IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.8078-8080 OF 2010

NILKAMAL LIMITED (FORMERLY KNOWN AS NILKAMAL PLASTICS LIMITED) .....Appellant(s)

Vs.

STATE OF KERALA ETC. .....Respondent(s)

WITH

CIVIL APPEAL NOS.10696-10697 OF 2011

O R D E R

The Kerala High Court by the impugned judgment reversed an order of the Kerala Sales Tax Appellate Tribunal (hereinafter referred to as "the Tribunal"). The Tribunal had reversed the revisional order made against the assessee and held that the transaction whereby M/s Kaveri Pet and Polyforms Pvt. Ltd. (hereinafter referred to as "Kaveri") sold plastic moulded furniture to it ("the assessee") constituted point of first sale and, therefore, the further sale by the appellant-assessee, did not fall within the mischief of Section 5(2) of the Kerala General Sales Tax Act (hereinafter referred to as "the KGST Act").

The essential facts are that Nilkamal Crates and

Containers which owns the trade mark and brand "Nilkamal" by two different licensing arrangements (in this case an agreement entered into with - Kaveri on 6th December, 2001) had authorized the right to use the brand for the purpose of manufacture and sale of its products. Kaveri on 02.04.2001 entered into a Memorandum of Understanding with the present assessee (hereinafter referred to as "N.L."). Kaveri was selling the entire production of furniture to it (i.e. the assessee). The assessee is registered as a trading dealer under the KGST Act. Its return was accepted and its contention that since the entire production were sold by Kaveri to it constituted the first sale and since both Kaveri and the assessee were holders of the brand, the first sale for the purpose of Section 5(2) of the KGST Act was the one by which Kaveri sold the goods, was accepted. The revisional authority differed; and, exercising powers under Section 35 of the KGST Act set aside the assessment order. Similarly for the next 3 assessment years the completed assessments were sought to be reopened. The assessee approached the Tribunal which accepted its contentions.

The Kerala High Court by its impugned judgment, considered the Memorandum of Understanding dated 2.4.2001 entered into between Kaveri and the assessee. It also took note of the fact that sale of products by Kaveri were exempted for the relevant year. After noticing that in terms of the arrangement between Kaveri and the assessee, the former was obliged to sell all the furniture produced by it

to the assessee, the High Court concluded that both Kaveri and the assessee being holders, the sale by Kaveri to the assessee did not constitute first sale. The High Court was also impressed by the fact that Kaveri's sales were exempted for the relevant period.

Section 5 of the of the KGST Act as it stood during the relevant period is extracted below:

> ***"5. Levy of tax on sale or purchase of goods***
>
> ***(1) Every dealer (other than a casual trader or agent of a 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,-***
>
> > ***(i) in the case of goods specified in the First or Second Schedule, at the rates and only at the points specified against such goods in the said Schedules;***
> >
> > ***(ii) [Omitted]***
> >
> > ***(iii) In the case of transfer of the right to use any goods for any purpose (whether or not for a specified period) at the rate of eight per cent at all points of such transfer;***
> >
> > ***(iv) (a) In the case of transfer of goods involved in the execution of works contract where transfer is in the form of goods at the rates and at the points specified against such goods in the First, Second or Fifth Schedule;***
> >
> > ***(b) In the case of transfer of goods involved in the execution of works contract (where the transfer is not in the form of goods but in some other form) specified in***

the Fourth Schedule, at the rate specified against such contract in the said Schedule:

PROVIDED that no tax is payable in respect of the turnover of goods the transfer of which was affected without any processing or manufacture on which tax was levied under clause (i) on any earlier sale in the State or which are exempted from tax and for goods coming under the Fifth Schedule, no tax specified for the first sale is payable, on which tax was levied in any earlier sales in the State:

PROVIDED FURTHER that tax payable in respect of turnover of goods coming under the Second Schedule the transfer of which was effected without any processing or manufacture shall not exceed the rate and only at the points specified against such goods in the said Schedule.

(v) in the case of goods specified in the Fifth Schedule at the rates and at the two points specified against such goods in the Schedule:

PROVIDED that where there are no two points of sale in the State for any goods coming under the Fifth Schedule and the first sale is to a person other than a registered dealer, the rate specified in column (8) of that Schedule shall apply to such sales:

PROVIDED FURTHER that the registered dealer effecting the last sale within the State to a person other than a registered dealer shall pay tax at the rates shown in column (6) or in column (8), as the case may be, of the Fifth Schedule irrespective of his turnover:

PROVIDED ALSO that where a registered dealer, after purchasing the goods on payment of the tax mentioned in column (4) of the Fifth Schedule,-

(a) uses or disposes of such goods in any manner other than by way of sale within the State, or

(b) dispatches them to any place outside the State except as a direct result of sale in the course of inter-State trade or commerce,

he shall pay tax at the rate shown in column (6) of the said Schedule on the purchase turnover of the goods.

PROVIDED ALSO that where no tax is payable by a dealer effecting the first sale within the State, to a registered dealer for sale then the dealer effecting the subsequent sale within the State shall pay tax at the rates shown in column (4) of the Fifth Schedule and where there are no two points of sale in the State for any goods coming under the Fifth Schedule and the subsequent sale is to a person other than a registered dealer, or to a registered dealer other than for sale the rate specified in column (8) of that Schedule shall apply to such sales.]

(vi) [Omitted by Kerala Finance Act 1997, w.e.f. 1-4-97]:

PROVIDED that no tax shall be payable on that part of the turnover on which tax has already been levied on the preceding sales in the State:

PROVIDED FURTHER that where a tax has been levied under this sub-section or under section 5-A, in respect of the sale or purchase of goods specified in the Second Schedule, and such goods are sold in the course of inter-State trade or commerce, the tax so levied shall be refunded to such person in such manner and subject to such conditions as may be prescribed.

(2) Notwithstanding anything contained in this Act in respect of goods, other than tea sold in auction in the State, 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."

As is evident every dealer, unless exempted, has to pay tax on the taxable turnover by virtue of Section 5(1). In the present case, the goods (furniture) are described in Entry 64 of the First Schedule to the KGST Act. Section 5(2) carves out an exception inasmuch as the levy falls upon the trade mark or brand name owner in the case of first sale of any product by such brand name holder or owner.

This Court had previously dealt with Section 5(2), on two occasions – the first being in "*Cryptm Confectioneries Private Limited vs. State of Kerala*" (2015) 13 SCC 492. In that judgment, the Court held as follows:

> ***9. "In order to attract Section 5(2) of the Act, the following conditions are to be satisfied:***
>
> > ***(i) Sale of manufactured goods other than tea;***
> > ***(ii) Sale of the said goods is under a trade mark/brand name and;***
> > ***(iii) The sale is by the brand name holder or the trademark holder within the State.***
>
> ***If the above three conditions are satisfied, the sale by the brand name holder or the trade mark holder shall be the first sale for the purpose of the Act.***
>
> ***10. 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 or 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."***

Later in the judgment reported as *"Kail Limited (Formerly Kitchen Appliances India Limited) vs. State of Kerala Represented through Joint Commissioner (Law)"* (2017) 1 SCC 60, the Court dealt with the same provision in a more elaborate manner. The facts involved the consideration of whether sale by one brand name owner to a subsidiary, who was also entitled to use the same brand, constituted first sale in accordance with Section 5(2). After considering the decision in *Cryptm Confectioneries* (supra) and the previous judgment of the Kerala High Court in *"State of Kerala vs. Kitchen Appliances India Limited"* (ST Rev. No. 36 of 2007 decided on 25.05.2010), this Court ruled as follows:

> ***"21) Brand name has no relevance when the products are manufactured and sold in bulk by the holding company to its subsidiary company for marketing. However, the brand name assumes significance when goods are marketed with publicity in the market. Moreover, when the goods are sold under the brand name, necessarily, it has to assume that the marketing company is the holder of the brand name or has the right to market the products in the brand name because, it is the first company introducing the products in the market. The objective of Sec 5(2) of KGST Act is to assess the sale of branded goods by the brand name holder to the market and the inter se sale between the brand name holders is not intended to be covered by Sec. 5(2) of the KGST Act.***

22) However, if the sale between the holding company and the subsidiary company, both having the right to use the same brand name, is at realistic price and the marketing company namely, the appellant-Company charged only usual margins in the trade, then there is no scope for ignoring the first sale, particularly, when the first seller was also the holder of the brand name and was free to market the products in the brand name. However, the evidence on record shows that the margin charged by the appellant-Company while making the further sale of product is unusually high. So the inter se sale between the groups of companies under the control of the same family was only to reduce tax liability and was rightly ignored by the assessing officer by levying tax under Section 5(2) of the KGST Act.

23) In view of the foregoing discussion, we are of the opinion that the tax invoking Section 5(2) of the KGST Act was rightly levied on the appellant-Company for the relevant period as it is proved beyond reasonable doubt that the appellant-Company is the brand name holder of "Sansui". We uphold the decisions rendered by the High Court in revision petition and review petition and no interference is warranted into it."

In the present case, it is evident that both Kaveri and the assessee are authorized to use the trade mark and brand "Nilkamal" through separate arrangements. It appears that despite this fact, the present assessee is not engaged in manufacture of the goods in Kerala but is only selling them in that State. On the other hand Kaveri appears to be a manufacturer / dealer whose entire produce is sold to the assessee. In view of the categorical ruling of this Court in "*Kail*" there can be doubt that the sale to the

assessee by Kaveri cannot be ignored by any stretch of the imagination - not in the least because Kaveri was an exempted unit at the relevant time. The fact that an exemption prevailed and enured in favour of a unit does not in any way detract from the circumstance that the levy subsists. This fundamental aspect appears to have been completely ignored by the High Court when it ruled that such sale had to be ignored altogether.

The High Court, therefore, acted clearly in error in reversing the findings of Tribunal.

In view of the foregoing discussion, the impugned judgment and order is hereby set aside; the appeals are allowed in the above terms. No order as to cost.

C.A. No. 10696-10697/2011

The impugned judgment and order of the High Court has to be set aside since it ignored the sale by the sister concern and held that Section 5(2) was not attracted. This aspect has now been decided finally by this Court in "Kail" which reads as follows:

> ***"21) Brand name has no relevance when the products are manufactured and sold in bulk by the holding company to its subsidiary company for marketing. However, the brand name assumes significance when goods are marketed with publicity in the market. Moreover, when the goods are sold under the brand name, necessarily, it has to assume that the marketing company is the holder of the brand name or has the right to market the products in the brand name because, it is the first company introducing the products in the market. The objective of Sec 5(2) of KGST Act is to assess***

the sale of branded goods by the brand name holder to the market and the inter se sale between the brand name holders is not intended to be covered by Sec. 5(2) of the KGST Act.

22) However, if the sale between the holding company and the subsidiary company, both having the right to use the same brand name, is at realistic price and the marketing company namely, the appellant-Company charged only usual margins in the trade, then there is no scope for ignoring the first sale, particularly, when the first seller was also the holder of the brand name and was free to market the products in the brand name. However, the evidence on record shows that the margin charged by the appellant-Company while making the further sale of product is unusually high. So the inter se sale between the groups of companies under the control of the same family was only to reduce tax liability and was rightly ignored by the assessing officer by levying tax under Section 5(2) of the KGST Act."

Having regard to the above legal position, the impugned judgment and order is set aside; the appeals are allowed. No order as to cost.

.....J.
(S. RAVINDRA BHAT)

.....J.
(DIPANKAR DATTA)

New Delhi;
March 15, 2023.

ITEM NO.102 COURT NO.13 SECTION XI-A

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal Nos. 8078-8080/2010

NILKAMAL LIMITED (FORMERLY KNOWN AS NILKAMAL PLASTICS LIMITED) Appellant(s)

VERSUS

STATE OF KERALA ETC. Respondent(s)
WITH
C.A. No. 10696-10697/2011 (XI-A)

Date : 15-03-2023 These appeals were called on for hearing today.

CORAM : HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE DIPANKAR DATTA

For Appellant(s) Mr. C N Sreekumar, Sr. Adv.
Mr. Prakash Ranjan Nayak, AOR

Mr. S.K. Bagaria, Sr. Adv.
Mr. Prakash Shah, Adv.
Mr. Jas Sanghvi, Adv.
Mr. Durga Prasad Poojari, Adv.
Mr. Prabhat Chaurasia, Adv.
Mr. Jasdeep Singh Dhillon, Adv.
Mr. Rahul Gupta, AOR
Mr. Kumar Ajit Singh, Adv.

For Respondent(s) Mr. C. K. Sasi, AOR
Mr. Abdulla Naseeh V.T., Adv.
Ms. Meena K Poulose, Adv.

UPON hearing the counsel the Court made the following
O R D E R

C.A. Nos.8078-8080 of 2010 & C.A. No. 10696-10697 of 2011

The appeals are allowed in terms of the signed order.

All pending applications are disposed of.

(NEETA SAPRA) (MATHEW ABRAHAM)
COURT MASTER (SH) COURT MASTER (NSH)
(Signed order is placed on the file)