
(1975) 08 KL CK 0011

In the High Court Of Kerala

Case No : O.P. No"s. 1965 and 3156 of 1974

Chandrasekhara Prabhu and Others

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 28-08-1975

Acts Referred:

Citation : AIR 1976 Ker 99

Hon'ble Judges : T. Chandrasekhara Menon, J

Bench : Single Bench

**Advocate : K. Sudhakaran, K.K. Babu and V.K. Raveendran, for the Appellant;
Govt. Pleader, for the Respondent**

Final Decision : Allowed

Judgement

T. Chandrasekhara Menon, J.—In these original petitions the petitioners who are wholesale dealers in kerosene, who have "got licences in that respect under the Kerala Kerosene Control Order, 1968 (shortly stated the Order) challenge the direction given by the Government by which they will have to pay what is called "Differential Cost" to the State Government in the matter of sale of kerosene. When a higher excise duty is levied the price of kerosene is refixed. At that time most of the wholesale dealers in the State will be having some stock of kerosene. Naturally they will be able to sell it at a higher price, as the refixation entails a higher price. It is this difference in price which the dealer might get due to the increase in price which is termed as "differential cost".

2. The petitioners purchase kerosene directly from Oil Companies and sell to the customers. The State Government fix the gross selling price of kerosene. The amount of selling price is arrived at after adding sales tax, loading, unloading, measuring, handling and shouldering charges, lorry hire, leakage, telephone charges and other incidental expenses for arranging despatch. The total price is calculated by the State Government on the basis of each increase in price due to increase in Excise duty and the price is communicated by District Collector through the Taluk Supply Officer. On the basis of the changed price the State

Government direct the kerosene dealers that the price should be refixed

3. According to the petitioners the property in the goods, viz., kerosene Which is in stock at any given time had passed to the petitioners. The increase in price or decrease in price may be due to several reasons which cannot affect the petitioners" right in the goods. The Government is, therefore, not competent to claim the difference as "differential cost" and direct the wholesale dealers to remit the amount There is no contract between the Government and the dealers as such and the dealers are not agents of the Government. There is no statutory provision which would entitle the Government to claim the "differential cost" or fasten the dealer with a liability to remit the amount to the Government. It is stated that by fluctuations in price dealers trading in any commodity will either gain to lose. But that will not entitle the Government to claim from the dealers what they may gain; in the same way as the dealers cannot claim to recoup from the Government what they lose. The petitioners in both the writ petitions ask for appropriate writs to quash the orders by which they have been made liable for "differential cost".

4. In the counter filed by the State it is stated that the issue price, both wholesale and retail of kerosene is fixed by the Government taking into account the various factors such as the ex-installation price, sales tax, incidental charges payable to the dealers etc. For various reasons, like increase in the ex-installation price consequent to increase in excise duty, change of sales tax etc., the price of kerosene oil undergoes revision from time to time. Revision of issue price means change in the ex-installation price, change in the wholesale issue price, change in consumer price etc. Whenever there is a revision of issue price it is possible that most of the dealers both wholesale and retail might be having some stock of kerosene oil with them which they have purchased prior to the revision of price by Government.

5. It is alleged that the practice followed by the department in the case of such stock is to assess the stock available with the dealers, at the close of business on the day previous to the date on which revised price becomes effective. Then the dealers are allowed to sell at the revised rate, the stock of kerosene oil available with them at close of business on the date preceding the date of price revision, and excess amount over and above the price fixed for the stock at the pre-revision rate so collected by wholesalers, i. e., the difference between the cost for the old stock calculated at the pre-revision rate and the revised rate, is collected by Government from the dealers as differential cost and remitted to the treasury. It is alleged that it was on the definite understanding with the wholesale dealers this practice is followed.

6. The counter further proceeds to state that though the stock is procured by paying their money, they are only procuring it as nominees of the Government They cannot indulge in free sale of stock, but are to conduct business in Kerosene subject to the restrictions imposed by the Government as per the Order which has been promulgated by the Government under the Essential

Commodities Act, 1955 for the purpose of ensuring equitable distribution and availability at fair price of kerosene oil to the consumers. Therefore, it is contended that the petitioners cannot claim absolute ownership over the property, i. e., kerosene oil and also cannot question the Government's right for claiming the differential cost.

7. It is also stated that the petitioners have entered into agreements with the Government under the Order, which embodies the terms and conditions under which they are to function as dealers. If there is any violation of agreements between the petitioners and the Government it is not a matter that can be agitated under Article 226 of the Constitution as it is in the realm of contract. It is stated that the differential cost claimed by the Government from the petitioners is neither a fee nor a tax. But condition 7 of the licence issued to the petitioners under the Order and clause 6 of the schedule to the agreement executed by the petitioner under Clause 5 (5) clearly stipulates that the licensee or the wholesaler shall not sell kerosene oil at a price which is in excess of the price fixed by the Government. Therefore whenever there is stock of kerosene oil with the dealers it has a price fixed by the Government. Again when a revision of price, is declared by the Government effective from a given date, all the dealers like the petitioners will be having some stock which they have to sell at the pre-revision price fixed by the Government. But for the sake of convenience and as it is practically impossible to verify whether any of the several wholesalers or hundreds of retailers are charging revised rate for the pre-revision stock also, all wholesalers and retailers are allowed to dispose of the pre-revision stock available with them at the revised price. The extra profit they make over and above the normal profit, which according to the State the petitioners have no legal right to retain, is the amount which is claimed by the Government.

8. I am at a loss to understand the legal basis on which the "differential cost" is claimed by the Government. No doubt under the Order there is restriction of sale. Clause 3 of the Order says that no person shall carry on business in kerosene as a wholesale dealer in such area except under and in accordance with the terms and conditions of a licence granted in that behalf by the District Collector. Clause 4 states that any person Who desires to carry on business in kerosene as a wholesale dealer may apply to the District Collector for a licence who may either grant the licence or after giving the applicant an opportunity of stating his case and for reasons to be recorded in writing refuse to grant the licence. Under clause 7 a wholesale dealer shall comply with all directions that may be issued from time to time generally to all wholesale dealers or to him in particular by the Commissioner, District Collector, Controller, Deputy Controller of Rationing, District Supply Officer or Taluk Supply Officer in regard to the purchase, sale, storage or distribution of kerosene. Under clause 8 there is further restriction on sale by wholesale dealer, which says that no wholesale dealer shall sell kerosene except to another wholesale dealer or retail dealer licensed under the Order or to any institution or person to whom a permit has been issued by the District Collector, the District Supply Officer or the Taluk

Supply Officer and such sales shall be in such quantities and at such intervals as the District Collector or the District Supply Officer or the Taluk Supply Officer may direct, having regard to the requirement of the area and any other relevant factor and the overall stock of kerosene available for sale and distribution. But the restriction in the matter of conducting wholesale trade in kerosene will not in any way make the wholesale dealers the agents of Government as such; nor could the stock of kerosene with them for which they have paid the price be considered as property of the Government. Any excess profit that the dealers might make legally on account of the re-fixation of prices, they are entitled to retain. There is no statutory provision, which would entitle the Government to claim what they term the "differential cost".

9. In *A. Venkata Subba Rao Vs. State of Andhra Pradesh*, in an action for recovery of money by the Government from the "procuring agents" appointed by them in the matter of procuring rice at the time of scarcity, the Supreme Court held the procuring agents and wholesale dealers under the system introduced by the Madras Government under the Essential Supplies (Temporary Powers) Act, 1946, who had entered into agreements with the Government in the matter and whose duty was to procure rice from specified areas at prices specified by the Government from time to time and to deliver it at prices so specified to the Government or to persons nominated by it or to other licensed purchasers, in spite of the description given to them as procuring agents and the undertaking given by them in the agreement they are not agents of the Government which would entitle the Government to claim any profit made by them over and above the remuneration paid to them. Under that Scheme the procurement price was in each case lower than the selling price and the procuring agents were under the contract entitled to the difference between the two prices, the difference being termed as "remuneration". During the years 1947 and 1948 three successive orders were made by the Government of Madras specifying the prices and in each case there was an increase. On the dates on which each of these orders came into force, these procuring agents and wholesale dealers had with them in stock certain quantity of rice, which they had procured earlier at the then prevailing lower purchase price. They had to sell this rice at the new increased price and hence became automatically entitled to a larger sum than they were before the increase. The enhancement of the procuring agents' profits was entirely due to the Government action in increasing the prices and the Government thought that they were not entitled to it and directed that the excess amount realised should be paid to it by the procuring agents. In regard to this claim the Supreme Court said that the Government was not entitled to claim the extra profit. The Supreme Court said that the procuring agents never stood as agents of the Government or in fiduciary capacity to Government so as to make Government entitled to claim excess profits earned by them.

10. That a licensee will have to comply with the directions given by the Government does not mean that the Government can ask for money which is not really due to them or over which they could have no legal claim. No doubt the

petitioners are bound to comply with any direction issued to them from time to time by the officers of the Department in regard to purchase, sale, storage or distribution of kerosene. That does not mean that they could give any direction for realisation of amounts which are not legally due to Government from the petitioners.

11. In the instant cases there not be any doubt that the petitioners are not agents of the Government. In the absence of any statutory provision which would support the demand made by the Government these O. Ps. have only to be allowed. I allow the original petitions; but in the circumstances of the case without costs.