**(2005) 06 KAR CK 0083**

**In the Karnataka High Court**

**Case No :** Writ Petition No''s. 48229, 48231 and 48233 of 2004 and 7279 of 2005

Abdul Gafoor — APPELLANT

Vs

State of Karnataka and Others — RESPONDENT

**Date of Decision :** 22-06-2005

**Acts Referred:**

Karnataka Sales Tax Act, 1957 — Section 20, 22, 28 AAA, 28 AAA (1)
Karnataka Sales Tax Rules, 1957 — Rule 52

**Citation :** (2007) 7 VST 252

**Hon'ble Judges :** D.V. Shylendra Kumar, J

**Bench :** Single Bench

**Advocate :** G.K.V. Murthy and P.E Umesh, for the Appellant; Niloufer Akbar, A.G.A., K.M. Nataraj and M.R.C. Ravi and Nupor Associates, for the Respondent

# Judgement

D.V. Shylendra Kumar J.

1. All these petitions are by dealers under the Karnataka Sales Tax Act, 1957 (for short, "the Act"), who are aggrieved by the orders passed by the Commercial Tax Officers at check-posts and the Commercial Tax Officer, Mobile Squad, who had occasion to intercept the goods vehicles carrying the goods taxable under the Act. In all these instances, the respondent-officers having passed orders in exercise of the power u/s 28AAA of the Act for effecting compulsory purchase of the goods in question at the price as declared in the supporting documents and the petitioners having been deprived of such goods and in the light of the orders being entitled to receive only the price as had been indicated therein, are before this court challenging the legality of these orders, while also questioning the constitutional validity of the very provision, namely, Section 28AAA of the Act, which reads as under:

28-AAA. Power to purchase in case of under valuation of goods to evade tax.-(1) Where in respect of goods liable to tax under this Act, carried in a goods vehicle or boat or held in stock by any dealer or on his behalf by any other person or held in custody of any transporter, the assessing authority or any officer empowered u/s 28 or 28A, has reason to believe that the value shown in the document accompanying the goods in transit or the purchase invoice, is lower than the prevailing market price or fair market value or MRP by a difference of thirty per cent or more, such authority or officers, for reason to be recorded in writing, may purchase such goods.

(2) The power under Sub-section (1) shall not be exercisable unless the person or dealer being dispossessed of such goods, is afforded reasonable opportunity of being heard.

(3) The price payable for purchase of such goods shall be the total price as mentioned in the invoice, challan, delivery note, stock transfer memo, or any other related document plus the cost of transportation of the goods incurred up to the time of purchase, if any.

(4) In determining whether or not the price shown in the invoice, challan, delivery note, stock transfer memo, or any other related document involves under valuation, in the case of owner of the goods other than an owner carrying on business in packaged goods, the authority exercising the power under Sub-section (1) shall apply the prevailing market price or fair market value and in the case of an owner carrying on business in packaged goods, shall apply the maximum retail price.

(5) Any person objecting to an order affecting him under this section by,-

(i) Any officer below the rank of Joint Commissioner, may appeal to the Joint Commissioner ;

(ii) A Joint Commissioner of Commercial Taxes, may appeal to the Appellate Tribunal ;

(6) Such appeal shall be dealt with as if it were an appeal filed u/s 20 or Section 22, as the case may be, and all the provisions of that section shall mutatis mutandis apply to such appeal.

(7) The authority or officer purchasing goods in exercise of the powers of Sub-section (1) subject to provisions of Sub-section (6), shall dispose of the goods in public auction within thirty days from the date of such purchase and for value not less than the price paid to the owner of the goods. The sale proceeds so realised should forthwith be paid into the Government treasury.

Explanation.-For the purposes of this section,

(i) ''Prevailing market price'' shall mean the published wholesale price in force in the market at about the time proceedings are taken to purchase such goods ;

(ii) ''Fair market value'' shall mean the price at which the goods are generally bought or sold in the market by dealers in such goods at about the time proceedings are taken to purchase such goods ;

(iii) ''MRP'' or ''Maximum Retail Price'' shall mean the price marked on the package in which the goods are contained ;

(iv) ''Published'' shall mean published in any newspaper, journal or periodical or notified by a market committee or any such authority.

2. The respondents had been put on notice, having entered appearance through Ms. Niloufer Akbar, learned Additional Government Advocate, appearing for the department, and have also filed statement of objections and additional statement of objections.

3. Submission of Sri G.K. V. Murthy, learned Counsel for the petitioners, is that the very provision under which the power is exercised does not answer the requirement of the constitutional provisions ; that the provision enables deprival of property ; that the provision for compulsory purchase of goods in an enactment like the Sales Tax Act, does not fit into the scheme of the Act, etc., apart from urging several other grounds.

4. However, it is also noticed that with the change over to Value Added Tax (VAT) system and the number of items or goods left with for collection of revenue under the Act being far and few and the goods involved in the present case, viz., supari being not one covered for liability of tax under the Act any further, it may not be very necessary to examine the constitutional validity of such provisions in the context of the present conditions.

5. One another reason is that as the petitioners had also impugned the validity of the orders and even a cursory scrutiny into the legality and correctness of these orders has revealed that they are suspect and if the orders themselves are not sustainable, the question of examining the constitutional validity of the provisions of Section 29-AAA of the Act does not arise in these petitions.

6. So far as the traders are concerned, the provisions of Section 28AAA are quite drastic in nature in the sense that the goods in respect of which traders have entered into a contract with the customers and towards whom they have an obligation to deliver such goods, are deprived of such goods while in transit, it amounts to such dealers committing breach of contract, exposing them to consequential damages and claims at the hands of the customers and therefore from their angle, the provision is a draconian one and at any rate a drastic provision, which affects their right, title and business itself in a serious manner.

7. Submission of Sri G.K. V. Murthy, learned Counsel for the petitioners, and as urged in the petitions, is that the power u/s 28AAA is not exercised in bona fide manner ; that the authorities have not invoked the power at the first instance, on the premise that the goods have been undervalued, but have gone on conducting a roving enquiry and also gone about improving their versions stage by stage and when the authorities found that the petitioners had with them necessary documents and other records to support the transportation and the goods in transit, the authorities have, as a desperate measure, resorted to the provisions of Section 28AAA of the Act and have passed the impugned orders, more by way

 

of passing a penal order on the petitioners rather than exercising the power under the Act in a bona fide manner. Sri Murthy places reliance on the decision in the case of M.G. Abrol, Additional Collector of Customs, Bombay v. Amichand Vallamji [2002] 149 ELT 32 to substantiate his submission.

8. Learned Counsel for the petitioner, further submits that unless the officer had formed a reasonable belief that the goods had been undervalued even at the very beginning, such belief cannot be developed midway and taking action u/s 28AAA is bad. One another contention urged on behalf of the petitioners is that even while exercising the power u/s 28AAA of the Act, safeguards have not been adhered to ; that the power being a drastic power, exercise of such power necessarily calls for adherence to safeguards, which has to be enforced strictly and the matter should be viewed in the strict sense than in a loose or benevolent sense ; that any non-compliance with the requirement of usual safeguards such as adhering to the requirement of Rule 52 of the Karnataka Sales Tax Rules, 1957 (for short, "the Rules"), is a serious lapse on the part of the department and therefore the impugned orders deserve to be quashed.

9. Ms. Niloufer Akbar, learned Additional Government Advocate, supports the orders. Learned Government Advocate submits that the power has been exercised as it was warranted in the case ; that on verification it has been found that the goods, in fact, had been undervalued to the extent of 50 to 60 per cent ; that in itself shows not only justification but the necessity for exercising the power ; that the officers had acted in the interest of the Revenue and for the purpose of plugging the leakage of revenue ; that the action does not call for any interference in exercise of writ jurisdiction and therefore the writ petitions deserve to be dismissed.

10. Respondent-department has also filed statement of objections and additional statement of objections. I have been taken through them.

11. While the petitioners have raised a specific ground that the respondents have not conformed to the requirement of Rule 52 of the Rules, learned Additional Government Advocate points out that this averment has been met in para 13 of the additional statement of objections filed today before the court. Para 13 of the additional statement of objections reads as under:

13. The requirement of Rule 52 that the exercise of powers u/s 28AAA shall be subject to the control and directions of both the Joint Commissioner of Commercial Taxes and the Commissioner of Commercial Taxes and that these officers have acted on their own in directing the purchase of goods u/s 28AAA by the second respondent is not true. The second respondent has acted under the directions of the Joint Commissioner of Commercial Taxes who was kept fully informed of the proceedings. The requirement of the proceedings to be under control of the Commissioner also is a general requirement. In fact, the Commissioner keeps a (sic) indirect control of the exercise of powers u/s 28AAA by instructing his sub-ordinate Joint Commissioners from time to time in general

 

terms as regards the norms to be followed. Thus, there is no violation of Rule 52 of the KST Rules with regard to the exercise of powers u/s 28AAA in the petitioner''s case.

12. Rule 52 of the Rules reads thus:

52. under valuation of goods and power to purchase.-Exercise of the powers under Sub-section (1) of Section 28AAA shall be subject to the control and direction of the Joint Commissioner and the Commissioner.

13. A reading of this rule indicates that the power u/s 28AAA should be exercised under the control and supervision of the Joint Commissioner of Commercial Taxes and the Commissioner of Commercial Taxes. That means that the officer proposing action u/s 28-AAA for compulsory purchase of goods is required to take such action with the consent, approval and permission and under intimation to the higher officers on all aspects of the matter.

14. Learned Additional Government Advocate has produced the original records maintained at the office of the officers who have passed the impugned orders.

15. The facts in W.P. No. 48229 of 2004 are illustrative of the manner in which the power is exercised u/s 28AAA of the Act. The vehicle in question carrying goods known as supari was intercepted by the Commercial Tax Officer, Mobile Squad-II (Intelligence), West Zone, Mangalore, at Guruvayanakere on November 21, 2004 at 2.50 am, in terms of the endorsement dated November 21, 2004, a copy at annexure B to the writ petition. It was followed by notice u/s 28AAA dated January 25, 2004 (annexure D). Thereafter, the officers issued notice and after waiting for the allowed time, the officer concerned has passed the orders on December 1, 2004 and in terms of the order at annexure G, exercising power u/s 28AAA ordered purchasing the goods in question on the premise that it has been undervalued beyond the permitted margin, i.e., a margin of more than 30 per cent.

16. Assuming for argument''s sake that the reason or justification for invoking the power u/s 28AAA was formed by the officer concerned during the course of inspection of the intercepted vehicle and while conducting physical verification of the quantity and quality of the goods and thereafter further action for exercising the power u/s 28-AAA should be necessarily taken under the control and supervision of the Joint Commissioner of Commercial Taxes and the Commissioner of Commercial Taxes, unfortunately, the record does not indicate any steps in this direction. The record, in fact, indicates that the permission for compulsory purchase was taken post facto in terms of the communication dated December 3, 2004, i.e., much later than the initiation of the proceedings u/s 28-AAA and actual passing of the order on December 1, 2004. The record does not indicate anything to accept the submissions of the learned Additional Government Advocate that oral permission of the officers concerned had been sought for and obtained, though certain recording of the day-to-day developments since interception of the vehicle as found in the record is produced

 

before me. Even these records do not indicate about any action under the provisions of the Section 28AAA in respect of which the higher officers have been apprised and the officers'' approval or permission has been sought for and/or obtained.

17. In the absence of any record to indicate that such action u/s 28AAA was with the control and supervision of the Joint Commissioner of Commercial Taxes and the Commissioner of Commercial Taxes, the exercise of power being contrary to the requirements of Rule 52 of the Rules, becomes bad in law.

18. As has been observed in a number of decisions, greater the impact of the action in exercise of the power, greater the draconian nature of the power and equally greater is the requirement of adherence to safeguards, which is strict and insisted upon. Observance of the safeguards is the only safety valve provided when drastic powers are exercised. The power u/s 28AAA is definitely one that can be characterised as drastic power vis-a-vis dealers on whom it has a cascading effect, if such power is exercised in a light and casual manner.

19. In the instant cases, the power having been exercised without adhering to the requirements of safeguard and in violation of the provisions of Rule 52 of the Rules, the orders cannot be sustained.

20. In the circumstances, these writ petitions are allowed and the impugned orders in all these writ petitions, passed u/s 28-AAA of the Act, are quashed, by issuing a writ of certiorari. Rule issued and made absolute.

21. Quashing of the impugned orders leads to the next question as to what consequential directions are required to be issued.

22. Once the impugned orders are quashed by allowing the writ petitions, the position as earlier should be resorted, i.e., the goods which had been seized and in respect of which orders of compulsory purchases have been passed should be returned to the persons from whom they were taken over. However, learned Government Advocate submits that pursuant to the purchase orders passed in cases relating to W.P. Nos. 48229, 48231 and 48233 of 2004, the department in turn had sold the goods and it had already paid the amount to the persons from whom the goods were taken over and the net proceeds of the sale of goods compulsorily purchased from the petitioners is a sum of Rs. 9,70,250 in respect of petitioner in W. P. No. 48229 of 2004, Rs. 9,71,127 in respect of petitioner in W. P. No. 48231 of 2004 and Rs. 10,36,420 in respect of petitioner in W. P. No. 48232 of 2004.

23. Learned Government Advocate also submits that the department is in the process of taking other action as against the petitioners inasmuch as it has noticed that in some cases, the consignees were not in existence ; that the transactions were not genuine, etc. This submission is strongly refuted by the learned Counsel for the petitioners.

24. Be that as it may, it is not necessary to go into such controversy. While the

 

net proceeds of the sale of the goods, which have been compulsorily purchased, has now to be restored to the petitioners, in the absence of the very goods, direction is issued to the respondent-department to return the amount referred to in respect of each of the petitioners in W. P. Nos. 48229, 48231 and 48233 of 2004, after deducting the amount already paid, to the petitioners by means of demand drafts, within a period of two weeks from today.

25. In so far as the petitioner in W. P. No. 7279 of 2005 is concerned, it is submitted that the goods have not been sold and the same is in the custody of the department. If that is the position, it is appropriate for the respondent-department to return the very goods to the petitioner in this case within a period of two weeks from today.

26. So far as the submission of learned Government Advocate that the respondent-department is entitled to take such other action for other violations committed by the petitioners is concerned, it is observed that what is examined by this court is only the validity of the orders passed by the authorities u/s 28AAA of the Act. That was the only aspect which has been gone into. This court has not examined any other violation nor have the petitioners complained about any adverse action in respect of such violations. If the petitioners have committed any other violation which attracts such action independent of the provisions of Section 28-AAA of the Act, the respondent-department is at liberty to take such action in accordance with law.

 