

(1998) 06 KL CK 0038
In the High Court Of Kerala
Case No : T.R.C. No. 270 of 1997

C.P. Fathima

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 25-06-1998

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 29A(4)

Citation : (1998) 111 STC 809

Hon'ble Judges : Om Prakash, C.J.; J.B. Koshy, J

Bench : Division Bench

Advocate : K.B. Mohamed Kutty, for the Appellant;

Final Decision : Dismissed

Judgement

J.B. Koshy, J.—Revision petitioner is a registered dealer engaged in the purchase and sale of cashewnuts which is a commodity taxable at the last purchase point under the Kerala General Sales Tax Act, 1963. The revision petitioner/assessee was imposed with the penalty u/s 29A(4) of the Kerala General Sales Tax Act, 1963 (hereinafter referred to as "the Act") as the officer found that there was an attempt to evade tax due under the Act. The above finding was affirmed by the first appellate authority as well as the Sales Tax Appellate Tribunal. Aggrieved by the above order of the Tribunal the assessee filed this revision petition.

2. The authorities concurrently found the following facts : The Sub-Inspector of Police, Ulikkal, while returning after trial patrol duty on April 20, 1996 at 00.30 hours, at Arabi Road, Karyaparambu junction near the Karnataka State border, intercepted, stopped and examined lorry Nos. KL 11/9408 and KL 13/8817 and mini lorry No. KL 13A/3567 and Gobda jeep No. KL 13B/8324. When the vehicles were examined it was confirmed that 250 bags of cashewnuts were in the above four vehicles and no documents prescribed under the Act and Rules were with the vehicles at that time. Subsequently, the goods with the vehicles were taken to the nearest sales tax check-post and the Sales Tax Inspector inspected the above. At the check-post the persons in charge of the goods did not produce any

documents like invoices, delivery notes, etc. A notice was served on April 22, 1996. The power of attorney holder of the assessee produced four sale bills dated April 20, 1996 to show that the above cashewnuts were purchased from Shri N.P. Ummer, hill produce merchant, Ulikkal. He also showed delivery notes Nos : 857577 and 857578 dated April 22, 1996. The goods were released after executing bank guarantee of rupees one lakh as provided u/s 29A(2) of the Act. Section 29A(2) provides as follows :

"(2) If such officer has reason to suspect that the goods under transport are not covered by proper and genuine documents (in cases where such documents are necessary) or that any person transporting the goods is attempting to evade payment of the tax due under this Act, he may, for reasons to be recorded in writing, detain the goods and shall allow the same to be transported only on the owner of the goods, or his representative or the driver or other person in-charge of the vehicle or vessel on behalf of the owner of the goods, furnishing security for double the amount of tax likely to be evaded, as may be estimated by such officer ;"

3. Thereafter, enquiry was conducted after issuing notice and receiving reply from the assessee. The case put forward by the assessee was that cashew-nuts were being loaded in lorry Nos. KL 11/9408 and KL 13/8817 from the business premises of Shri N.P. Ummer for transporting to Quilon. The Sub-Inspector of Police checked these vehicles at 9.00 p.m. on April 20, 1996. At that time mini lorry Nos. KL 13A/3567 and goods jeep No. KL 13B/8324 carrying cashewnuts collected from the cultivators also came there. It was submitted that as soon as lorries are loaded bills will be issued by Shri N.P. Ummer after weighment. It was submitted that two such loads were already despatched on April 20, 1996. The above version was not believed by the departmental authorities and enquiry officer came to the conclusion that these goods were intended for smuggling through the border area of Kootupuzha. The enquiry officer found as follows :

"The actual incident was took place at places nearest to Karnataka State from where the hill produces can be easily smuggled to Karnataka State. The interception of vehicles by police was at 00.30 hours when there is no possibility to get the documents prescribed under the Act. So the ulterior motivation behind the above incident is nothing but smuggling the goods to outside State. Hence both actus rea and mens rea on the part of persons in-charge of goods and vehicles is proved and intention to evade tax due to State.

Following are the facts led to the above conclusion :

- (1) The goods were not supported with documents prescribed under the Act.
- (2) The case was detected at 00.30 hours.
- (3) The vehicles were intercepted at border area of Kerala and Karnataka States.
- (4) It was detected by the Police whom we need not disbelieve."

On the basis of the finding that there is intention to evade tax due to the State, rupees one lakh was awarded as penalty u/s 29A(4) of the Act. Section 29A(4) of the Act reads as follows :

"The officer authorised under Sub-section (3) shall, before conducting the inquiry, serve notice on the owner of the goods and give him an opportunity of being heard and if, after the enquiry, such officer finds that there has been an attempt to evade the tax due under this Act, he shall, by order, impose on the owner of the goods a penalty not exceeding twice the amount of tax attempted to be evaded, as may be estimated by such officer."

4. The first appellate authority confirmed the findings that the goods were transported with an intention to evade payment of tax. However, first appellate authority noticed that all earlier assessments were accepted and no irregularities were pointed out earlier. Considering the above, maximum penalty was not imposed. Value of the goods involved as per the sale bills produced by the assessee herself is Rs. 6,40,000 (250 bags weighing 80 kg.) and tax due thereon works out to Rs. 44,800. Therefore, instead of charging maximum penalty of double the amount of tax due, the penalty was reduced to Rs. 50,000 as the authority found that that will meet the ends of justice. The Appellate Tribunal confirmed the findings of the lower authorities and found that no records were kept in the vehicles and there was a valid finding that there was an intention to evade payment of tax due to the State and quantum of penalty reduced by the first appellate authority is justified. Hence the appeal was dismissed.

5. It is seriously contended by the petitioner that the petitioner was loading raw cashew-nuts from the customer at the customer's premises at about 9 p.m. on April 20, 1996 and since loading operations were not completed, the documents were not in the lorries. This contention is rejected by the enquiry authority, appellate authority as well as the Tribunal. The concurrent findings of facts by all the three authorities were that the vehicles were intercepted by the police on April 20, 1996 at 00.30 hours at a place very near to the border of Kerala and Karnataka States and no required documents were there in the vehicles. It is not disputed that at the time when the lorries were seized by the police or when it reached the check-post, no documents regarding the goods were there in the vehicles. Under Rule 35(2) of the Kerala General Sales Tax Rules no person shall transport any consignment of goods if the value thereof exceeds twenty-five rupees by any vehicle unless he is in possession of either a bill of sale or delivery note or way bill or certificate of ownership. Neither sale letter nor delivery note was there. Delivery note Nos. 857577 and 857578 dated April 22, 1996 were produced before the authorities on April 22, 1996 much after the incident. That itself shows that the delivery notes were prepared after the goods were checked and inspected. The finding that the vehicles were intercepted at night by the police while it was running is a finding of fact entered consecutively by three authorities and no material is produced by the petitioner to enter into a different finding in a revision application where question of law has to be

considered. The two delivery notes produced were dated April 22, 1996 and were produced on April 22, 1996 for release of the vehicles after executing bank guarantee as can be seen from annexure "A".

6. Petitioner submits that it is enough that documents can be produced at the time of enquiry even the documents were not there at the time of inspection. The petitioner relied on the decision of this Court in *Gentle Joseph & Co. v. State of Kerala* [1993] 89 STC 494(Ker) wherein it was held by this Court that the penalty stipulated in Section 29A(4) of the Kerala General Sales Tax Act cannot be imposed on a mechanical manner without independent evaluation and appraisal. It was held that before imposing penalty u/s 29A(4) of the Act the authority has to find that there has been an attempt to evade tax. In the case under hand, there was a clear finding entered by the authority with reasons that there was an attempt to evade tax. Here, the penalty was imposed only after evaluation of the entire matter. The first appellate authority has also reduced the penalty taking into account the sales tax due on the commodities contained in the vehicles and also noted that in the past there was no such evasions. So, the relevant aspects were considered by the authorities.

7. The next case cited by the petitioner was *F. Ramachandran v. State of Kerala* [1994] 92 STC 221 (Ker) : (1994) 2 KTR 150 (Ker). There, at the time of seizure, only delivery voucher was available with the salesman. But, during enquiry the documents were produced to show that goods transported had already suffered tax on its first sale and as such there was no attempt to evade tax. Here, no reliable documents were produced to show that tax was paid or the assessee is not liable to pay tax as she is not the last purchaser in the State. In *Sunitha Diesel Sales & Services v. State of Kerala* [1996] 102 STC 448 (Ker) and *South India Wire Ropes Ltd. v. State of Kerala* (1996) 4 KTR 470(Ker) it was held by this Court that even though required documents are not there at the time when the vehicles are intercepted and checked, documents can be produced to satisfy the adjudicating authority that there is no attempt to evasion of tax. If it is satisfied that there is no attempt to evade tax, no penalty can be imposed u/s 29A. In this case, before the adjudicating authority or before the appellate forum no documents were produced to the satisfaction of the authorities to show that the assessee is not liable to pay tax as she is not the last purchaser in the State so that there is no attempt to evade payment of tax.

8. The last case relied on by the assessee is *Pallimalil Rubber Traders v. State of Kerala* [1998] 109 STC 537 (Ker). In the above case, documents were produced before the Appellate Tribunal to prove that it was not the last purchase in respect of the consignment. The Tribunal accepted the above and penalty was reduced. In such circumstances, this Court held that since the Tribunal accepted the fact that petitioner was not the last purchaser and, therefore, no tax was payable, penalty cannot be imposed merely because there are irregularities in the documents contained in the transport. But, as already held, in this case, no reliable documents were produced before the enquiry officer or before the

appellate stage to prove that appellant was not the last purchaser in the State and, therefore, goods were exempted from payment of duty. Annexure "E" is produced by the assessee along with the revision application which is a form 25 declaration dated April 24, 1996. It was not produced before the enquiry officer. It is not contended that despite the production of the same before the authorities below, it was not considered. The declaration is dated April 24, 1996. The declaration speaks about 500 packages received by the purchaser at Quilon and sale bills referred as 33 to 36 (four consignments) in the declaration is dated April 24, 1996, i.e., four days after the date of consignment. So, the sale bill itself is much after the date of the transport of the goods from the place of the assessee as at the check-post goods were inspected on April 21, 1996. There is no mention of the delivery notes in annexure "E" declaration and there is nothing to connect with 250 bags of cashewnuts involved in this case and the declaration. In such circumstances, we do not see any reason to disturb the findings concurrently made by the authorities that there was an attempt to evade tax in the transport of the goods without documents. The appellate authority also considered the justification of quantum of penalty imposed and for valid reasons it was reduced. The authorities below have applied their mind and correctly imposed the penalty u/s 29A(4). There is no merit in the revision petition and the revision petition is dismissed.

C.M.P. No. 3988 of 1997 in T.R.C. No. 270 of 1997 dismissed.