(2014) 06 KL CK 0084

In the High Court Of Kerala

Case No : Writ Petition (Civil) No. 14585 of 2014

Guganbabu	APPELLANT
Vs	
Commercial Tax Inspector	RESPONDENT

Date of Decision : 17-06-2014

Acts Referred:
Constitution of India, 1950 — Article 301, 304(b)
Kerala General Sales Tax Act, 1963 — Section 29, 47(2), 48(1), 48(3)

Citation : (2014) 3 KHC 580 : (2014) 3 KLT 350 : (2014) 76 VST 97

Hon'ble Judges : K. Vinod Chandran, J

Bench : Single Bench

Advocate : E.P. Govindan and G. Deepa, Advocate for the Appellant; Shoba Annamma Eapen, Government Pleader, Advocate for the Respondent

Judgement

K. Vinod Chandran, J.—The petitioner was aggrieved with Ext.P1 notice issued, against the driver of a vehicle bearing Registration No. KA-01D/2199, which admittedly belongs to the petitioner; who is the registered owner. The notice was issued for reason of an earlier transit pass issued on 23.2.2014, not having been surrendered at the exit check post. The transport then and now was of the very same goods being Liquid Petroleum Gas (LPG), belonging to the Hindustan Petroleum Corporation Limited. The LPG was transported from Mangalore to Madurai and had been issued at the earlier instance, with a transit pass at the entry check post being Manjeswaram. The transit pass was not surrendered at the exit check post. The petitioner''s grievance is with respect to the detention of the present transit, which is supported by Ext.P6 invoice. The petitioner contends that not even a notice under S. 47(2), was issued and the detention is illegal. This Court by an interim order dated 11.6.2014 directed release of the vehicle, and issuance of transit pass as also sought for explanation from the officer as to how the goods could be detained on the basis of a notice issued as evidenced in Ext.P1.

2. The Commercial Tax Officer, Kasargod has filed an affidavit, in which it is

indicated that there was no detention effected and no notice under S. 47(2) was issued with respect to the instant transport. However, as per the Kerala Value Added Tax Information System (KVATIS) module, installed at the check post, a transit pass, issued at the entry check post if not surrendered at the exit check post, then the customized system does not permit a further transit pass to be issued for the very same vehicle. The e-tokens, being generated on the computer system; it is also submitted that, only on recording electronically the surrender of the transit pass already issued, at the exit check post could a new e-token be generated. The software is stated to be designed; so as to, prevent approval and token generation, for future consignment in such defaulted vehicles.

3. The notice Ext.P1, presumably was issued to the driver, to enable furnishing of evidence as to the delivery of the said transit pass at the exit check post Technical impediment is projected on the ground of the computerization effected, and the system configuration which bars any electronic system generated tokens, to be issued in the case of vehicles which have failed to surrender a transit pass, issued earlier, at the exit check post. The impediment pleaded by the officer on the basis of the system configuration, seems to be a fact. However while the sales tax enactment is concerned with the transport of goods and its delivery within the State or outside it, the system seems to have given emphasis to the delivery of the transit pass itself.

4. This Court cannot discount the fact that, though a notice under S. 47(2) was not issued, effectively the vehicle was detained at the check post, for reason of an earlier transit-transport having not been properly registered at the exit check post On failure to surrender a transit pass at the exit check post, necessarily, the department is entitled to take proceedings under S. 48(3) of the Act deeming, an owner or consignor of the goods or owner or driver or the person in charge of the vehicle or goods, to be an assessee in default, presuming the sale to have been made within the State itself. The statute does not permit prevention of further transport in the same vehicle or detention of goods on that count.

5. Under S. 48(3), all the aforesaid persons are jointly and severally liable for assessment and penalty. But, when the statute does not sanction a detention of goods or an interdiction of a vehicle engaged in transport of goods within the State, the technical difficulty of e-tokens not being generated cannot be a reason for effectively detaining vehicles, at the check post.

6. Section 48(1), (2) and (3) of the Act are extracted hereunder:-

(1) When a vehicle or vessel carrying goods from any place outside the State and bound for any place outside the State passes through the State, the owner or consignor of goods or owner or driver or person in charge of such vehicle or vessel shall obtain a transit pass in the prescribed form for such goods from the officer-in-charge of the first check post after his entry into the State and deliver it to the officer-in-charge of the last check post before his exit from the State.

(2) If the owner or consignor of goods or owner or driver or person in charge of

such vehicle or vessel fails to deliver the transit pass for such goods referred to in sub-section (1) to the last check post, it shall be presumed that such goods which are liable to tax under this Act and the goods have been delivered within the State for sale:

Provided that where the goods carried by such vehicle or vessel are, after their entry into the State, transported outside the State by any other vehicle or conveyance, the onus of proving that goods have actually moved out of the State, shall be on the owner or consignor of goods or owner or driver or person in charge of such vehicle or vessel, as the case may be.

(3) Where it is presumed under sub-section (2) that the goods carried in a vehicle or vessel have been delivered within the State for sale by the owner or consignor of goods or owner or driver or person in charge of such vehicle or vessel such owner or consignor of goods or owner or driver or person in charge of the vehicle or vessel shall be jointly or severally liable to pay tax which shall be assessed and recovered in accordance with the relevant provisions of this Act, irrespective of the limit of any turnover together with an amount of penalty not exceeding twice the amount of such tax as may be assessed, after having given to the person or persons aforesaid an opportunity of being heard by the assessing authority under whose jurisdiction the check post is situate.

7. The aforesaid is a self-contained provision wherein, the Legislature has contemplated situations were the transit pass issued to a vehicle at the entry check post is not surrendered at the exit check post Such omission, according to the provision, gives rise to a presumption, that the goods carried in the vehicle were delivered within the State for sale, inter alia by the owner or consignor of goods or owner or driver or a person in charge of such vehicle or goods and make such persons jointly and severally liable to pay tax and penalty, irrespective of any limitation in turn over prescribed under the statute. It is also to be noticed that the proviso to sub-s.2 gives an opportunity, in the event of transportation outside the State by any other vehicle, to rebut the presumption so raised by sub-s.(2). The self-contained provisions, hence speak of issue and surrender of transit pass and an assessment on failure to do so, which more than protects the interest of the State. No detention on that count could be made, on a subsequent consignment merely for the reason that the same is transported in the very same vehicle, which had not surrendered a transit pass issued to an earlier consignment

8. Admittedly the present consignment does not suffer any defect in transport and no notice on that count was issued. But for all practical purposes the goods and vehicle were detained, at the check post. If such detention is made, especially without notice under S. 47(2), that would fall foul of the statutory prescriptions, and violate Art. 301 of the Constitution of India. The elaborate provisions dealing with transport of goods, and the prescription of documents to accompany such transport, intra-State and inter-State, is definitely to ensure revenue collection. It should also further trade and commerce and facilitate

smooth movement of goods within and between the States.

9. In this context, the officers of the Department would do well, to take note of a Full Bench decision of this Court reported in Yogesh Trading Company v. Intelligence Officer of Sales tax & Ors. in (1970 KLT 154 (F.B.)). S. 29 of the Kerala General Sales Tax Act, 1963 and R.35 of the Kerala General Sales Tax Rules 1963, were under challenge. Goods consigned by the petitioner were detained, since the purchase said to have been made inside Mahe, a Union Territory; land locked by the State of Kerala, was found to be fictitious. The dealer who had registration in the Union Territory, under the Pondicherry General Sales Tax Act, 1967, was suspected of having effected purchases within the State of Kerala and styled it as having been purchased within Mahe.

10. The petitioner challenged the notice issued, under R.35(15), demanding double the tax amount on goods as cash security for release of the same. The Full Bench copiously quoted from the decisions of the Hon''ble Supreme Court reported as Atiabari Tea Co., Ltd. Vs. The State of Assam and Others, , The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others, and Khyerbari Tea Co. Ltd. and Another Vs. The State of Assam, . The distinction between a regularization and restriction as emphasised in the decisions were specifically noticed. The declaration that "restrictions obstruct the freedom whereas regulation promote it" (sic), was highlighted in the context of Art. 301 of the Constitution of India. S. 29 of the Act and R.35 of the Rules as it existed then was found to be not worthy of being regarded as merely regulatory, provisions, entailing free flow of goods.

11. The Full Bench found that the wordings of sub-s.(2) of S. 29 of the Act, indicated a prohibition, which is directly against transport. Sub-s. (2), as it stood, ordained that no person shall transport the goods across a check post, unless the transport is accompanied by certain documents. It was also observed by the Court that, if the matter rested with a mere obligation to produce certain documents for examination, the provision could have been upheld as a mere regulation. The further provision under sub-s.(3) of the Act, clothing the officer with unbridled power to detain the vehicle "as long as required" and the power conferred, under sub-rule (4) of Rule 35, on, even a Peon on duty, to order such detention for a period not exceeding 10 minutes, to facilitate the officer to come to the spot, were all found to be directly and immediately affecting the transport of the movement of the goods.

12. The regulatory laws, though found to be not violative of Art. 301, it was also found that if "any particular provision operates as a restriction on the free flow of trade, there can be little doubt that, if enacted by a State Legislature, it should pass the test of Art. 304(b)" (sic)(paragraph 10). The Full Bench held clause 3 and 4 of S. 29 of the Act and clauses 3 to 12 of R.35 of the Rules to be violative of Art. 301.

13. The law makers, imbibing the spirit of Art. 301, as expounded in the

decision, immediately came forth with S. 29A as inserted, by Act 11 of 1972 w.e.f 28.12.1971, thus retaining the power to check the documents accompanying the goods, but however, removing the prohibition that existed in S. 29. The executive officers also would do well to understand the fetters placed on even the Legislature by Art. 301. Practical difficulties in operation of a system, which would by its operation violate Art. 301 of the Constitution of India, definitely cannot be a ground for the executive officers to so do; what the statute itself does not and cannot sanction.

14. In such circumstance, this Court is of the definite opinion that the Commissioner has to look into the issue and provide for necessary measures, to facilitate smooth transportation of goods, as also ensure that no such illegality is repeated hereafter. The system configuration cannot lead to consequences not provided for in the Statute. The Registry will forward a copy of the above judgment to the Commissioner of Commercial Taxes, Department of Commercial Taxes, Trivandrum. With respect to the present Writ Petition, it is clear that Ext.P1 notice has been issued against the driver of the vehicle, who was in charge of the subsequent transport and S. 48(3) deems; only a driver or owner or person, who was in control of the vehicle or the goods, at the time when the delinquency is noticed, to be an assessee in default. However, since, the registered owner of the vehicle, whose vehicle was used in the earlier transportation also, is before this Court, it is directed that the registered owner shall appear before the Commercial Tax Officer, Kasargod on 25.07.2014 when the registered owner shall be issued with a proper notice by the officer, under S. 48(3) and proceedings shall be carried on, against the petitioner or any other person who are held to be jointly and severally liable, as per the provisions. Ext.Pl cannot be given effect to if the driver of the subsequent consignment was not the one who carried the earlier one and proceedings shall be proceeded with against the petitioner herein, if he appears or otherwise the proceedings shall be on notice. The Department would be reserved the liberty to initiate proceedings simultaneously against the owner of the goods also; since the liability is joint and several.

The Writ Petition is disposed of with the above observations.

