

(2000) 02 KL CK 0032

In the High Court Of Kerala

Case No : Writ Appeal No. 2578 of 1999

Divisional Forest Officer, Kalpetta and Another

APPELLANT

Vs

C.C. Aravindan

RESPONDENT

Date of Decision : 04-02-2000

Acts Referred:

Constitution of India, 1950 — Article 265
Evidence Act, 1872 — Section 115
Kerala Forest Act, 1961 — Section 2, 75A
Kerala Forest Resource Development Fund Rules, 1989 — Rule 1

Citation : AIR 2000 Ker 121 : (2000) 2 ILR (Ker) 277

Hon'ble Judges : S. Sankarasubban, J;Ar. Lakshmanan, J

Bench : Division Bench

Advocate : Spl. Govt. Pleader and S. James Vincent, for the Appellant; T.M. Sreedharan, for the Respondent

Final Decision : Dismissed

Judgement

AR. Lakshmanan. J.

1. This appeal is preferred by the State against the judgment of K. S. Radhakrishnan, J. in O.P. No. 17737 of 1999 dated 12th August, 1999 (reported in C.C. Aravindan Vs. Divisional Forest Officer and Another,

2. In this appeal the following interesting questions arise for determination.

(i) Whether coffee is not a forest produce as contended by the respondent and as per the definition contained in Section 2(f) of the Kerala Forest Act.

(ii) Whether coffee is a plantation crop as held by this Court in the decision in Aliyakutty Paul v. State of Kerala (1995) 2 KLT 93 and whether the decision of the Division Bench requires reconsideration.

(iii) Whether Section 75A of the Kerala Forest Act, 1961 authorises levy and collection of Forest Development Tax (FDT) at 5% of the amount of consideration

paying for the forest produce disposed of by the Government by sale.

(iv) Whether the levy and collection of Forest Development Tax u/s 75A are legal.

(v) Whether such levy and collection can be made when Article 265 of the Constitution of India says that no tax shall be collected except with the authority of law.

3. On the above questions of law we heard the arguments of Mr. James Vincent, Special Government Pleader (Forests) and Mr. T. M. Sreedharan, learned counsel for the respondent.

4. The respondent is a dealer in raw coffee seeds, coffee powder etc. and he is a registered dealer of the Coffee Board and also under the KGST Act and CST Act. He purchased coffee seeds from the Divisional Forest Officer. South Wayanad Division in the auction held on 19-9-1996 for Rs. 36,36,702/-. He also paid a sum of Rs. 1,81,836/- to the Divisional Forest Officer as Forest Development Tax (FDT) and another sum of Rs. 1,45,469/- as purchase tax. According to the respondent the above sums were required to be paid as per confirmation order dated 1-11-1996 issued by the Divisional Forest Officer. According to the respondent the recovery of the said sum is not legal, or valid and that Section 75A of the Kerala Forest Act authorises levy of collection of Forest Development Tax at 5% of the amount of consideration paid for the forest produce disposed of by the Government by sale and since the coffee is only a plantation crop and not a forest produce as defined in Section 2(f) of the Act. Levy and recovery is not permitted under the Act or the Rules and that the recovery has no legal sanction and it is beyond the provisions of the Act and therefore the amount so recovered is liable to be refunded. He submitted a representation on 12-12-1996 claiming refund of the amounts recovered from him by way of FDT. There was no response from the Forest Department which compelled him to file O.P. No. 143 of 1997 which was disposed of as per judgment dated 11th March, 1999 directing the Forest Department to consider the letter dated 12-12-1996 and pass a speaking order within three months. It is the case of the respondent that the appellant herein, without granting an opportunity for hearing, disposed of the representation dated 12-12-1996 on 18-6-1999. It was held that as per sale notice condition published before the date of sale the purchaser was bound to remit FDT at 5% of the sale value of the coffee bid in the auction-cum-tender conducted on 19-9-1996 and that the Chief Conservator of Forests (Development) vide letter No. C4 36970 dated 24-11-1997 had clarified that the Government Order exempting payment of FDT for coffee as per G.O. (MS) No. 64/97-Forest dated 23-8-1997 had no retrospective effect that therefore the Chief Conservator of Forests clarified that FDT collected should not be refunded. This order was not challenged in the writ petition. The respondent filed this original petition to quash Ext. P5 dated 18-6-1999 and also sought a declaration that he is not liable to pay FDT on the purchase value of the coffee purchased in auction as per Ext. P1 and for a mandamus directing the respondents in the original petition to grant refund of the FDT amounting to Rs. 1,81,836/-

recovered from him together with interest.

5. The appellant herein filed a counter-affidavit along with Exts. R1(a) to R1(d). It is stated that coffee is a forest produce as per the definition contained in Section 2(f) of the Act and the decision of the Division Bench reported in (1995) 2 Ker LT 93 is not correct. It is also submitted that as coffee cherry in question has not been raised from notified vested forest, the decision does not apply to the instant case.

6. K. S. Radhakrishnan, J. allowed the original petition and found that coffee is a plantation crop and hence not a forest produce. It was however, found that u/s 75A of the Kerala Forest Act read with the definition contained in Section 2(f), FDT is leviable and collectible at 5% only on the consideration paid for the sale of forest produce and not otherwise. Since coffee was not a forest produce but a plantation crop, the learned single Judge found that no FDT can be levied u/s 75A on the sale of coffee seeds. The learned Judge held that the levy and collection of FDT, as far as coffee was concerned, was unauthorised and illegal and directed the appellants herein to refund the amount to the respondent. Aggrieved by the above judgment the above writ appeal has been filed.

7. Mr. James Vincent, the Special Government Pleader (Forests) submitted that the respondent being the purchaser is bound to remit FDT at the rate of 5% of the sale value of the coffee auctioned as per the Gazette conditions and that the sale was confirmed in his favour by order dated 25-10-1996 and the property in the goods auctioned passed on to the respondent-purchaser on confirmation and therefore the FDT as per the Kerala Forest (Amendment) Act, 1986 was in force on that date i.e. on 1-11-1996. It is further argued that Ext. R1(c) G.O. (MS) No. 64/97/F&WLD, dated 23-8-1997 came into force only prospectively and therefore the respondent is liable to pay FDT at 5% of the sale value of coffee. Accordingly the impugned order under Ext. P5 was issued stating that refund was not possible. Mr. James Vincent further contended that Section 76(g) of the Kerala Forest Act makes it obligatory on the person who enters into contract to reimburse damages and loss in case of breach and it also makes it obligatory on him to perform such contract and pay to the Department the expenses. Winding up his arguments he feebly contended that the Judgment of the Division Bench in (1995) 2 KLT 93 is not correct since the said Judgment is distinguishable on facts and therefore the said decision requires reconsideration. It is also submitted that as the coffee cherry in question has been raised from a notified vested forest, the decision does not apply to the instant case.

8. Per contra Mr. Sreedharan after reiterating his submissions made in the original petition and the counter-affidavit filed in the writ appeal, submitted that the levy and recovery of the tax for the sale of a produce which is not a forest produce is unauthorised and since coffee was not a forest produce but a plantation crop the levy u/s 75A on the sale of coffee seeds was unauthorised and illegal and without the authority of law. He stated that the judgment of the Division Bench in (1995) 2 KLT 93 does not require any reconsideration and that

therefore the appeal by the State is liable to be rejected and the Government should be directed to refund the entire money with interest at 18% per annum from the date of the judgment by the learned single Judge.

9. In this case we are concerned with two sections. Section 2(f) defines forest produce as follows :--

"2(f) "forest produce" includes -

(i) the following whether found in or brought from, a forest or not, that is to say,--timber, charcoal, wood oil, gum. resin, natural varnish, bark lac, fibres and roots of sandalwood and rosewood; and

(ii) the following when found in, or brought from, a forest, that is to say, --

(a) trees and leaves, flowers and fruits, and all other parts or produce not hereinbefore mentioned, of trees;

(b) plants not being trees (including grass, creepers, reeds and moss) and all parts or produce of such plants; and

(c) silk cocons, honey and wax;

(d) peat, surface oil, rock and minerals (including limestone, laterite), mineral oils and all products of mines or quarries."

Section 5A in Chapter X-A deals with levy of Forest Development Tax. The said section reads thus :--

"75A. Levy of forest development tax :--

(1) Notwithstanding anything contained in this Act, in respect of forest produce disposed of by the Government by sale, there shall be levied and collected a tax at the rate of five per cent, of the amount of consideration paid therefore :

Provided that no tax under this subsection shall be levied and collected on any forest produce, except timber, charcoal, cane, bamboo and firewood, sold,--

(a) to members of Scheduled Castes or Scheduled Tribes for their bona fide personal use or for use connected with their traditional crafts; or

(b) to co-operative societies of Scheduled Castes or Scheduled Tribes.

Provided further that no tax under this sub-section shall be levied and collected in respect of the sale of forest produce to any industrial establishment to which Section 6A of the Kerala Forest Produce (Fixation of Selling Price) Act, 1978 (29 of 1978) shall apply.

Explanation : In this sub-section, the term "sale" shall have the meaning assigned to it in the Kerala General Sales Tax Act. 1963 (15 of 1963).

(2) The tax payable under Sub-section (1) in respect of any forest produce shall be collected along with the consideration paid therefor.

(3) The tax levied under Sub-section (1) in respect of any forest produce shall be in addition to any not in lieu of any tax payable in respect of such forest produce under the Kerala General Sales Tax Act, 1963 (15 of 1963) or under any other law for the time being in force."

Forest produce includes articles which are normally found in forest and which are the spontaneous and wild growth in the forest. It does not include products which are the result of plantation, agriculture and cultivation as held by the Division Bench in Aliyakutty Paul referred supra. In this case the respondent purchased coffee seeds in auction from the Divisional Forest Officer. A sum of Rs. 1,81,836/- was recovered from him as FDT in addition to Rs. 1,45,469/- as purchase tax. As already noticed Section 75A of the Kerala Forest Act authorised levy and collection of Forest Development Tax at 5% of the amount of consideration paid for the forest produce disposed of by the Government by sale if the coffee is a forest produce.

10. We have already noticed that Section 2(f) of the Act which defines forest produce does not take in coffee as a forest produce, which is only a plantation crop. Therefore, if the product which was sold in auction is not a forest produce but a plantation crop, the levy u/s 75A on the sale of coffee seeds was unauthorised and illegal and without the authority of law. In fact it is specifically pointed out in Ext. P3 representation that coffee is not a forest produce, but is a plantation crop according to the definition contained in Section 2(c) of the Kerala Forest Produce (Fixation of Selling Price) Act, 1978. It was further pointed out that levy and recovery of Forest Development Tax in addition to auction amount is not contemplated or permitted under the Act or Rules and that the recovery of the said amount has no legal sanction. As rightly pointed out by the learned single Judge that the appellant has failed to consider this important question raised in the letter dated 12-12-1996 which he was directed to consider and pass a speaking order. In our opinion the appellant is not justified in relying upon the notification G.O. (MS) No. 64/97-Forest dated 23-8-1997 and the order of the Chief Conservator of Forests for declining the claim for refund of FDT. The respondent being a public authority ought to have followed the Division Bench decision of this Court reported in (1995) 2 KLT 93 and should have refunded the FDT. This apart the notification G.O. (MS) No. 64/97-Forest dated 23-8-1997 can be understood only as clarificatory in the light of the judgment of this Court reported in (1995) 2 KLT 93. The legal position was only clarified by the said G.O. In any event the dictum as laid by the Division Bench judgment applied to the case and was binding on the appellant.

11. It is argued by counsel for the respondent/petitioner that the recovery of FDT is not legal or valid and that according to the Kerala Forest Resources Development Fund Rules 1989, the Forest Resources Development Fund is constituted by the Government for the purpose of development of forests and the fund shall consist of ten per cent of the amount obtained by the sale of forest produces under the Kerala Forest Produce (Fixation of Selling Price) Act, 1978

and the interest accruing from the investment, if any, of the amount standing to the credit of the fund. Forest produce is defined in the Kerala Forest Produce (Fixation of Selling Price) Act, 1978 in Section 2(c). Coffee is not a forest produce and it is only a plantation crop. Therefore, as rightly contended by the counsel for the respondent herein, the amount obtained from the sale of coffee seeds is not an amount contemplated for the purpose of creating the forest development fund and that the fund is created by transferring 10% of the amount obtained on the sale of forest produce and that there is no provision for collecting 10% from the person who is taking forest produce in auction.

12. We are therefore, of the opinion that the amount recovered as FDT has no legal sanction and it is beyond the provisions of the Rules and that the amount so recovered is liable to be refunded with interest as claimed.

13. In *Aliyakutty Paul v. State of Kerala* (1995) 2 KLT 93, the Division Bench held in para 6 as follows :--

"One significant fact about this particular definition is that it does not include products which are the result of plantation, agriculture and cultivation. The definition of "forest produce" only includes articles which are normally found in the forest and which are the spontaneous and wild growth in the forest. The produce found stored in the godowns and stores in this case is coffee, cardamom, arecanuts, pepper and rubber sheets. These are all products which are obtained by raising plantations and by cultivating the plantation regularly. They cannot be termed as spontaneous or wild growth of a forest."

The above judgment also considered the definition "forest produce" as defined u/s 2(f) of the Act and held that the definition of forest produce only includes articles which are normally found in the forest and which are the spontaneous and wild growth in the forest and that the produce found stored in the godowns and stores such as coffee, cardamom, arecanuts etc. are all products which are obtained by raising plantations and therefore they cannot be termed as spontaneous or wild growth of a forest.

14. We are in agreement with the opinion expressed in the above Judgment and in our view the judgment does not require reconsideration by a Larger Bench as requested by the learned Special Government Pleader. In the circumstances, there is no basis for the appellant State to say that coffee seed is a forest produce and not a plantation crop and that the levy of FDT was in accordance with Section 75A which is not sustainable. Article 265 of the Constitution of India states that tax should not be imposed except by authority of law. Article 265 provides that not only levy but also the collection of a tax must be under the authority of some law. Where an executive authority has been empowered to collect a tax by an invalid law or rules made thereunder, the Court is entitled to interfere. The learned Special Government Pleader argued that the party respondent has remitted the tax voluntarily pursuant to Clause 17 in the terms and conditions of auction and therefore, he is now precluded from claiming

refund. It is well settled that acquiescence cannot take away from a party the relief he is entitled to in case of contravention of Article 265 of the Constitution of India. Authority of law refers to a valid law which means that the tax proposed to be levied must be within the legislative competence of the Legislature imposing the tax and that the tax in question must be authorised by a valid law. In this case the auction was conducted on 19-9-1996 and the respondent/petitioner applied for refund under Ext. P3 on 12-12-1996 itself very clearly stating that coffee is not a forest produce and that FDT collected from him was without authority of law and that the levy and recovery has no legal sanction u/s 75A of the Act, which levy is confined only to the forest produce.

15. For the foregoing reasons we are of the opinion that the appeal filed by the State is liable to be dismissed and it is accordingly dismissed. But however, in the circumstances of the case, we say, no costs. The appellant is directed to refund the FDT amounting to Rs. 1,81,836/- within one month from today, failing which the amount will carry interest at the rate of 18% per annum from the date of judgment in O.P. No. 17737 of 1999 dated 12-8-1999.