matter with an open mind irrespective of any observations made

A not only be open to the appellant to raise all contentions, they would also be at liberty to produce all relevant materials before the assessing authority to show that the orders of assessment passed earlier were legal and no deviation therefrom is warranted.

19. This appeal, thus, being devoid of any merit, is dismissed with the B aforementioned observations. In the facts and circumstances of this case, however, there shall be no order as to costs.

B.B.B. Appeal dismissed.