
(2004) 09 KL CK 0023
In the High Court Of Kerala
Case No : O.P. No. 25813 of 2000

Ernakulam Chamber of Commerce

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 28-09-2004

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 29(2), 29A, 32, 45B
Kerala General Sales Tax Rules, 1963 — Rule 57, 58

Citation : (2004) 3 KLT 822 : (2005) 142 STC 538

Hon'ble Judges : C.N. Ramachandran Nair, J

Bench : Single Bench

Advocate : S.K. Devi, for the Appellant; Raju Joseph, Spl. Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

C.N. Ramachandran Nair, J.—Two transporting agencies and the Ernakulam Chamber of Commerce representing transporting agencies generally are the petitioners challenging the constitutional validity of Section 45B of the Kerala General Sales Tax Act hereinafter called the "Act". While Sub-section (1) of the impugned Section provides for levy of penalty at double the amount of sales tax for transport of goods in Kerala without the documents prescribed u/s 29(2) of the Act, for repeated offence, Sub-section (2) in addition to penalty provides for detention of the vehicle involved for a period of thirty days. The impugned section, introduced to the Act with effect from 1.4.2000 is extracted hereunder for easy reference:

45B. Penalty for transport of goods without records.

1. If any Officer empowered under Sub-section (1) of Section 29A finds on inspection of any vehicle or vessel that any transport agency or contract carriage transport any goods without the documents required under Sub-section (2) of Section 29, such Officer may without prejudice to any action that may be taken u/s 29A, impose by art order in writing on such transporting agency, or contract

carriage, or the owner of the vehicle a penalty equal to twice the amount of the tax due on such goods subject to a minimum of five thousand rupees;

2. Where a transporting agency or contract carriage or the owner of the vehicle or vessel is subsequently guilty of the offence under Sub-section (1) for more than one occasion, the Officer referred to in that sub-section may, in addition to the penalty that may be imposed under the said sub-section, by an order in writing detain the vehicle or vessel for a period of 30 days from the date of inspection of the vehicle or vessel, whether the vehicle or vessel used for the commission of the offence on subsequent occasion is the same or not.

3. The vehicle or vessel detained under Sub-section (2) shall be kept in safe custody by the Officer detaining the vehicle in a place notified by the Government.

4. No order under Sub-section (1) or Sub-section (2) shall be passed unless such person affected by such order shall be given an opportunity of being heard.

5. The vehicle or vessel detained under this section shall after the expiry of thirty days from the date of detention release to the person from whom it was detained.

Explanation:-- Transporting agency for the purposes of the section shall include parcel agency.

The contention of the petitioners is that since transporters are not engaged in purchase or sale of goods and are not "dealers" as defined under the Act, there cannot be any evasion of sales tax by them and so much so, penalty cannot be levied on them. The further contention raised is that entry 54 of the State List to the 7th Schedule to the Constitution of India which authorises the State Legislature to make law for levy of tax on sale or purchase of goods does not give authority to the State Legislature to enact Section 45B affecting public carriers who are exclusively governed by parliamentary law for Public Carriers, made under Entry 7 of the Concurrent List. The specific contention of the petitioners is that Section 45B is a colourable piece of legislation because bailment is covered by the provisions of the Contract Act and the Carriers Act, which do not provide for any such penalty and therefore Section 45B has to be declared as unconstitutional, by virtue of operation of Article 251 of the Constitution of India. The Special Government Pleader Sri. Raju Joseph appearing for the respondents on the other hand contended that the provisions are intended only to prevent evasion of sales tax and the petitioners will be liable for penalty u/s 45B of the Act only if they help evasion of tax by transporting goods without any documents prescribed under the Act.

2. I do not think this Court should go in detail on all points argued by the petitioners because the issue is essentially covered by at least three decisions of the Supreme Court. Those are State of Rajasthan v. D.P. Metals 2002 10 KTR 1 SC Tripura Goods Transport Association and Another Vs. Commissioner of Taxes and Others, and State of West Bengal v. Road Transport Association, Siliguri

2003 131 STC 1. In the Rajasthan's case, the Supreme Court held that the provisions for penalty on transport were only provisions to check evasion of tax which was held to be within the legislative competence of the State under Entry 54 of List II of the 7th Schedule to the Constitution of India. The Supreme Court upheld the provision for levy of penalty equal to 30% of the value of goods on the transporter who does not carry the prescribed documents, or who carries documents which are bogus, false or forged. In the Tripura's case also the Supreme Court upheld the constitutional validity of provisions of Tripura Sales Tax Act which cast an obligation on transporters and carriers to get themselves registered, maintain accounts of goods transported and to furnish declaration forms relating to consignments. The Supreme Court held that the objective of these provisions is to seal loopholes of avoidance of sales tax and are within the legislative competence of the State Legislature. It is to be noted that similar provisions as in Tripura Act are in Kerala whereunder transporting agencies are liable to file return in terms of Section 32 of the Act read with Rules 57 and 58 of the KGST Rules which prescribe Form Nos. 44 and 45 to be submitted by the owners of vehicles and transporting agencies periodically. Strangely petitioners have no challenge against these provisions which are in the statute for long or even Section 29(2) which prescribes documents required for transport, the absence of which only entails penalty u/s 45B of the Act. I do not think the petitioners who are willing to comply with statutory obligations can challenge the provisions which provides penalty or punishment for breach of such duty. Therefore the challenge against the penal provision alone is not even maintainable. Petitioners' contention based on Article 251 of the Constitution of India also has no relevance as there is nothing inconsistent between the provisions of the Contract Act and that of the Carriers Act on the one side and that of Section 45B of the Kerala General Sales Tax Act. It is pertinent to note that Law on Contracts and Carriage of Goods being subjects coming under entry 7 of the Concurrent List on which the State Legislature is also competent to make law not inconsistent with any parliamentary legislation. Since I have already found based on the decision of the Supreme Court above referred that Section 45B is only a deterrent provision to check evasion of sales tax, it does not go against any of the provisions of the Contract Act or Carriers Act as pointed out by the petitioners. Eventhough the petitioners have relied on the decisions of the Supreme Court and that of the High Courts particularly the decision of the Supreme Court in State of Haryana v. Sant Lal 1993 91STC 321 the decision of the Gauhati High Court in ABC India Ltd. v. State of Assam 1996 101 STC 401 the decision of this Court in Sunitha Diesel Sales & Service v. State of Kerala (1996 (2) KLT 571), I do not think Section 45B can be declared unconstitutional or beyond the powers of the State Legislature based on these decisions. Therefore the challenge against the constitutional validity of the Section is only to be rejected and I do so.

3. Petitioners have pointed out that levy of penalty u/s 45B is in addition to penalty provided u/s 29A of the Act on the owner of the goods who evades tax.

Therefore according to the petitioners there is double penalty for the same transaction that is evasion of tax in respect of the same goods. Eventhough there is some substance in the contention of the petitioners that two persons cannot be penalised for offence relating to same goods, I do not think the possibility of later levy of penalty on the owner of the goods u/s 29A is sufficient to declare Section 45B as arbitrary, unconstitutional or illegal. In the first place, in terms of sequence of penalty, it is to be noted that Section 45B provides penalty on transporter for transporting goods without documents prescribed u/s 29(2) of the Act. This only means that levy of penalty on the carrier u/s 45B does not bar the department from tracing the ultimate owner of the goods and levy tax on such owner u/s 29A of the Act. Of course the tracing of actual owner and the levy of penalty on such person will certainly mitigate the case against transporter and if the transporter is contesting penalty certainly the eventual identification of the owner and the levy of penalty on such owner of goods will go to help the carrier in escaping or at least reducing penalty u/s 45B. It is to be noted that the penalty u/s 45B is discretionary and not mandatory. Therefore if the owner of the goods is traced and penalty is levied on such owner, then it will be open to the department to drop the penalty initiated against the carrier for the same goods. However, the possibility of penalty later being levied on the owner of the goods u/s 29A does not affect the validity of Section 45B. Therefore this contention is also found against the petitioners,

4. The next contention raised by the petitioners is against Sub-section (2) of Section 45B for detention of vehicle for 30 days in addition of penalty in case of repeated offence. The provision itself shows the legislative intention is to prevent evasion of tax and unless deterrent punishment is provided, the objective cannot be achieved. In every statute higher penalty is provided for repeated offence and I do not think the provision for higher penalty for repeated offence of transporting goods without documents can be termed as arbitrary or illegal,

In the circumstances O.Ps. and W.P. are devoid of any merit and they are dismissed. Petitioners are given three week's time from now to challenge penalty order on merits in appeal or revision before statutory authority if not already done.