(2006) 03 KL CK 0065

In the High Court Of Kerala

Case No : O.P. No. 14196 of 2003

Hassankunju APPELLANT

Vs

Asst. Excise Commissioner RESPONDENT

Date of Decision : 15-03-2006

Acts Referred:

Kerala Abkari Act, 1077 — Section 67(2), 67B, 67B(2), 67C
Motor Vehicles Act, 1939 — Section 3, 31
Motor Vehicles Act, 1988 — Section 2(30), 31
Sales of Goods Act, 1930 — Section 19, 20, 21, 22, 23

Citation : (2006) 2 ILR (Ker) 181 : (2006) 2 KLT 417

Hon'ble Judges : Kurian Joseph, J

Bench : Single Bench

Advocate : P.K. Nishad Puzhithara, for the Appellant; P.K. Shakeela, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Kurian Joseph, J.—What is the concept of ownership under the provisions of Section 67 C of the Abkari Act, in the matter of confiscation of the vehicle, is the question to be considered in this case. Petitioner, by profession a driver, claims to be the owner of an Ambassador Car bearing registration No. KLN-1859. According to him he purchased the vehicle in the month of July 1999. "on 08-06-2000. the petitioner handed over the vehicle to the 5th respondent on executing an agreement for sale" as per Ext.P1. The value was fixed at Rs. 75,000/- of which Rs. 20,000/- was received in advance, the possession was handed over; of the balance Rs. 55,000/-, Rs. 25,000/- was to be paid within ten days and the remaining in 14 monthly instalments. It is seen from Ext.P1 agreement itself that the petitioner was liable for all the liabilities in respect of the vehicle and also all cases till the date of such handing over and thereafter the liability was of the 5th respondent. According to the petitioner the 5th respondent did not act according to the agreement and hence he caused a lawyer notice dated 16-8-2000 to be served on the 5th respondent and further, a complaint was lodged before the Police on 18.9.2000. On 3.10.2000 the vehicle was seized by the Excise Inspector as it was found carrying 420 litres of spirit in secret tanks under the seats of the car. An abkari case was registered. According to the petitioner on coming to know of the case he filed a petition dated 26-3-2001 before the first respondent for releasing the vehicle and pursuant to directions issued by this Court, the vehicle was released on bank guarantee to the petitioner. Thereafter confiscation proceedings were initiated; procedural formalities have been complied with and the first respondent passed Ext.P10 order confiscating the vehicle. Ext.P11 is the appellate order and Ext.P14 is the order in revision, all against the petitioner.

2. Sri. P.K. Nishad Puzhithara, learned Counsel appearing for the petitioner inviting extensive reference to the factual background of the case contended that the petitioner is the owner of the vehicle. The 5th respondent having violated the conditions of sale, petitioner had taken all possible steps to repossess the vehicle. The 5th respondent was in illegal possession of the vehicle at the relevant time and hence for the conduct of the 5th respondent at the relevant time the owner is not responsible. The owner thus having taken reasonable and necessary steps, the vehicle is not liable to be confiscated, it is submitted. The learned Counsel made persuasive submissions elaborately referring to the legal position as obtaining from the Sale of Goods Act, Transfer of Property Act, Motor Vehicles Act and the Abkari Act. Reference also was invited to several decisions of the Supreme Court as well as this Court. The sheet anchor of the contentions is that the petitioner is the owner. Though the vehicle was handed over to the 5th respondent, on his violating the conditions of the transfer, petitioner has taken reasonable steps to repossess the vehicle and hence the vehicle is not liable to be confiscated. Smt. P.K. Shakeela learned Government Pleader, on the other hand contends that at the time of commission of the abkari offence, the vehicle was in the custody of the 5th respondent and that the petitioner had handed over the vehicle to the 5th respondent four months prior to the incident. His remedy is only to proceed against the 5th respondent for breach of contract and other consequential reliefs since the grievance of the petitioner can only be on breach of contract by the 5th respondent; it is further submitted.

3. Section 67B of the Abkari Act provides for confiscation of vehicles involved in abkari offences by the abkari officers. Section 67C provides for the procedure. Section 67(2) provides that in case the owner of the vehicle proves to the satisfaction of the authorised officer that he had taken all reasonable and necessary precautions against such use, the vehicle is not liable to be confiscated. Thus the crucial question to be tackled in this case is what is the concept of ownership u/s 67B read with Section 67C of the Abkari Act.

4. According to Sri. Nishad, ownership of a motor vehicle is to be understood as defined under the Motor Vehicles Act, 1988 u/s 2(30) which reads as follows:

Owner means a person in whose name a motor vehicle stands registered, and where such person is" a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire purchase agreement or an agreement of lease, or an agreement of hypothecation, the person in possession of the vehicle under that agreement.

It is contended that the petitioner still remained to be the owner and the property is intended to pass u/s 19 of the Sale of Goods Act, 1930 only on the terms of the contract being fully complied with. The submission is that only if the 5th respondent completing the balance payment, the property in the vehicle passes to the buyer. Section 19 reads as follows:

19. Property passes when intended to pass,--

(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract the conduct, of the parties and the circumstances of the case.

(3) Unless a different intention appears, the rules contained in Sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

The terms of the contract and the conduct of the parties are the two important factors to be considered while analysing the intention of the parties as to the passing of the property in a contract for sale. Even going by the definition of the word "owner" as appearing under the Motor Vehicles Act, 1988 it is very clear that it is not only the person in whose name the motor vehicle stands registered is the owner. The person who is put in possession of the vehicle under certain agreements is also the owner. The person in whose name the vehicle is registered is commonly known as the registered owner. In the instant case admittedly the petitioner had handed over possession of the vehicle in terms of Ext.Pl agreement to the 5th respondent. One of the terms in the agreement was that the liability for all cases in respect of the vehicle, after the agreement and handing over possession was that of the transferee, the 5th respondent. According to the petitioner there is breach of the terms of the agreement. The contention is that once there is breach, the possession thereafter is unlawful possession and hence the petitioner resumes the capacity and ownership in respect of the vehicle. For one thing it has to be seen that what is the breach and what is the consequence thereof are matters yet to be adjudicated. Petitioner assumes that on the mere breach, the possession of the vehicle which is handed over to the 5th respondent becomes unlawful. That assumption has no basis either on law or on facts. There is no declaration by any competent forum as to the consequence of the alleged breach. The fact remains that the petitioner had handed over the possession to the 5th respondent. Ever since 8-6-2000 this vehicle was in the possession and enjoyment of the 5th respondent. The offence is committed on 3-10-2000. In this context it is significant to note that the intention of the petitioner as can be gathered from Ext.P2 lawyer notice is only to recover the balance of the sale consideration and not to repossess the vehicle. Thus it is fairly clear that the petitioner has conceded the possession of the vehicle with the 5th respondent. His remedy is only to proceed against the 5th respondent for breach of contract and the consequences thereof as per Ext.Pl agreement.

5. As far as the Abkari Act is concerned, the word ''owner'' need only be understood as the person in possession and control of the vehicle at the time of commission of the offence. That has no relation to the concept of transfer of ownership under the provisions of the Motor Vehicles Act. Even otherwise, it is not the registration certificate of a motor vehicle which confers ownership as far as a vehicle is concerned. As a matter of fact ownership depends on the conduct of the parties in terms of Section 19 of the Sale of Goods Act regarding the passing of the property. Unless the vehicle has factually been transferred, there cannot be any change in the registration. In other words, ownership has to precede the registration -registration follows ownership. This legal position is seen dealt with in detail in the Bench decision of this Court in United India Insurance Co. Ltd. v. Jameela Beevi 1991 (1) KLT 832. To quote:

It can be seen that it is not the registration certificate of a motor vehicle which confers ownership on the owner. On the other hand, the registration certificate follows the ownership and not vice versa. The transfer of ownership of a vehicle is a matter governed not by the provisions of the Motor Vehicles Act but by the provisions of the Sale of Goods Act. A transfer made in accordance with the Sale of Goods Act must precede registration certificate and that such certificate is not a document of title. Insurance Company Limited Vs. Vimal Rai and Others, . What is of the essence is the actual transfer of the property in the vehicle and not the certificate of registration.

6. Sri. Nishad; learned Counsel inviting reference to the decision of the Supreme Court in Vasantha Viswanthan and Others Vs. V.K. Elayalwar and Others, contends that though the vehicle was transferred to the 5th respondent as per Ext.Pl agreement, once there is breach of the terms, the continued possession thereafter makes the possession illegal. That was a case of forcible repossession of the vehicles. To quote from paragraph 10 of the judgment:

10. Shri Sudhir Chandra further submitted that the plaintiff was at the highest entitled to the price of the vehicles in question and was not entitled to recover profits earned by the Defendant 1 and later on by Defendants 4 to 7 from plying of the vehicles as property in the vehicles in question passed on to the Defendant 1 on the day when the order for transfer of registration was passed by the Regional Transport Authority in view of the provisions of Section 31 of the Motor Vehicles Act, 1939 and Section 19 of the Sale of Goods Act, 1930, which lays down that if there is a contract for sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred, has no application. Section 31 of the Motor

Vehicles Act, 1939 lays down that where the ownership of any motor vehicle registered under the Motor Vehicles Act is transferred, the transferor and transferee both are required to report the fact of transfer to the registering authority so that particulars of transfer of ownership may be entered in the certificate of registration. The transfer is not effected u/s 3 of the Motor Vehicles Act, 1939, but the same simply prescribes procedure or entering the factum of transfer in the registration certificate, which is an act posterior to the transfer. The transfer of vehicles in question would be governed by the provisions of Section 19 of the Sale of Goods Act according to which property in the vehicle would pass to Defendant 1 at such time as the parties to the contract intend it to be transferred. Thus the passing of property in the goods would be dependent upon the intention of the parties, as evidenced from the contract. From the contract, Exhibits A-1 and A-2, it would appear that the parties intended that after the registration formalities were completed, price of the vehicles covered by the permits would be ascertained and thereafter the same would be paid by the Defendant 1, entitling him to take possession of the vehicles. Thus the parties intended that property in the vehicles shall pass only after possession of the vehicles was delivered to the Defendant 1 after completion of all the aforesaid formalities. In the present case, after registration formalities were completed, the value of the vehicles covered by the permits was not ascertained, much less paid, rather, on the other hand, possession was forcibly taken by the Defendant 1. Therefore, property in the vehicles did not pass to the Defendant 1 as required u/s 19 of the Sale of Goods Act. As the Defendant 1 had illegally taken possession of the vehicles which he was not entitled to ply, it has been rightly held by the High Court that the plaintiff would be entitled to profits earned by the Defendant 1 and Defendants 4 to 7 from plying of the vehicles.

In the instant case the parties intended the property in the vehicle to be transferred to the 5th respondent and be in his possession, in contradistinction to the forcible possession of the vehicle in the decision cited above. Therefore, that situation has no application to the facts of this case. This Court, as early as in 1980, in Vijayan v. Asst. Excise Commissioner, reported in 1980 KLT 45 had laid down eight propositions with regard to application of Section 67C. It will be profitable to refer to the same. Paragraph 5 of the judgment containing the propositions reads as follows:

5. The following propositions emerge from the above discussion: (i) to confiscate a conveyance u/s 67Cofthe Act it is necessary that its owner, his agent or the person to whom it is entrusted by him should have a guilty mind (mens real though not to the extent of an intention on his part to commit the Abkari Offence of carrying contraband goods therein or to abet the same, at least to the extent of knowingly and willingly permitting its user for the carriage of such goods; (ii) the onus is on the owner to establish absence of any guilty mind and not on the department to prove its presence; (iii) the owner, his agent and the person in charge of the conveyance should also have taken all reasonable and necessary precautions against such use; (iv) here again, the burden of proof is upon the

owner to prove that each of them had exercised reasonable and necessary precautions against such use; (v) there are no rules specifying the nature of the precautions to be taken by them, the only guideline in that behalf being that all reasonable and necessary precautions should be taken; (vi) Section 67B(2) is only permissive and not obligatory (this sub-section uses only the word ''may'' and not ''shall'', even which word was Construed by the Supreme Court in the above-mentioned case, as only permissive and not obligatory); (vii) it is a penal provision and should be construed in such a way that an innocent person is not visited with a penalty; and (viii) a very strict and rigid construction of the provision in Section 67B(2) may lead to absurdity and unconstitutionality. It is bearing in mind all these aspects that the question of ordering confiscation of a stage carriage from which contraband liquor was detected in a suit-case and in a packet both admittedly belonging to a passenger travelling in it, is to be considered.

In the instant case the petitioner had entrusted the vehicle to the 5th respondent. He was in possession of the vehicle. Thus it is fairly clear that the owner referred to in Section 67 C of the Abkari Act is the person who is put in possession of the vehicle, who is entrusted with the custody of the vehicle and who is in control of the use of the vehicle at the relevant time. There is nothing to show that the 5th respondent who was thus put in possession of the vehicle had taken any reasonable or necessary precaution against the commission of abkari offence. In fact the 5th respondent himself was the driver of the vehicle at the relevant time. Therefore, the petitioner cannot be heard to say that he is the owner of the vehicle and he had taken all necessary precautions, by sending a lawyer notice or lodging a complaint regarding the breach of the agreement regarding sale of the vehicle, a month prior to the incident. The reasonable and necessary precaution contemplated u/s 67(2) is against use of the vehicle in respect of abkari offence. That precaution is to be taken by the person who is in possession and control of the vehicle at the relevant time. Merely because there is breach of contract, or the terms of sale, it cannot be said that the transferor automatically resumes ownership, unless it is declared so by a competent forum. Thus there is no legal infirmity in the impugned orders passed by respondents 1 to 4.

The Writ Petition is accordingly dismissed.