

(2005) 03 KL CK 0049
In the High Court Of Kerala
Case No : O.P. No. 5260 of 2003 etc.

Gracy	Vs	APPELLANT
Intelligence Officer		RESPONDENT

Date of Decision : 16-03-2005

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 2, 29, 29(2), 29A, 29A(4)
Kerala General Sales Tax Rules, 1963 — Rule 37, 58
Railways Act, 1989 — Section 93

Citation : (2005) 3 KLT 168 : (2005) 141 STC 309

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

Bench : Single Bench

Advocate : K.V. Sadananda Prabhu, for the Appellant; Raju Joseph, Spl.Government Pleader for Taxes, for the Respondent

Judgement

C.N. Ramachandran Nair, J.—These Writ Petitions are filed by various Railway officials challenging penalty orders issued by the Intelligence Officers of Sales Tax Department under various provisions of the Kerala General Sales Tax Act, 1963, hereinafter called the "KGST Act". Penalty levied is either u/s 45A, 29A(4) or Section 45B of the KGST Act on the allegation of evasion of sales tax in respect of goods transported through Railways. All the Writ Petitions except OP 18234 of 1999 were posted for hearing on 9.6.2004. Sri.K.V. Sadananda Prabhu, appeared and argued for petitioners - Railway officials, and Sri.Raju Joseph, Special Government Pleader appeared and argued for the respondents. However, all those O.Ps. were again posted along with OP 18234 of 1999 on 10.12.2004 and counsel were again heard. After hearing both sides and after going through the orders under challenge and the circumstances under which those orders were issued, which are discussed below, I feel the orders against individual Railway Officials in any case are not sustainable and therefore there is no need to go into the propriety, legality or correctness of each and every order challenged in the OPs. However, what is required in the interest of the Railways and the State Government and in public interest is to clarify the powers and jurisdiction of the

Officers under the KGST Act to enforce statutory provisions against the Railways and the extent of immunity available to the Railways from interference with their operations by the officials of the Sales Tax Department so that omissions and violations do not take place in future and violations in the future are handled properly. For this purpose also, the facts and allegations raised generally have to be gone into. The allegations leading to the orders impugned in the OPs. are transport of goods namely, rubber, and spices like pepper, ginger etc., from Kerala to outside the State through Railways by dealers in Kerala without paying sales tax and without being accompanied by documents prescribed under the KGST Act and Rules and similarly bringing goods to Kerala through Railways from outside State in the name of unregistered or non-existing or bogus dealers leading to evasion of sales tax. The Railways have no case that there is compliance of statutory provisions by the owners of goods who are dispatching goods from Kerala through Railways or receiving goods in Kerala from other States through Railways and their claim is total immunity from scrutiny, by Officers of Sales Tax Department, of goods or documents pertaining to it while in the custody of the Railways either during transit or in their godowns. In other words, the allegation of massive evasion of sales tax taking place on goods taken out of the State or goods reaching the State is not denied by the Railways. It is common knowledge that rubber is an industrial raw material and is transported from Kerala to outside the State for sale to industries for use in manufacture of rubber products. Since natural rubber in all forms is taxable under the KGST Act at the point of last purchase in the State, it's transport outside the State by dealers after purchase in Kerala either for sale outside the State or as inter-state sale to outside dealers should be made on payment of sales tax in Kerala and if transaction is not accounted, there is loss of tax to the State. Similarly, though spices like pepper, ginger, etc. are consumer goods, no one transports the same through Railway parcel service for own use. Therefore transport of these goods through Railways are always in trade quantities and in the course and for the purpose of trade. Such transport by dealers after purchase in Kerala are either as inter-state sales to outside parties or as stock transfer for sale in States outside Kerala. All these commodities are taxable at the point of last purchase in the State and therefore any of these goods transported outside Kerala attracts sales tax in Kerala. Therefore when rubber and spices are transported through Railways without proper documents prescribed under the KGST Act and Rules then presumption of evasion of sales tax in Kerala is inescapable and Railways should not promote it's business at the cost of legitimate revenue due to the State. Even though collection of sales tax is the responsibility of the authorities under the KGST Act, the statutory safeguards provided to prevent evasion of sales tax apply to all against whom they are directed including Railways howsoever inconvenient those provisions are to such authorities. Of course, the Legislature has not provided detailed or specific provisions in the KGST Act for inspection and detention of goods while under transport by Railways probably because they do not expect the Railways to violate general provisions applicable for transport of goods and to promote it's business by encouraging smuggling of

goods by unscrupulous dealers. Therefore the question is as to what extent the Railways should conform to the requirements of the existing statutory provisions and what are the immunities available to the Railways for transport of goods without scrutiny and interference by the Sales Tax Department. In this regard the main question to be considered is whether the Railways can dispense with documents prescribed under the KGST Act and Rules which dealers are required to use for transport of goods throughout Kerala, while permitting transport through Railways, and if so, the powers of the Officers authorised under the KGST Act to enforce compliance by dealers to prevent evasion of tax. I feel reference to facts, documents and counter affidavit in OP 24930 of 1998 will be sufficient for the purposes of disposal of all the cases. Therefore all references to documents hereinafter made are those produced in O.P.No. 24930 of 1998.

2. Counsel appearing for the Railways contended that Railway is rendering all assistance to the Sales Tax Department to check evasion of sales tax in Kerala and in this regard instructions are issued to all the Railway Officials to permit Sales Tax Department to collect details from Railway records. He has also pointed out that inspection of goods should be carried out by the Sales Tax Department before arrival of goods at the parcel office of the Railways and similarly inspection of goods reaching Kerala should be done after goods are released from the Railways. He has relied on Ext.P1 issued by the Railway Board authorising State Government and municipal authorities to collect information and extracts from the records pertaining to goods-transport maintained by the Railways. Therefore according to him it is for the Sales Tax Department to collect information from the Railways and proceed against evadors of tax. His contention is that goods under the custody of the Railways whether it be in the parcel office or in transit should not be inspected or detained as the same will affect the Railways' business--operations. The Special Government Pleader appearing for the respondents contended that statutory authorities under the KGST Act are entitled to inspect the goods at the Railway Godowns and while in transit and the said powers cannot be restricted by the Railways. He pointed out that when goods are transported under bogus records there is no point in collecting details from the Railway records and conducting enquiry based on it as apparent consignors or consignees in documents are not the actual owners despatching or receiving goods. Therefore according to him unless statutory documents are used for transport of goods through Railways, transactions cannot be traced to dealers and evasion of tax, if any, cannot be detected. While the contention of the Railway is that Railway is bound by the provisions of the Railways Act, the contention of the Special Government Pleader is that KGST Act applies to all goods moved all over Kerala including through the Railways and department is entitled to order detention of goods while in the custody of Railways and if released in violation of such orders, penalty can be levied on Railways and it's officials helping evasion of sales tax.

3. The first question to be considered is whether the Railway is immune from the application of the KGST Act and Rules. I do not find any immunity granted to the

Railways either under the Railways Act or under the KGST Act. On the other hand, Section 93 (d) and (e) of the Railways Act visualize a situation where goods under transport by Railways are subject to seizure or detention by the State Government or its officers or under any other legal process. The relevant provisions of Section 93 are extracted hereunder for easy reference.

93. General responsibility of a railway administration as carrier of goods: Save as otherwise provided in this Act, a railway administration shall be responsible for the loss, destruction, damage or deterioration in transit, or non-delivery of any consignment, arising from any cause except the following, namely:--

(a) ...

(d) arrest, restraint or seizure under legal process:

(e) orders or restrictions imposed by the Central Government or a State Government or by an Officer or authority subordinate to the Central Government or a State Government authorised by it in this behalf:

...

...

Therefore obviously the Railways Act visualises transport of goods only in compliance with law of the land which includes the Sales Tax laws of every State. However, it has to be examined whether the provisions of the KGST Act pertaining to establishment of checkposts, detention of vehicles, and checking of the same u/s 29A apply as such to Railways or not. While the contention of counsel for the Railways is that the train whether it be goods or passenger is not "vehicle" which can be intercepted and checked u/s 29A of the Act, the Special Government Pleader relied on the definition of "Vehicle" contained in Section 2(xxviii) of the KGST Act and contended that every "wheeled conveyance" used for the carriage of goods solely or in addition to passengers includes a train as it is a wheeled conveyance. I am unable to accept this argument of the Special Government Pleader that the scheme of Sections 29 and 29A of the KGST Act which provide for establishment of check posts at various places, particularly at State borders and checking of vehicles in movement or stoppage of vehicles and checking at any place within the State by officers of the Sales Tax Department apply to trains. Even though the train is a wheeled conveyance, it is obviously not intended to be covered by the definition contained in Section 2(xxviii) of the KGST Act. Therefore no detention of train or inspection of goods while in the train is contemplated u/s 29A of the KGST Act.

4. The next question is whether the Railway is a "transporting agency" for the purpose of Section 32 of the KGST Act making them liable to submit returns in Form 45 prescribed under R.58 of the KGST Rules. "Transporting agency" is not defined under KGST Act. Therefore only a literal and common-parlance meaning has to be assigned to the "Transporting Agency" referred to in Section 32 of the KGST Act which certainly includes Railways as it is regularly engaged in the

transport of goods. Special Government Pleader contended that definition of "business" contained in Section 2(vi) of the KGST Act takes in any trade or commerce or manufacture or any adventure in the nature of trade, commerce or manufacture with motive to make gain or profit, and therefore Railway comes under the definition of a "dealer". I do not think railway can be treated as a "dealer" for the purpose of KGST Act. However, being a transporting agency" Railway is bound by the provisions of Section 32 of the KGST Act to file returns and to comply with the prescribed formalities. However, it is for the Commissioner of Commercial Taxes in consultation with the Divisional Managers of the Railways in the State to centralise filing of returns only in major centers to avoid unnecessary filing of returns by all the Railway Stations wherever there is cargo booking and delivery.

5. The next question to be considered is the applicability of Section 29(2) of the KGST Act and Section 30 read with Rule 37 of the KGST Rules for the purpose of transport of goods through Railways. Section 29(2) is extracted below for easy reference:

29. Establishment of check posts and inspection of goods in transit:

(1) ...

(2) No person shall transport within the State across or beyond the notified area any consignment of goods exceeding such quantity or value as may be prescribed by any vehicle or vessel, unless he is in possession of --

(a) either a bill of sale or delivery note or way bill or certificate of ownership containing such particulars as may be prescribed, and

(b) a declaration in such form and containing such particulars as may be prescribed when the vehicle or vessel enters or leaves the States limits.

Explanation 1: The term "goods" referred to in this sub-section shall not include luggage of persons who cross the notified area.

Explanation 2: For the purpose of this Act transport of goods commences at the time of delivery of goods to a earner or bailee for transmission and terminates at the time when delivery is taken from such carrier or bailee.

While Section 29(2) prescribes the documents required for transport of all goods, additional/ alternate documents such as permit, delivery note in Form 26 with endorsement of payment of tax, etc. are required for transport of notified goods and Railways are bound to ensure compliance of these provisions by goods owners while transporting goods through Railways. I have already found that the establishment of check posts and checking of vehicle during transport of goods do not apply to trains. However, the same does not entitle the dealers to transport goods through the Railways without being accompanied by documents prescribed u/s 29(2) or Section 30, as the case may be of the KGST Act. This is because, Section 29(2) and Section 30 of the KGST Act are not inconsistent with

the Railways Act or Regulations and Conditions of transport of goods through Railways. In addition to documents required under the KGST Act and Rules, Railways are absolutely free to prescribe their documents for transport including insurance. It is clear from Explanation 2 to Section 29(2) that goods are deemed to be in transit from the time it is delivered to the carrier or bailee for transport and terminates at the time when delivery is taken from such carrier or bailee. Consequently Railways can accept goods for transport from and through Kerala, only if goods are accompanied by documents prescribed under the KGST Act and Rules. Violation naturally will lead to all consequences under the KGST Act to the owner of goods and to Railways as transporter. Though goods and documents accompanying it can be inspected by Sales Tax Authorities to ensure compliance of the provisions of the KGST Act and Rules particularly Sections 29(2) and 30 while goods are with the Railways after booking and before delivery to the owner, no such scrutiny is permissible while goods are on train. Inspection and detention if any should be done before goods are loaded in trains and only after unloading from the trains.

6. The next question is the validity of various circulars issued by the Railways and Commissioner of Commercial Taxes. While the Railways are relying on Exts.P1, P2, P5 and P6, Special Government Pleader relied on Ext.R1(a) circular issued by the Commissioner of Commercial Taxes, and the earlier circular Ext.R1(e) issued by the Railways, Ext.P1 is a general instruction issued by the Railways authorising the Officers of the State Government and Municipal bodies to verify and collect information from the registers and records of the Railway goods and Parcel Offices pertaining to transport of goods. According to the Railways, the maximum facility that can be given to the Sales Tax Department is to permit them to take extracts from the registers pertaining to transport of goods maintained by the Railways. I have already stated that when goods are being transported under bogus names and in the name of non-existing persons and Railways deliver the goods without identification of owners of goods on production of railway receipt and payment of freight, no purpose will be served by the Sales Tax Department taking the details from the Registers maintained by the Railways which do not disclose the real position. Therefore what is important is to identify the goods transported with owner of goods and the transaction pursuant to which goods are transported. This is achieved only if goods are transported with documents prescribed under the KGST Act and Rules. In this regard, it is pertinent to note that Railways are well aware of the requirement of their complying with the provisions of the KGST Act and Rules for accepting goods for transport in as much as they have as early as on 11.1.1984 issued Ext.R1(e) instructions to all goods booking stations to accept notified goods such as rubber, pepper, dried ginger, lemongrass oil, arecanut, timber etc. for transport only if it is accompanied by permits issued under Rule 37 of the KGST Rules prescribed u/s 30 of the KGST Act makes it mandatory for dealers to transport notified goods through Railways only with permits and documents prescribed under Rule 37. It is strange that Railways which correctly understood

the legal position and issued Ext.R1(e) circular consistent with the provisions of the KGST Act later chose to withdraw the same vide Ext.P2 issued on 25.4.1985 itself stating that goods can be accepted for transport without permits prescribed under Rule 37 of the KGST Rules. I hold that Railways have no authority to withdraw the earlier circular Ext.R1(e) vide Ext.P2 and therefore Ext.P2 is vacated. As already held above, Railways are entitled to accept goods for transport to and out of Kerala only if goods are accompanied by documents prescribed under Sections 29(2) and 30 of the KGST Act and violations will lead to consequences provided under the KGST Act both on the owner of goods and the Railways as Transporting Agency.

7. The attitude of the Railway officials towards Ext.R1(a) circular issued by the Commissioner of Commercial Taxes dated 29.7.1988 deserves to be condemned. In fact the Commissioner of Commercial Taxes after getting specific information about the transport of spices through Railways with bogus address, instructed the Railways to accept goods for transport only from dealers and with proper identification such as ration card, passport or any such authentic document. The Commissioner of Commercial Taxes is the head of the Sales Tax Department in the State and he is given statutory authority to enforce the provisions of the KGST Act and Rules. Therefore, Ext.R1(a) filed along with counter affidavit is not just a request by the Commissioner of Commercial Taxes which can be brushed aside lightly and Railway officials are bound by such instructions and those who violate will be liable for penalty u/s 45A(1)(g) and (h) of the KGST Act. As I have already observed above, no one transports rubber or spices for personal use and every transport is in trade quantity and is in the course of trade. The stand of the Commissioner of Commercial Taxes that persons transporting goods are "dealers" within the meaning of the Act are and entitled to transport goods only after taking registration under the KGST Act is quite reasonable and Railways should insist on production of statutory documents for transport of goods. Similarly when the main allegation is evasion of sales tax by transport of goods under bogus names, the Commissioner is perfectly within his authority to request the Railways to insist on identity of the person booking for receiving goods. There is absolutely no difficulty for any person booking or receiving the goods through Railways to produce identity in the form Bank passbook, ration card, which every adult in Kerala has. Therefore these restrictions imposed by the Commissioner u/s 3(1A)(c) of the KGST Act vide Ext.R1(a) are absolutely enforceable and binding on the railways and violations will read to penalty on the concerned Railways official. Moreover in these days of escalation of terrorist activities, Railways on security considerations also should insist on identity of the persons booking and receiving goods and a register should be maintained to record these particulars.

8. The last issue to be considered is penalty and other actions that can be taken against the Railways and it's officials. No one can have a doubt that Railways is a public utility service and it is not intended to violate any law. Therefore what is required is not to impose penalty or fine on a public organization like Railways, even if it is technically possible, but to identify the officers responsible for

violations and to impose penalty on them individually particularly u/s 45A(1)(g) and (h) of the KGST Act. Even though Section 45B specifically provides for penalty on public carriers including "transporting agency" and Railways also come within the definition of "Transporting Agency" I do not think penalty u/s 45B can be levied on Railways because Section 45B contemplates levy of penalty on goods while in transport in a vehicle. This position is clear from Section 45B(2) which provides for detention of vehicle involved in repeated offence for thirty days, which obviously cannot apply to Trains. Similarly all proceedings for detention, and release on security, seizure and confiscation provided u/s 29A, 30C and 30E of the KGST Act do not apply to Trains, but will apply to goods entrusted with Railways for transport, and proceedings should be taken except when goods are on train.

9. In view of the above observations and findings, O.Ps and WPCs are disposed of with the following declarations and directions.

1. The provisions of Section 29(2) of the KGST Act and Section 30 of the Act read with Rule 37 of the KGST Rules and all instructions issued by the Commissioner of Commercial Taxes which have statutory force u/s 3(1) and 3(1A) (c) of the KGST Act, will apply to Railways. Therefore Railways are entitled to receive goods for transport within and out of Kerala and release of goods reaching Kerala from other destinations only if goods are accompanied by documents prescribed under the provisions of the KGST Act and Rules.

2. The Railways shall instruct all their Parcel Offices and Booking Offices to accept goods and release goods only on proper documents and on production of proof of identification of the person from whom goods are received and to whom goods are released, which should be through authentic document like ration card, voters identification card, passport, bank records etc.. The Railways shall maintain a Register at every place of booking or release of goods containing the details of goods received, or released, and the address and identity of the person from whom goods are received or to whom goods are released and if the person booking or taking delivery is not the consignor or consignee, authorisation should be insisted on.

3. The authorised officers of the Sales Tax Department are entitled to inspect goods and records in the custody of the Railways at any office, godown, or place, except when the goods are on train in the course of transport. Railway Officers are bound to comply with all instructions of the Sales Tax Officers in regard to detention, seizure and confiscation of goods and for violations, the Sales Tax authorities are free to take appropriate action including penalty u/s 45A(1)(g) and (h) of the Act. Penalty for violations as far as possible should be levied against officials involved and not against Railways as illegal things done by the Officers do not bind the Railways and the immunity to officials for work done in the discharge of duties do not cover illegal acts.

4. Railway being a transporting agency failing u/s 32 of the Act is bound to file

returns in Form No. 45 prescribed under R.58 of the KGST Rules. However, the Commissioner of Commercial Taxes shall permit the Railways to file centralised returns in every District or Region wise to avoid unnecessary filing of returns by every railway station. It will be open to the Railways to give their suggestions to the Commissioner and Commissioner will consider the same and fix centers where returns have to be filed.

5. Commissioner of Commercial Taxes is free to issue more precise instructions u/s 3(1A)(c) of the Act which shall be complied with by the Railways.

6. Since the State Government could not hitherto enforce the provisions of the KGST Act and Rules through statutory authorities to prevent evasion of tax for goods transported through Railways and Railways allowed its officers to ignore the provisions of the KGST Act and Rules and Commissioner's instructions in regard to transport of goods through Railways, all penalty orders challenged in these OPs and WPs against individual Officers of the Railways are quashed but declaring the authority of the statutory authorities under the KGST Act to levy penalty on the Officers of the Railways for violations in the future.