

(2013) 05 KL CK 0045

In the High Court Of Kerala

Case No : W.A. No. 121 of 2013 and O.T. Rev. No. 9 of 2013

K. Viswambharan

APPELLANT

Vs

Intelligence Inspector, Squad No. III and Another

State of Kerala Vs K. Viswambharan

RESPONDENT

Date of Decision : 20-05-2013

Acts Referred:

Citation : (2014) 67 VST 356

Hon'ble Judges : K.M. Joseph, J;K. Ramakrishnan, J

Bench : Division Bench

Advocate : G. Bhagavat Singh, G. Hariharan, Praveen H. and Muhammed Rafique, Amicus Curiae, for the Appellant; Bobby John Pulikkaparambil, Government Pleader, for the Respondent

Judgement

K.M. Joseph, J.—These cases being connected, they are disposed of by this common judgment. An hydraulic excavator while being transported on a lorry was detained by the authorities acting u/s 47(2) of the Kerala Value Added Tax Act, 2003 (hereinafter referred to as "the Act"). Thereafter, finding that there was an attempt to evade tax, the adjudicating authority u/s 47(6) of the Act, imposed a penalty, both on the consignor and the consignee in a sum of Rs. 13,13,830. The consignee preferred an appeal before the appellate authority which was unsuccessful. However, the Appellate Tribunal in further appeal found that the consignee was not guilty of any connivance and set aside the penalty. It is against the same that the State has filed O.T. Rev. No. 9 of 2013.

2. After the order of the Appellate Tribunal setting aside the penalty, though the consignee approached the officer for release of the excavator, it was not released. He thereupon filed a writ petitions for directing release of the excavator. The learned single judge disposed of the said writ petition by directing that if the State did not file revision against the order of the Appellate Tribunal within a period of fifteen days, the excavator must be released to the consignee. It is feeling aggrieved by the same that the consignee has preferred Writ Appeal

No. 121 of 2013.

3. It would appear that the consignee had availed of a loan from M/s. Indusind Bank Ltd. in connection with the purchase of the excavator. In the light of the detention of the excavator, the bank filed a writ petitions for a direction that the excavator shall be released to it. The said writ petition being unsuccessful, the bank has preferred Writ Appeal No. 1714 of 2012.

4. Since the State had filed a revision petition within the time granted by the learned single judge and it is found that there was a prima facie case made out, this court had granted stay of the order of the Appellate Tribunal. Thereafter, this court proceeded to hear the matter. Since certain issues arose which this court considered to be fairly vexed, it was felt that this court should appoint an Amicus Curiae to assist us. Accordingly, this court appointed Shri. Muhammed Rafique as Amicus Curiae.

5. This court heard Shri. G. Bhagavat Singh, learned counsel for the consignee, the learned Amicus Curiae and also Shri Bobby John Pulikkaparambil, learned Government Pleader.

6. I will straightaway extract the relevant provisions of the Act. Section 47(2) and 47(6) of the Act read as follows:

47. Procedure for inspection of goods in transit.--(1)

(2) If such officer has reason to suspect that the goods under transport are not covered by proper and genuine documents (in cases where such documents are necessary) or that any person transporting the goods is attempting to evade payment of the tax due under this Act, he may, for reasons to be recorded in writing, detain the goods and shall allow the same to be transported only on, the owner of the goods or his representative or the driver or other person in charge of the vehicle or vessel on behalf of the owner of the goods, furnishing security for double the amount of tax likely to be evaded, as may be estimated by such officer:

Provided that such officer may, if he deems fit, having regard to the nature of the carrier or the goods and other relevant matters, allow such goods to be transported on the owner of the goods or his representative or the driver or other person in charge of the vehicle or vessel executing a bond with or without sureties for securing the amount due as security:

Provided further that where the documents produced in support of the transport of goods evidence defects of a minor or technical nature only and the goods are owned by a dealer registered under this Act, such officer may allow the goods to be transported after realizing the tax on the turnover of the goods under transport.

(3) to (5)....

(6) The officer authorized under sub-section (5) shall, before conducting the

inquiry, serve notice on the owner of the goods and give him an opportunity of being heard and if, after the enquiry, such officer finds that there has been an attempt to evade the tax due under this Act, he shall, by order, impose on the owner of the goods a penalty not exceeding twice the amount of tax attempted to be evaded, as may be estimated by such officer.

7. u/s 47(2), inter alia, on the basis of a suspicion that the transporter is attempting to evade payment of the tax due, it is open to the officer to detain the goods. Thereafter, the officer unless it be that the tax has been paid and he drops the proceedings, must proceed to make an adjudication. The procedure for making the adjudication is as contemplated u/s 47(6) of the Act. Section 47(6) of the Act provides that if the officer finds that there has been an attempt to evade the payment of tax that he shall impose penalty, not exceeding twice the rate of tax sought to be evaded on the owner of the goods. The penalty can be realised by sale of the goods. Section 47(15) of the Act contemplates refund of the excess amount realized on the sale of the goods to the owner of the goods.

8. Now let me turn to the facts:

The consignee claims to be a works contractor. According to him, a quotation was given in December, 2011. Under receipt, a sum of Rs. 17,60,000 was given by him to the consignor. The consignee availed of a loan from the Indusind Bank. The first instalment towards the loan was paid to the bank on January 25, 2012. The invoice is dated January 20, 2012 and the transport of the excavator was made on February 8, 2012. On February 13, 2012, the bank made payment of a sum of Rs. 36,00,000 to the consignor under the loan. The consignor filed monthly return for the month of January, 2012 on February 17, 2012. The last date for filing the return was February 20, 2012. The excavator was detained at Mylakkad near Kottayam on February 8, 2012. Mylakkad is stated by the consignee to be before the destination.

9. According to the learned Government Pleader, it has been found by the adjudicating officer that the consignor has not effected any purchase of the excavator under question during the year 2011-12 as evidenced by the purchase bills filed by the dealer along with the monthly returns. It is found that the result of verification on KVATIS data is as follows:

10. The consignor is authorized to deal only in compressor, tractor and parts and rock drilling tools. The details of purchase and sales turnover in the self-assessed return during the year 2011-12 is as follows:

11. It was found that the purchases effected by the consignor during June, October and December, 2011 are below Rs. 5 lakhs and for the other months, NIL return. It is found that it is proved that the consignor has not conceded purchase of any excavator to the tune of Rs. 47,30,250 in question. It is further found that the details of the closing stock value as on March 31, 2011 and stock inventory e-filed by the consignor for 2010-11 are as follows:

12. The aforesaid is the closing stock as on March 31, 2011. Without any accounted purchase of the excavator or availability in opening stock, it is found that it is sure that the seller is disabled in accounting properly its sale. Hence he can only suppress the sales even though the transport is supported by 8B bill. It is stated that there is no doubt about the transportation and transactions would have been unnoticed, but for the detention. It is thereafter found that considering the facts and figures it is proved that the consignor as well as the consignee maliciously colluded to defraud the exchequer and thereby a clear attempt to evade tax legitimately due to the State exchequer is involved in this case. A penalty of Rs. 13,13,830 was imposed being double the amount of tax attempted to be evaded. It is further ordered that the consignor/consignee is directed to pay the penalty as demanded within fifteen days of the receipt of the demand notice. The appellate authority dismissed the appeal. It was found that the consignor and consignee have colluded. It is, inter alia, found by the first appellate authority that the consignee had paid an advance of Rs. 17,60,000 in cash and the bank had given Rs. 36,00,000 thus Rs. 53,60,000 (the invoice is for Rs. 47 and odd lakhs). It is found that being a registered dealer, the consignee should have explained the source of cash payment. It is also found that the consignee did not produce any receipt for the excess payment. It is further found that the TIN number of the consignee is consciously avoided in the invoice. It is found that even though the respondent is an end-consumer, there is violation of rule 58(11) and it is found that the consignee has colluded with the seller. It is also found that the consignee has not filed any application for compounding and that he has filed quarterly returns for the first three quarters only on February 10, 2011, that is after detention of the goods.

13. The Tribunal took the view that the Intelligence Officer was probably justified in detaining the consignment. The Tribunal further found that the materials do not indicate that there was an attempt on the part of the appellant to evade payment of tax. The consignment was supported by the prescribed documents, namely, the invoice. The materials on record, it is found, would indicate that the consignee was a genuine buyer. The consignee availed of a loan of Rs. 36 lakhs from the bank. The Tribunal refers to the report of the Intelligence Officer prepared on the basis of the direction of this court. The Tribunal further finds that the enquiry report indicates that the attempt to evade tax was by the seller (consignor). There is nothing to conclude that the consignee colluded with the seller. The Intelligence Officer ought to have proceeded against the consignor and the sale is reflected in the return filed by the consignor and, therefore, there is no justification for finding that there is attempt to evade payment of tax, it is found. Apparently, the Tribunal found merit in the contention of the consignee that the excavator was being taken to the Santhigiri Ashramam in Thiruvananthapuram, as the consignee was a devotee who wanted the vehicle to be presented there before putting it to use. The materials do not indicate that there was an attempt on the part of the consignee to evade payment of tax, it is found. The Tribunal set aside the order of penalty. The Intelligence Officer was

given liberty to make further investigation with regard to the transactions of the consignor and the consignee's revision was allowed.

14. The learned Government Pleader would submit that the finding of the Tribunal cannot be justified. As found by the adjudicating authority and the appellate authority, there was clear attempt to evade payment of tax. According to him, u/s 47(6), once it is found that there is attempt to evade payment of tax, penalty can be imposed. He would submit that what is relevant is only that there must be an attempt to evade payment of tax. The learned Amicus Curiae would submit that when there is a concluded sale and there is proof of payment of tax by the buyer to the seller who collects as an agent of the Government then the attempt by the seller to evade the tax is to be ignored u/s 47 of the Act. He also would submit that it may be true that there was an attempt to evade payment of tax by the seller. He would submit, not doubt, that non-mentioning of the TIN number in the invoice is a matter which would point to there being collusion. This is for the reason that if the TIN number is indicated, the authorities are enabled to get for the details and prevent tax evasion. In this regard, he referred this court to section 40A(2) of the Act which reads as follows:

40A. Issuance of sale bill by dealers.--(2) Where a dealer effects taxable sale, he shall furnish the name and address of the purchaser in the sale bill/invoices, and where the sale is to a dealer, the address shall include TIN or PIN, as the case may be.

15. The consignee is a dealer. Undoubtedly, he would point out that section 47(6) permits imposition of penalty on the owner of the goods. In this case, there is no finding as to who is the owner of the goods (In fact, this court has already noticed that the adjudicating officer has imposed penalty both on the consignor and the consignee). He drew the attention of this court to the following case law:

- (1) Sundaram Finance Ltd. Vs. State of Kerala and Another,
- (2) Commissioner of Income Tax Vs. Kerala State Financial Enterprises Ltd. and Others,
- (3) Tahil Ram Issardas Sadarangani v. Ramchand Issardas Sadarangani [1993] KHC 757.
- (4) Malkiat Singh and Another Vs. Joginder Singh and Others,
- (5) Jayalakshmi Vs. Avara,

16. He would point out that the proper questions of law are not raised. He further drew the attention of this court to Circular 39 of 2007 which explained section 40A of the Act. He drew the attention of this court to the decisions in Assistant Commissioner, Anti Evasion Commercial Taxes, Bharatpur Vs. Amtek India Limited, and Madras Rubber Factory Ltd. Vs. State of Kerala, He would contend that under the Sale of Goods Act, 1930, u/s 20, property in the goods would pass when the contract is made. He would further submit that actually

section 47(6) of the Act is a re-production of section 29A of the KGST Act. He would submit that there is clear defect in the drafting of the section under the VAT regime. He would submit that under the KGST Act, it was mostly single point taxation whereas under the VAT regime, it is a multi-point tax regime. No doubt, there is multi-point tax also under the KGST Act. He would submit that there may be attempt to evade tax by a person after the sale and during the transport. He may attempt to sell a part of the goods. He may attempt to sell the goods by attempting to evade tax which he would have to pay on a subsequent transaction by him. It may not be just to impose penalty on the buyer of the goods to whom the property has passed under the concluded sale when he is completely innocent and what is more, he had paid the entire tax to the seller who collects as the agent of the Government.

17. The learned counsel for the consignee would contend that there is no merit at all in the Government's revision. He would submit that the consignee was a works contractor who is having registration at Kollam. He has been allowed to pay tax on the compounded basis. He would submit that much significance cannot be attached to the omission of the TIN number in the invoice. According to him, the omission of the TIN number is irrelevant because the sale to the consignee in this case is as an end-user. He is not buying it for the purpose of resale. It may be true that he is a dealer who is registered under the Act, but when he is purchasing it for his own use, namely, in his contract business, no significance can be attached to the omission of the TIN number. He would submit that it was for the seller to have included the same. He contended that possibly the consignor would have accounted the purchase of the excavator in January, 2012. He further, poses a question as to why the Department had not taken any action against the consignor. According to him, it is always open to the Department to proceed against the consignor as was allowed by the Tribunal. He refers to section 67 of the VAT Act. He would submit that the transaction was a genuine transaction and it was financed by the bank. The invoice showed that the tax amount was paid. As far as the payment of the amount in excess, he would submit that after the amount was paid by the bank, on noticing that excess payment was made by the consignee, the consignor had returned the excess amount. (He made available the pass book before this court indicating a credit entry in his name in support of the said contention). He would submit that a penalty can be imposed u/s 47(6) only on the owner of the goods. When the consignee who is the owner of the goods had not done anything wrong and he was innocent, he poses the question as to how penalty could be imposed on the consignee. He would also submit that the section requires a re-drafting.

18. This court directed the learned Government Pleader as to whether the consignor had accounted purchase of the excavator in January 2012. Thereupon, he made available the file and from the same, it became clear to this court that the consignor had not accounted the purchase of the excavator even in January, 2012. Thereafter, learned counsel Shri G. Bhagavat Singh submitted that going through the files it would become clear that there was an accounted purchase of

excavator by the consignor during 2009-10. This court directed the learned Government Pleader to ascertain whether actually any such excavator was purchased, going by the details furnished by the consignor to the Department. Learned Government Pleader on instructions submitted that there are no materials to find that the consignor had made available documents to account purchase of an excavator. This is for the reason that in the return filed by the consignor on which Shri G. Bhagavat Singh relied on, the column against which the purchase is shown takes in other items apart from excavator. Probably, there were some other items other than excavator which had been purchased. In this context, it is relevant to note that going by the finding, the consignor was not having registration to deal in excavators. This also disabled this court from finding as to whether the so-called excavator shown as purchased, is the same excavator which is the subject-matter of the present controversy, a finding on which lines, was sought by the consignor. But, no details are forthcoming. Shri G. Bhagavat Singh would also contend that the writ appeal filed by him must be allowed and the writ petition filed by him for release of the excavator should have been allowed, he contends. Once the Tribunal set aside the order of penalty, there is no basis at all for the Department to not release the vehicle, he complained.

19. The fundamental question to be considered is whether the levy of penalty in this case is justified and the appellant is liable to pay the penalty. This court would in this context scan the case law made available. In the first place, this court would refer to the following case law relied on by the Amicus Curiae:

(i) In *Govindan and Co. Vs. The State of Tamil Nadu*, a Bench took the view that to claim the benefit of a second sale exemption, the assessee need not show that their sellers have in fact paid tax and it is enough if they show that the earlier sales are taxable sales and the tax is really payable by their sellers. The learned Amicus Curiae would apparently seek to contend that if that be the position, it may not be appropriate to fasten liability on the consignee in this case when he has already paid tax to the consignor who collects the amount as an agent of the Government.

(ii) In *Madras Rubber Factory Ltd. v. State of Kerala* [1987] 67 STC 183 (SC), a Bench of this court took the view that when the invoice indicated that the property in goods will remain with the seller until the payment is received and the goods were returned by the buyer without taking delivery, there is no sale.

(iii) In *P.D. Sudhi v. Intelligence Officer, Agricultural income tax and Sales Tax, Mattancherry* [1992] 85 STC 337 (Ker) the court was dealing with section 45A of the KGST Act which provided for imposition of penalty. The court took the view that there must be mens rea and the officer cannot initiate proceedings without there being material. The discretion u/s 45A, it was held, was not an unexaminable or unfettered discretion. Penalty was discretionary. The quantum of penalty should depend upon the gravity of the offence.

(iv) In *Gentle Joseph & Co. v. State of Kerala* [1993] 89 STC 494 (Ker), again a Bench of this court dealt with a case u/s 29A of the KGST Act whereunder the goods of the petitioner were detained, inter alia, referred to *P.D. Sudhi v. Intelligence Officer, Agricultural income tax and Sales Tax, Mattancherry* [1992] 85 STC 337 (Ker) and held that the finding that there has been an attempt to evade tax could be rendered only on the basis of the materials and the reasons for such finding should also be disclosed. The court further held that the law laid down in *P.D. Sudhi's* case [1992] 85 STC 337 (Ker) is applicable though the phrase used in section 29A(4) is slightly different from the phraseology in section 45A of the KGST Act. Levy of maximum penalty was found to be unreasonable and irrational. The court found that the reason given by the Tribunal that penalty u/s 29A(4) of the KGST Act is different from the penalty to be imposed under the other penal provisions is unsustainable and the order of penalty was set aside.

(v) In *V. Ramachandran v. State of Kerala* [1994] 92 STC 221 (Ker), a Bench of this court was dealing with a case where the petitioner therein sold milk powder manufactured by two manufacturers. The manufacturers collected tax on their sales to the petitioner being first sales. The petitioner employed a travelling sales man who effected the sales of the milk powder. The vehicle was intercepted having no records to accompany the transport. The petitioner's claim that the sales were second sales was rejected and it was held that there was attempt at evasion. The court took the view that admittedly the petitioner was second seller of milk powder and that when there were no proper and valid documents, it may be possible to presume that there was an attempt to evade tax. But, the court further held that it is only an inference or a presumption of fact. The court further held that there was a duty to consider the plea of the petitioner that he was only indulging in second sales which is not taxable and even if the transport was not accompanied by proper and valid documents, no penalty would be exigible because it could not be said that there was an attempt to evade tax due under the Act. The matter was remitted back to the Tribunal to consider the aspect.

(vi) In *State of Tamil Nadu v. Govindan & Co.* and *State of Tamil Nadu v. Raman & Co.* [1994] 93 STC 185 (SC) the apex court was dealing with a case of purchase of condemned coaches and nissen huts in public auction and sale after dismantling as scrap. The said sale was second sale which was not taxable. The apex court confirmed the view of the Madras High Court that there was no duty to show that the sellers had paid tax at the first point, thus confirming the decision in *The State of Madras Vs. Raman and Co. and Others*,

(vii) In *V.V. Agencies Vs. State of Kerala*, the court held that the goods under transport was taxable at the first point of sale. The records showed that in respect of the goods under transport, tax was paid by Tata Oil Mills and this was sufficiently proved by the assessment orders passed in the case of the assessee. The court took the view that there was no attempt to evade payment of tax and no penalty could be levied.

(viii) In Assistant Commissioner, Anti Evasion Commercial Taxes, Bharatpur Vs. Amtek India Limited, it was a case where there were all the documents relating to goods which were produced at the time of checking of the vehicle. The assessing officer entertained a doubt on the basis of an invoice of an earlier date and imposed penalty. There was a lapse of one year from the date of the invoice. The appellate authority and the Tax Board found the explanation of the respondent satisfactory. The apex court in fact took the view that there was no basis at all to levy penalty and also deprecated the practice of orders imposing penalty which were bereft of any rationality.

(ix) In Gheru Lal Bal Chand Vs. State of Haryana and Another, the judgment rendered by a Bench of the Punjab and Haryana High Court, the issue related to denial of input-tax credit on the ground that the dealers from whom the petitioners had purchased the goods had not deposited the full tax. A writ petition was filed for declaring section 8(3) of the Act in question as ultra vires. The court, inter alia, held as follows:

In legal jurisprudence, the liability can be fastened on a person who either acts fraudulently or had been a party to the collusion or connivance with the offender. However law nowhere envisages to impose any penalty either directly or vicariously where a person is not connected with any such event or an act. Law cannot envisage an almost impossible eventuality. The onus upon the purchasing dealer gets discharged on production of form VAT C4, prescribed under rule 20(1) of the Haryana Value Added Tax Rules, 2003, which is required to be genuine and not thereafter to substantiate its truthfulness by running from pillar to post to collect the material for its authenticity. In the absence of any mala fide intention, connivance or wrongful association of the purchasing dealer with the selling dealer or any dealer earlier thereto, no liability can be imposed on the principle of vicarious liability. Law cannot put such onerous responsibility on the purchasing dealer otherwise, it would be difficult to hold the law to be valid on the touchstone of articles 14 and 19 of the Constitution of India. The Department is required to allow the claim once proper declaration is furnished and in the event of its falsity, the Department can proceed against the defaulter when the genuineness of the declaration is not in question. However, an exception is carved out in the event where fraud, collusion or connivance is established between the registered purchasing dealer and the immediate preceding selling registered dealer or any of the predecessors selling registered dealer, resulting in the benefit contained in form VAT C4 not being available to the registered purchasing dealer. The aforesaid interpretation would result in achieving the purpose of the rule which is to make the object of the provisions of the Act workable, i.e., realization of tax by the Revenue by legitimate methods.

20. Now, let this court turn to the case law cited by the learned Government Pleader:

(i) In Sorabji Hormusha Joshi and Co. Vs. V.M. Ismail and Another, a Bench of the said court interpreting sections 15, 16 and 41 of the Sale of Goods Act, 1930,

inter alia, took the view that the right of examination is closely connected with the acceptance of the goods and the passing of property. It was further held that a mere receipt of goods does not amount to acceptance and before the buyer can be called upon to accept the goods, he can claim a reasonable opportunity of examining the goods and "that opportunity is to be given by the seller on request by the buyer". Apparently, this decision is cited to contend that in this case, the seller had not, according to the accounts, accounted the purchase of the excavator. He poses the question as to where the excavator could be housed. If it could not be lawfully housed, it is quite possible that if indeed the consignee had seen the excavator as he claims, it would have been housed in an undeclared godown. It again would show that there was connivance between the seller and the buyer. He would further contend that it was not clear as to who was the owner of the goods. The officer issued notice accordingly to the consignor and the consignee. The consignor did not respond. He would also contend that the owner of the transporting establishment had written to the officer indicating that they were being carried on behalf of the owner of the goods who was said to be the consignor. In short, his contention is that it could not be said that the consignee was the owner and it is his further contention that there was collusion between the consignor and the consignee.

(ii) In Ibrahim Isaphai Vs. Union of India (UOI) and Another, a Bench of the said court took the view that mere endorsement on the railway receipt does not transfer the property in the goods covered by a railway receipt and what is relevant was the intention of the parties which had to be decided with reference to the terms of the contract, the conduct of the parties and the circumstances of the case.

(iii) In Leigh & Silavan Ltd. v. Aliakmon Shipping Co. Ltd. [1985] 2 All ER 44, the Court of Appeals took the following view:

The ship-owners' appeal would be allowed for the following reasons--

(1) Under the original contract of July 1976 the property in the goods was not to pass to the buyers until the sellers received a bill of exchange endorsed by the buyers' bank and therefore u/s 19(1) of the 1979 Act the property in the steel remained with the sellers until that condition was met, notwithstanding the delivery of the steel to the buyers or to a carrier for transmission to them. It was to be inferred from the actions and statements of the parties that when they agreed in October 1976 that the steel was to be held by the buyers "to the order of or "at the disposal of the sellers they did not intend to change the original terms of sale but merely intended that because security in the form of a bill of exchange was not available the sellers would retain ownership until the steel was resold. Furthermore, since the buyers had represented themselves as being the sellers' agents, and had acted as if they were, when presenting the bill of lading to the shipowners' agents and taking delivery of the steel it was not possible to imply a contract between the buyers and the shipowners on the terms of the bill of lading. Accordingly, title and the right to sue the shipowners in contract had

never passed to the buyers.

(iv) In *Bharat and Company Vs. Trade Tax Officer and Another*, the appellant carried on business in Mumbai which sent goods to a consignee. The tax officer took the view that the appellant was the owner of the goods. The court took the view that a mere entry of the purchaser's name in the consignment note is not sufficient to hold that title of the goods had passed to the purchaser.

(v) In *Suchetan Exports P. Ltd. Vs. Gupta Coal India Limited and Others*, the court repelled the contention that after delivery of the goods to the stevedore, title and ownership passed to the buyer and the lien over the goods stood terminated. The court took the view that the title was to pass only on full payment.

(vi) In *State of Kerala Vs. K.M. Abdul Gafoor*, the document authorized transport of HSD (High Speed Diesel) only up to Mahe. The goods were, however, detected at Thalassery in Kerala without proper documents. The assessee at a later stage produced the documents and penalty was imposed u/s 29A(4) of the KGST Act. The penalty originally levied was sustained up to the stage of the Tribunal. The High Court remanded the matter. Thereafter, the Tribunal cancelled the penalty. It was in such a case the court held that Mahe had only one sq. kilometer area. The respondent's explanation for taking the tanker lorry with full load of diesel outside Mahe, was that it had developed a valve problem. The court found the explanation unacceptable and the attempt of the respondent was found to be to sell the goods in Kerala. It was found to be a case of a clear attempt to evade tax and the respondent could not claim exemption from penalty by accounting the goods after the fraud was detected. The learned Government Pleader contended that the subsequent payment of tax after the detection in the facts of this case, when he had not accounted, the purchase was a clear attempt to evade payment of tax.

(vii) In *Abdul Aziz Bepari Vs. Jogendra Krishna Roy* the court, inter alia, held as follows:

"The Indian law is the same and the provisions of section 81 of the Contract Act do not exclude the question of intention which is laid down in the English cases as the determining factor. Where according to the usage of trade at Chandpur the sale of jute by fariah is not complete until the goods are examined, selected and weighed by the company (purchaser) although stored in the godowns of the company by whom advances have been made to the fariah against these goods.

(viii) In *Arcot Mills Limited Vs. State of Tamil Nadu*, a Bench of the Madras High Court held, inter alia, as follows:

The special term regarding passing of property in the contracts could not prevail over the fiscal statute, or bind the taxing Department, whatever might be its binding force or merit as between the parties, as a term in the contract. Therefore, the special term in the contract in the instant case was powerless

against the inexorable application of the statutory provisions.

21. Now, let this court consider the case law relied on by the consignee:

(i) In *P.K. Aboobacker and Others Vs. State of Kerala and Another*, the constitutional validity of section 29A of the KGST Act was challenged. Therein, it was, inter alia, held as follows:

...Seizure of goods is allowed only if security is not furnished. No doubt it is a temporary restriction in the movement of goods. But, the property in the goods continues to be with the owner unlike in the case of confiscation. The danger of losing custody and control of the goods will act as discouragement and an effective check at evasion. Therefore, the provision to furnish security and seizure of the goods in default are only in the nature of an effective provision to recover the penalty which, in turn, is a measure aimed at prevention of tax evasion and perfectly within the incidental or ancillary powers of taxation.

(ii) In *Sundaram Finance Ltd. Vs. State of Kerala and Another*, the case arose under the Travancore-Cochin General Sales Tax Act, 11 of 1125 M. E., the court, inter alia, held as follows:

The true effect of a transaction may be determined from the terms of the agreement considered in the light of the surrounding circumstances. In such case, the court has, unless prohibited by statute, power to go behind the documents and to determine the nature of the transaction, whatever may be the form of the documents. An owner of goods who purports absolutely to convey or acknowledges to have conveyed goods and subsequently purports to hire them under a hire-purchase agreement, is not estopped from proving that the real bargain was a loan on the security of the goods...a hire-purchase agreement is a more complex transaction. The owner under the hire-purchase agreement enters into a transaction of hiring out goods on the terms and conditions set out in the agreement, and the option to purchase exercisable by the customer on payment of all the instalments of hire arises when the instalments are paid and not before. In such a hire-purchase agreement, there is no agreement to buy goods; the hirer being under no legal obligation to buy, has an option either to return the goods or to become its owner by payment in full of the stipulated hire and the price for exercising the option. This class of hire purchase agreement must be distinguished from transactions in which the customer is the owner of the goods and with a view to finance his purchase he enters into an arrangement which is in the form of a hire purchase agreement with the financier, but in substance evidences a loan transaction, subject to a hiring agreement under which the lender is given the licence to seize the goods.

(iii) In *The Executive Engineer and Another Vs. Sri Seetaram Rice Mill*, the apex court was considering the provisions of the Electricity Act, 2003. Therein, inter alia, the court held as follows:

35. All these explanations clearly show that dishonesty is a state of mind where a

person does an act with an intent to deceive the other, acts fraudulently and with a deceptive mind, to cause wrongful loss to the other. The act has to be of the type stated under sub-sections (1)(a) to (1)(e) of section 135 of the 2003 Act. If these acts are committed and that state of mind, mens rea, exists, the person shall be liable to punishment and payment of penalty as contemplated under the provisions of the 2003 Act. In contradistinction to this, the intention is not the foundation for invoking powers of the competent authority and passing of an order of assessment u/s 126 of the 2003 Act.

22. He also drew support from the judgment of the Punjab and Haryana High Court in *Gheru Lal Bal Chand Vs. State of Haryana and Another*,

Findings:

23. The first question to be considered is whether this is a case where this court could hold that the intention of the consignor to evade payment of tax has been established. I am of the view that this is a case where as held by the officer and by the appellate authority, the intention of the seller to evade the payment of tax stood established. Even the Appellate Tribunal in fact does not take a distinctly different view. Though served with a notice, the consignor did not contest the proceedings. The consignor was apparently not authorized to deal in excavators. The closing stock for the year 2010-11 of the consignor did establish that he was not having any excavator. Till January, 2012, the consignor has not accounted purchase of any excavator. A person who has not accounted the purchase is most likely to not account the sale. This is the very strong circumstance which is established by materials. Even though the consignee made an attempt to point out that an excavator was seen purchased, going by the return during 2009-10, as already noted, the same could not be established. Therefore, there can be no doubt that the consignor would not have accounted the transaction, both purchase and sale, but for the detention. The transaction is alleged to be based on the invoice dated January 20, 2012. It is true that the consignor had time till February 20, 2012 to file the monthly return and pay the tax for the month of January, 2012. It is equally true that the consignor has filed monthly return for the month of January, 2012 on February 17, 2012 in which he has accounted the purchase and sale of the excavator and purported to pay the tax due on the same. But, it is indisputable that the detention of the vehicle took place on February 8, 2012. I am in agreement with the learned Government Pleader, in the circumstances established by materials available in this case, that it is a clear case of subsequent accounting and payment of tax by the consignor after the factum of detention. I am of the aforesaid view, despite the fact that the consignor had time till February 20, 2012. It is undoubtedly true that before penalty is imposed on the finding that there was attempt to evade the tax, there must be materials warranting such a finding. The intention of a party to evade payment of tax is to be considered based on the facts of each case and on the strength of the materials which point to circumstances which warrant the requisite finding u/s 47(6) of the Act. The consignor has not contested the

imposition of penalty which the adjudicating officer has imposed on him also. He has not carried the matter in appeal. He must be treated as having accepted the findings. Even then, this court notice, as pointed out by the learned Government Pleader, that the Appellate Tribunal has set aside the order of penalty. Thus, the order of penalty does cease to operate even against the consignor. Therefore, this court is of the clear view that there was attempt on the part of the consignor to evade payment of tax.

24. In the facts of this case, a further question arises whether the aforesaid finding is sufficient for the disposal of the matter. This is for the reason that u/s 47(6) of the Act, penalty can be imposed only on the owner of the goods. The Act provides for multi-point taxation unlike the provisions of the KGST Act. No doubt, under the KGST Act also, there are certain goods which were subjected to multi-point taxation. I must undoubtedly bear in mind that section 47(6) of the Act enables imposition of penalty. Penalty is to be imposed for the contravention of some law. It is established that all penalties do not require the establishment of mens rea. According to the learned Government Pleader, u/s 47(6) of the Act, irrespective of the question as to whether the consignee colluded with the consignor, penalty can be imposed once there was a finding that there was an attempt to evade payment of tax. Section 47(6) of the Act does not insist on evasion of tax. What must be proved is only that there must be an attempt to evade payment of tax. The question, however, is whether the attempt should be made by the consignor or the consignee. Also, section 47(6) of the Act limit the imposition of penalty in cases where the consignor or the seller alone intended to evade the payment of tax or is it applicable even in a case where the buyer was innocent and did not share the guilty mind of the seller. What is the meaning of the word "owner of the goods"? Is there a personal liability for the owner to shoulder the burden of penalty either by the sale of the goods, the property in which has already passed to him and what is more, in the event of the sale not fetching the amount of penalty by incurring a personal liability?

25. As far as the question of a penalty being imposed beyond the value of the goods is concerned, this court would think that it can be safely concluded that the penalty being leviable at the maximum of two times of the rate of tax, the question of penalty being recovered from the other assets of the owner of the goods, there being deficiency, can be ruled out. Section 47(15) of the Act, no doubt, contemplates that the excess amount realized by the sale, is to be given back to the owner of the goods.

26. The question as to who is the owner of the goods has really not been found by the authorities, as pointed out by the learned Amicus Curiae and admitted by the learned Government Pleader. The final fact-finding body is the Appellate Tribunal. In fact, the learned Government Pleader would point out that the adjudicating officer has proceeded against both the consignor and the consignee as according to him, at that stage it was not clear to the adjudicating officer as to who was the owner of the goods. As already noticed, penalty has been

imposed both on the consignor and the consignee. This, this court find is impermissible and unacceptable. Section 47(6) of the Act permits imposition of penalty only on the owner of the goods. In this case, either the consignor or the consignee is the owner of the goods. Both of them could not possibly be treated as owner of the goods at the same point of time. Property in the goods is with either of them. Property passes on a sale of goods as contemplated under the Sale of Goods Act, 1930. Section 19 of the said Act 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.

27. Therefore, the question as to whether there has been a completed sale is to be determined on the facts of each case and on a conspectus of the contract, the intention of the parties, their conduct and the rules which have been adverted to in section 19 of the Sale of Goods Act. The invoice is purported to be dated January 20, 2012. According to the consignee, a large advance stood paid to the consignor prior to the date of the invoice (nearly Rs. 17 lakhs). The bank is alleged to have made the payment on February 13, 2012. The excavator was on the road on February 8, 2012 and was detained even before receipt of the full payment. It would appear that the consignor had engaged the carrier. These facts are not in dispute. The learned Government Pleader would point out that not having accounted the purchase, the consignor could not have possibly given an opportunity to the consignee for inspection as claimed by the consignee, and that even if the consignee has seen it, it would have been lodged in an unauthorised godown which itself spells out collusion between the consignor and the consignee. If the parties contemplated a right of disposal with the seller, that would detract from the passing of title, submits the learned Government Pleader. Learned Government Pleader has a further case that, at any rate, the consignor must be treated as the owner at the time when the transaction took place.

28. On the one hand, the Amicus Curiae and the counsel for the consignee submit that it would be unfair to cede the power to the officer to impose penalty on an innocent purchaser who, in fact, paid the price which included the tax component. He on his own did nothing to indicate that he will evade the payment of tax, that is to say, assuming that there is a concluded sale in favour of the consignee and there was no intention on his part to sell the excavator to another and evade the payment of tax by him, no penalty on the consignee is possible, it is submitted. On the other hand, according to the learned Government Pleader,

irrespective of whether the consignee has colluded with the consignor as was the case of the authority, on there being intention to evade the payment of tax established, that suffices, he submits. Blocking the loopholes in tax evasion, even when an attempt is made by imposing penalty, is well within the authority of the Legislature, he points out. u/s 47 of the Act, the imposition of the penalty is brought to its logical conclusion by the realization of the amount of penalty by the sale of the goods which are detained and seized and later sold, he submits. Unlike u/s 67 of the Act, when an order of penalty may be passed which may turn out to be incapable of being realized, in the case of the penalty order which is passed u/s 47(6) of the Act, the Legislature intends the effective realization of the penalty also by the sale of the goods which are detained. No doubt, I must deal with the further question as to whether the buyer being innocent of any guilty mind, no penalty can be imposed by the sale of the goods u/s 47 of the Act. There is no positive finding rendered by the authorities including the Tribunal as to whether the consignor or the consignee is the owner of the goods. But, the question which arises is whether as contended by the learned Government Pleader, the fact being proved that the seller made an attempt to evade the payment of tax due, is sufficient for imposition of a penalty. This court find no merit in the contention of the learned counsel for the consignee that the tax having been paid by the consignor on February 17, 2012, the adjudicating authority acted illegally in further probing the question as to whether there was an attempt to evade the payment of the tax due. As noticed by us, the detention was on February 8, 2012. Not only was there ground for detention, but even at the time of adjudication, inasmuch as the payment of tax on the basis of the return filed was after the date of detention, such filing of return and payment of tax, could in no way take away the reasonable and irresistible inference that there was attempt to evade payment of tax by the consignor, having regard to the circumstances in this case. On detention being noticed it is only a natural course of conduct by the consignor to account it and to make it appear that the tax due was paid. What the section requires and what this court is called upon to decide is whether there was an attempt to evade payment of tax and not whether there was an actual evasion of payment of tax.

29. If this court interpret the provisions of section 47 as meaning that irrespective of the absence of any intention on the part of the consignee or rather buyer and, therefore, the owner of the goods to attempt to evade payment of tax, then necessarily this court would be countenancing the imposition of penalty on such a person who has no dishonest intention as contemplated. It could also be said that the result of such an interpretation would be that the owner of the goods or the consignee rather will lose the goods by compulsory sale and entitled only to the amount realized in excess whereas the actually guilty person, namely, the consignor or the seller who was attempting to evade the payment of tax would not be visited with the penalty. As a matter of law, when a contract for sale of goods takes place, the property may pass even though the entire price is not paid. In a case where there was a

completed sale though the price is not fully paid, undoubtedly, when the goods are sold, a question may arise whether the consignee can set up the penalty and the compulsory sale in defence to a suit for payment of the price or the balance amount. The statutory compulsory sale would no doubt in such a case put an end to the lien which the seller may have.

30. The court has to primarily gather the intention embedded in a provision with reference to the words used in the provisions. Section 47(2) of the Act provides for detention of goods, that if the officer has reason to suspect, inter alia, that any person transporting the goods, is attempting to evade the payment of tax due under the Act. In this case, the goods were being carried by a carrier. There is not much dispute that the carrier was engaged by the consignor. No doubt, the consignee has a case that it was being dispatched by the consignor at his instance. As far as the carrier is concerned, this court would proceed on the basis that he was an agent of the consignor. The driver has given a statement wherein he has, inter alia, stated that the excavator was being taken to near Rajagiri College, Pothencode as directed by Viswambharan (consignee). The driver has given the consignee's mobile number which was given to him. It is thereafter that section 47(6) of the Act contemplates an inquiry. The officer is obliged to issue notice to the owner of the goods. An opportunity of being heard is to be provided to the owner of the goods. At the conclusion of the inquiry, the section further mandates that if there is an attempt to evade tax, the officer is to impose penalty on the owner. The penalty is to be on the basis of the tax attempted to be evaded and the maximum amount of penalty is twice the tax attempted to be evaded, as is estimated by the officer (the tax sought to be evaded is to be estimated by the officer).

31. Rule 67 of the KVAT Rules is the rule which is connected with section 47 of the Act. Rule 67(3) of the KVAT Rules reads as follows:

67. Procedure for inspection of goods in transit.--(1) and (2)....

(3) The officer recording the statement under sub-section (5) of section 47 shall obtain, from the person in charge of the goods or vehicle or vessel, the name and address of the owner of the vehicle or vessel and the name and address of the owner of the goods if he is not present in the vehicle or vessel. Such officer shall also record the details of the consignor as well as the consignee as ascertained from the person in charge of the goods or vehicle or vessel. For this purpose such officer may direct the driver or the person in charge of the vehicle or vessel to produce the registration certificate of the vehicle or vessel, driving licence of the driver or permits, as may be required.

32. Under the Sale of Goods Act, section 5 reads as follows:

5. Contract of sale how made.--(1) A contract of sale is made by an offer to buy or sell goods for a price and the acceptance of such offer. The contract may provide for the immediate delivery of the goods or immediate payment of the price or both, or for the delivery or payment by instalments, or that the delivery

or payment or both shall be postponed.

(2) Subject to the provisions of any law for the time being in force, a contract of sale may be made in writing or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties.

33. Section 18 of the Sale of Goods Act declares that in the case of a contract for the sale of unascertained goods, unless the goods are ascertained, there is no transfer of property in the goods. Section 19 being relevant, is extracted below:

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.

34. At this juncture, it is necessary to consider what is meant by "specific goods". "Specific goods" is defined in section 2(xiv) as goods identified and agreed upon at the time a contract of sale is made. As far as the words "ascertained goods" is concerned, this court may notice the following commentary in Pollock & Mulla in the Sale of Goods Act (Sixth Edition):

The term "ascertained goods", which also occurs in section 58, is not defined by the Act; see notes to that section, below. It is, however, clear that the words "specific goods" bear the meaning assigned to them in the definition clause, "goods identified and agreed upon at the time a contract of sale is made." "Ascertained" probably means "identified in accordance with the agreement after the time a contract of sale is made.

35. Therefore, in the case of a contract for the sale of "specific" or "ascertained goods", what is crucial is the intention of the parties. Intention is to be ascertained on the basis of the terms of the contract, the conduct of the parties and the circumstances. Section 20 contemplates property in the goods passing when the contract is made. There are three requirements, however, to be fulfilled to apply the said provision. They are as follows:

(i) There must be an unconditional contract for the sale of goods.

(ii) Secondly, such contract must relate to sale of specific goods.

(iii) Lastly, the specific goods as aforesaid must be in a deliverable state.

36. u/s 21 of the Sale of Goods Act, property will not pass in the case of a contract for sale of specific goods, when the seller is bound to do something to the goods for putting them in a deliverable state. In such circumstances, unless

the seller does what is required to put the goods in a deliverable state and the buyer has notice thereof, the property in the goods will not pass. Section 22 of the Sale of Goods Act reads as follows:

22. Specific goods in a deliverable state, when the seller has to do anything thereto in order to ascertain price.--Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof.

37. Section 23 also reads as follows:

23. Sale of unascertained goods and appropriation.--(1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

(2) Delivery to carrier.--Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

38. As far as delivery to a carrier or other bailee resulting in deemed unconditional appropriation of the goods to the contract is concerned, it is subject to the condition that the seller has not reserved the right of disposal. Section 24 of the Sale of Goods Act deals with consent on approval or sale or return.

39. In this case, there is no finding as to whether the consignor or the consignee is the owner. In fact, the officer has imposed penalty on both which is plainly impermissible. This question has not also engaged the attention of the fact finding authorities.

40. I have already found that the consignor did have the intention to evade payment of tax. Still further, even if it is a case where the consignor and the consignee colluded or if the consignee was in any way privy to the consignor, attempting to evade the tax, then also, the imposition of penalty by sale of the goods as contemplated in the Act cannot be faulted. Then there is the third situation which is where the consignee is completely innocent of any wrong doing.

41. In this case, as pointed out by the learned Amicus Curiae, the circumstance that the TIN number of the consignee was not indicated in the invoice, is a lapse. The indication of the TIN number is rendered mandatory by virtue of the provisions of section 40A(2) of the Act. The answer of the consignee is that even

though the consignee is also a dealer, in as much as the particular transaction related to the purchase of excavator as an end user and that it was not meant for resale, he purchased in his capacity not as dealer, but in connection with his own business which is as a works contract. He also contends that the address of the consignee is indicated in the invoice and the provisions (section 40A) cast a duty on the consignor and the consignee, cannot be blamed.

42. I am of the view that the gloss sought to be put on the words in section 40A(2) may not be sustainable. All that is required is that there must be a sale to a dealer. There is no dispute that the consignee is a dealer. Circular No. 39/07 inter alia, reads as follows:

The following instructions are issued in this context:

1. All manufacturers and traders other than PIN holders who effect sale to a person other than retail customer shall issue their sale invoices in form 8, which is being modified as in annexure 1.

....

3. Invoices in form 8B will be restricted only to dealer-to-retail consumer sales.

....

6. Section 40A of the Act as amended by the Kerala Finance Act, 2003 stipulates that every sale bill/invoice shall contain complete address and TIN/PIN details of the purchaser. The intention behind the legislation is only to bring systemic pressure on all traders to write bills so as to tap revenue up to the ultimate consumer.

7. There is no intention to require dealers to give all these details in respect of all sales to retail consumers and to burden traders with unnecessary formalities. In fact bills need compulsorily be given only for amounts of Rs. 100 or more.

8. So to begin with, the stipulation that TDM/PIN along with complete address should be compulsorily given in bills/invoices will apply only to dealer-to-dealer transactions.

....

11. Complete address of the buyer will be required to be given in case of dealer-to-retail consumer sales only if the sale value is Rs. 5,000 or more.

43. Circular No. 46/07 reads as follows:

Sub : The KVAT Act, 2003-section 40A --Insistence on TIN/PIN/Details of purchasing dealers and declaration in lieu thereof--Reg.

Read : Circular No. 39/2007 dated August 24, 2007 of Commissioner of Commercial Taxes.

The circular read above has brought out the difference in billing requirements

between business to business (B2B) and business to consumer (B2C) transactions. It was also made obligatory in B2B transactions to disclose the identity of the purchaser. In case the purchaser was below the registrable limit, he was given the option of filing a declaration as in the case of individuals wanting to get exemption from tax deduction at source under the income tax Act, 1961, who have to give a declaration in form 15G.

However, there have been representations from the trade that para 10 of the circular read above which states that if the purchasing dealer is untraceable at the address given in the bill then action shall be taken against the selling dealer, has created certain apprehensions. In the circumstances, it is clarified that action shall be taken against the selling dealer only where fraud and collusion between the selling dealer and the purchasing dealer in the transaction is proved.

It is further clarified that security deposit shall be collected on consignments which do not comply with the requirements of Sub-sections (1) and (2) of section 40A at twice the difference between the tax on MRP and billed price of the consignment.

The circular read above stands modified to the above extent. (No. C1-10760/07/CT, office of the Commissioner, Commercial Taxes, Thiruvananthapuram, dated October 31, 2007).

44. Invoice in form 8 is a tax invoice, Invoice in form 8 is to be issued by a manufacturer or trader who effect sale to a person other than an end-customer-- See rule 58(10)(i). Form 8B is the retail invoice and it is to be issued when sale is to the end-consumer. Learned Government Pleader does contend that there is a clear possibility that the consignee colluded with the consignor in so far as when the consignor was not either permitted to deal in excavators and also did not account the purchase of the excavator, it was not possible for the consignee to have inspected the excavator unless and until he showed it in an unauthorised godown. (The consignee insists that before the sale he had indeed inspected the excavator).

45. The learned Government Pleader would give examples of loss which have a harsh effect and which deprive innocent parties of their property when there is some wrong doing. He would point out that when there is counterfeiting, a person in possession of the counterfeit notes will stand deprived of the counterfeit currency even though he may be completely innocent. Likewise, he would point out that the situation is no better when a person stands deprived of property which is found in his possession and found to be stolen property.

46. As far as section 47(2) of the Act is concerned, I have already noted that u/s 47(2) of the Act, what is required for detention, inter alia, of the goods, is the suspicion that the person transporting the goods is attempting to evade the payment of tax. Section 47(6) of the Act does not specifically and expressly say that the attempt to evade tax due under the Act must be by the owner. In this context, this court must consider firstly whether the interpretation sought to be

placed by the consignee, namely, that unless there is an attempt to evade tax by the consignee on the supposition that the consignee is the owner of the goods, there can be no penalty, will render the provision a dead letter. Under the Act, what is contemplated is multi-point taxation. Taxes are contemplated on value addition. Even after a sale takes place and ownership has passed and the goods are being transported, there could be cases where the consignee/owners could indulge in attempts to evade the tax. Take for example, in this case itself, if the goods were after being purchased, purportedly for the own use of the consignee, he had actually intended a resale and the goods were detained at or near the place of the proposed second buyer of goods or the proposed buyer of the goods from the consignee, clearly there will be an attempt on the part of the consignee/owner to defeat the due payment of tax. In a case where large number of goods are being transported, there could be attempt to evade tax by diverting and attempting to sell part of the goods. All these things could have been irrelevant in a tax regime which contemplated tax at the first point of sale in the State by a dealer liable to tax where the tax had already been paid on the taxable transaction.

47. The other way to look at the issue is the large part of the tax evasion or attempted tax evasion would be practiced by the sellers, like the seller in the facts of this case. It is quite clear that, but for the detention of the goods, in all likelihood, he would not have filed the monthly return on February 17, 2012, after the detention of the goods on February 8, 2012 and paid the tax. If the interpretation of the consignee is accepted, section 47(6) of the Act is not at all available to the officer and the only remedy, as far as penal action is concerned, would be to resort to section 67 of the Act. u/s 67 of the Act, it must immediately be noted that after passing the orders of penalty proceedings against the wrong doer in many cases, would be defeated by the officer realizing that the delinquent has no assets to proceed against. u/s 47 of the Act, by virtue of the goods being detained, they become available for being proceeded against by a sale.

48. In this case, I must notice certain features. Though it was submitted that the consignee has paid the tax also, it is pertinent to note the following facts:

The consignee is alleged to have paid in cash Rs. 17,60,000 to the consignor. (The entire amount is alleged to have been paid in cash and the appellate authority notes that the source for such payment is not explained by the consignee). This is a circumstance which this court cannot ignore. The invoice is raised on January 20, 2012. The tax amount is a little over Rs. 5,00,000. The total amount is Rs. 47 lakhs and odd. The goods were put on the road and it was detained on February 8, 2012. It is only after the goods were detained, the bank gives the payment of Rs. 36,00,000 to the consignor. Thus, as on the date of the invoice and even subsequently, as on the date of the detention, out of the sum of Rs. 47 lakhs and odd, only a sum of Rs. 17,60,000 was allegedly paid to the consignor.

49. It is therefore not possible to hold that the entire amount inclusive of tax has been paid. The substantial amount which would include the amount of tax was paid only on February 13, 2012, that is, after the detention.

50. No doubt, the consignee would point out that there was an assurance of the finance being provided by the bank as far as the consignor was concerned, and it is not unlike a situation where a payment is made by cheque. I am not inclined to agree. As on the date of the invoice and the proposed delivery, it is clear that the seller has not received the entire amount. This court is also not impressed by the argument of the consignee that since Rs. 17,60,000 was paid and tax amount is less than 1/3rd of the same and the State has first charge over the tax, it must be treated that the tax amount was paid. In other words, this court would only say that it is not as if the payment was made as contended of the entire amount inclusive of the tax.

51. Still further, this court must also notice that the question as to ownership of the goods, must be decided with reference to a point of time not later than the date of detention. That is a point of time when the officer entertains suspicion that there is intention to evade the tax u/s 47(2) of the Act. Therefore, the question would be as to who is the owner of the goods at least as on the date of detention of the goods u/s 47(2) of the Act.

52. The learned Government Pleader, no doubt, would contend that in a case where there is a sale and the ownership has passed and the goods are detained and the buyer/owner is completely innocent, in that, he has acted bona fide and even paid the tax inclusive amount, it may have a bearing only on the quantum of penalty.

53. I am of the view that u/s 47(6) of the Act, when there is an intention of the seller of the goods to evade the tax which is established, it may be accompanied by the buyer being party to such guilty intention entertained by the seller. In such a case, even if the title to the goods had passed to the buyer, there can be no doubt that the penalty u/s 47(6) of the Act can be imposed on the owner of the goods to be realized by the sale of the goods as provided u/s 47 of the Act. Undoubtedly, if the seller continues to be the owner of the goods, nothing more remains to be enquired and his guilty mind would clothe the officer with authority to visit him with penalty by sale of the goods. There may be cases where the buyer/owner may not share the intention. There may be circumstances from which one could readily infer that the seller has the intention to evade the payment of tax. Such circumstance would be the circumstance where the seller does not for instance have any registration to deal in the particular goods and the quantum of purchase is clearly sufficient to make the transaction exigible to tax.

54. In this case, I am of the view that not only did the seller had the intention to evade the payment of tax, but the consignee was also party to it or was colluding with the seller. I cannot treat the consignee as an end-user in regard to the

excavator. The consignee could possibly use the same by transferring the right to use the same in which case it would be a sale. Therefore, admittedly, the consignee is a registered dealer. Also, as found by the appellate authority, the consignee was not able to explain the source for payment of Rs. 17,60,000 which he has alleged that he has paid in cash.

55. The next question is whether this court should remand the matter back for finding as to who is the owner. In the circumstances of this case, this court is inclined to find that the consignee is the owner. This court already alluded to the relevant provisions in the Sale of Goods Act. This court may also advert to the definition of "sale" in section 2(xliii) of the Kerala Value Added Tax Act as follows:

1. Definitions.--In this Act, unless the context otherwise requires,--

(xliii). "Sale" with all its grammatical variations and cognate expressions means any transfer whether in pursuance of a contract or not of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or for other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge.

56. Even u/s 5 of the Sale of Goods Act, neither the delivery of goods, nor the full payment of the price is a criterion for the passing of property. In this case, there is a third party, namely, the bank. Quite clearly, the consignor stood assured of payment of the full price through the medium of the arrangement made with the bank. There is delivery effected to the carrier. In this case, there is delivery of the goods effected through the goods being delivered to the carrier for being sent to the buyer. The statement of the driver or the transporter, is on record to the effect that the goods were being taken as instructed by the consignee. Therefore, in the circumstances of this case, this court would hold that the consignee is the owner as this is the finding which this court can arrive at on the materials on record.

57. In the circumstances of this case, this court is, therefore, of the view that the penalty must be sustained on the consignee, treating him as owner of the goods and on the basis that the seller entertained the intention to evade the tax unambiguously and the buyer (consignee) did colluded with him as found by us.

58. However, as far as the question of quantum of penalty is concerned, this court is of the view that relief must be given to the party. Twice the amount of tax (Rs. 5,25,000) is Rs. 10,50,000. There is complaint that the penalty levied exceeds even twice the amount of tax. This is a case where there was a bank transaction. The tax has been paid. In the circumstances, I set aside the order of the Tribunal and the order of the intelligence officer as affirmed by the appellate authority will stand modified and there will be an order imposing penalty in a sum of Rs. 3,00,000 (rupees three lakhs) on the consignee treating him as the owner. The revision filed by the State is allowed as above.

59. This court see no merit in the writ appeal filed by the consignee. Merely

because there was an order of the Tribunal, it cannot be said that without giving reasonable time for the officers to decide whether further steps should be taken, it is incumbent on the officers to release the goods. No doubt, unreasonable delay without reference to any intention to challenge the Tribunal's order could be impermissible. But, in the facts of this case, this court does not think that such a conclusion is possible. Accordingly, the direction of the learned single judge giving time for filing the revision cannot be taken exception to. Writ Appeal No. 121 of 2013 will stand dismissed.

60. This court see no merit in the writ appeal filed by the bank. This court see no right in them to claim a lien and get the vehicle released. The rights of the bank cannot prevail over the right u/s 47 of the Act. I see no reason to disagree with the judgment of the learned single judge dismissing the writ petition. Accordingly, Writ Appeal No. 1714 of 2012 will stand dismissed.

61. This court records its appreciation for the efforts put in by Shri Muham-med Rafique who assisted us as Amicus Curiae in arriving at the conclusions which we have arrived at.

K. Ramakrishnan, J.

62. I have gone through the judgment of my learned brother and I am fully agreeing with his findings, conclusions and the reliefs granted, but I wish to touch upon some more aspects, which I am adding in this judgment.

63. As regards the appeal filed by the bank, namely W.A. No. 1714 of 2012 is concerned, they cannot be deemed to be the owner of the goods as there is only a debtor-creditor relationship between the appellant and the second respondent, in view of the dictum laid down in the decision in Sundaram Finance Ltd. Vs. State of Kerala and Another, At the most, they may have a lien over the goods, namely, the excavator, detained in this case and they may be entitled to get the balance amount if any available after the sale of the vehicle by the Department and adjustment of the penalty amount imposed, if the owner of the goods did not pay the penalty imposed in this case. Except that right, they have no right to get delivery of the vehicle as they are not owner of the goods. So, we do not find any reason to interfere with the finding of the learned single judge on this aspect.

64. As regards the writ appeal filed by Sri Viswambharan, namely W.A. No. 121 of 2013 is concerned, the learned single judge has dismissed the writ petition on the ground that the State wanted to file a revision against the order of the Tribunal and so, there is nothing wrong in granting reasonable period for the State to file a revision and during that time, retaining the goods with the Department cannot be said to be illegal or unjustifiable. So, we do not find any reason to interfere with the finding of the learned single judge on this aspect as well.

65. The main issue involved in OTR No. 9 of 2013 filed by the State is whether the Tribunal was justified in setting aside the concurrent finding of the

adjudicating authority and the first appellate authority and exonerating the appellant herein from payment of penalty on the ground that he is a bona fide purchaser of the goods and even setting aside the order against the seller as well, though he did not file any appeal. The other question of law involved in this case is "who can be said to be the owner of the goods at the time of detaining the goods by the detaining authority?"

66. As regards the second point is concerned, none of the authorities have gone into the question as to who is the owner of the goods in respect of the goods that has been detained by the authorities. It may be mentioned here that the owner of the goods has not been defined under the Kerala Value Added Tax Act, 2003 (hereinafter referred to as, "the Act"). Normally, as far as the taxation statutes are concerned, the owner of the goods will be deemed to be the seller for all practical purposes. But, in some cases, if the title in movable property passes to the buyer, in such cases, he will have to be deemed to be the owner of the goods. Further, going by the scheme of the Act, it will be clear that only the owner of the goods will be liable for the tax evasion as he will be in possession of the goods to be proceeded against and he will be given an opportunity to explain as to why penalty should not be imposed on the goods detained on the basis of attempt of evasion of tax payable on the goods.

67. Section 47(2) of the Act says "If such officer has reason to suspect that the goods under transport are not covered by proper and genuine documents (in cases where such documents are necessary) or that any person transporting the goods is attempting to evade payment of the tax due under this Act, he may, for reasons to be recorded in writing, detain the goods and shall allow the same to be transported only on, the owner of the goods or his representative or the driver or other person in charge of the vehicle or vessel on behalf of the owner of the goods, furnishing security for double the amount of tax likely to be evaded, as may be estimated by such officer : Provided that such officer may, if he deems fit, having regard to the nature of the carrier or the goods and other relevant matters, allow such goods to be transported on the owner of the goods or his representative or the driver or other person in charge of the vehicle or vessel executing a bond with or without sureties for securing the amount due as security : Provided further that where the documents produced in support of the transport of goods evidence defects of a minor or technical nature only and the goods are owned by a dealer registered under this Act, such officer may allow the goods to be transported after realizing the tax on the turnover of the goods under transport." So, it is clear from the above provision that at that time, the intercepting authority need only satisfy that there is suspicion of an attempt to evade payment of tax by the owner of the goods, or the person transporting the same and the goods were not supported by valid documents representing the real sale at that time and he need not consider as to whether there was actual evasion of tax or attempt to evasion of tax. Suspicion is only subject to the satisfaction of the intercepting officer and nothing more at that time.

68. Section 47(6) of the Act says that the officer authorised under Sub-section (5) shall, before conducting the inquiry, serve notice on the owner of the goods and give him an opportunity of being heard and if, after the enquiry, such officer finds that there has been an attempt to evade tax due under this Act, he shall, by order, impose on the owner of the goods a penalty not exceeding twice the amount of tax attempted to be evaded, as may be estimated by such officer. So, it is clear from this that the adjudicating officer must give an opportunity to the owner of the goods and come to the conclusion, on the basis of the materials available, that there has been an attempt to evade tax due under the Act and only if such a conclusion has been arrived at by the officer, he is expected to impose penalty under this section. This was supported by the decision reported in *Manager, M.T.M. Higher Secondary School Vs. State of Kerala and Others*, , wherein it has been held that the crucial difference between the provisions contained in section 47(2) and 47(6) is that the detaining authority is authorized to intercept and demand security deposit if he has reason to suspect that the person transporting the goods is attempting to evade payment of tax or the goods are not covered by proper and genuine documents in cases where such documents are necessary. But, in section 47(6), the authorized officer conducting the enquiry is empowered to impose penalty only if such officer finds that there has been an attempt to evade the tax due under the Act. From the scheme of the statute, it is clear and evident that if any detention is made on the basis of a reasonable suspicion regarding attempt to evade payment of tax or on the basis of not accompanying proper and genuine documents, it shall be succeeded by an enquiry by another officer of higher rank. Culmination of such enquiry should result in an adjudication as to whether there was an actual attempt to evade payment of tax due under the Act. Hence it is evident that even if there exists a reasonable suspicion regarding attempt of evasion of payment of tax, penalty can be imposed after completing an enquiry only if the officer arrives at a conclusive finding that such an attempt was there in existence. Conclusive finding contemplated u/s 47(6) of the Act, regarding the attempt to evade tax could not be on mere presumption. There should not be any missing link between the suspicion of attempt of evasion of tax and the existence of an intention of attempting to evade tax by the owner of the goods.

69. Further, in the decision reported in *Gheru Lal Bal Chand Vs. State of Haryana and Another*, the Punjab and Haryana High Court, while considering the penalty provisions under the Haryana Value Added Tax Act and Rules, 2003, observed that no liability under the Haryana Value Added Tax Act, 2003 could be fastened on the purchasing registered dealer on account of non-payment of tax by the selling registered dealer in the treasury, unless fraudulence, collusion or connivance of the registered selling dealer or its predecessors with the purchasing registered dealer was established. It is also observed in the same decision that there is no vicarious liability in the case of evasion of payment of tax by one person on another person. It is further observed in the same decision that in legal jurisprudence, the liability can be fastened on a person who either

acts fraudulently or had been a party to the collusion or connivance with the offender. However, the law envisages to impose no penalty either directly or vicariously where a person is not connected with any such evasion or act. Law cannot envisage an almost impossible eventuality. In the absence of any mala fide intention, connivance or wrongful association of the purchasing dealer with the selling dealer or any dealer earlier thereto, no liability can be imposed on the principle of vicarious liability. Law cannot put such onerous responsibility on the purchasing dealer otherwise. So, in order to fasten the liability on a purchaser, it must be proved by the Department that he had colluded or he had fraudulent intention to share with the seller in the evasion of tax payable on the goods sold.

70. So, in such cases, the person, who is the owner of the goods at the time of detention, has to be ascertained before imposing penalty. There may be cases where though the sale has taken place, the title in the property would not have passed from the seller to the buyer and that may depend upon fulfilment of certain conditions. Further, in a case where the property is in transit, there may be cases where it may be subject to the verification of the same by the buyer that title may pass to the buyer from the seller and till then, the seller will be deemed to be the owner of the goods. All these things will depend upon the terms of the contract between the parties and if there are no written terms of the contract, then, that will depend upon the intention of the parties as to when the title in the goods would pass to the buyer and that will have to be ascertained from the attendant circumstances and conduct of the parties, if there is no written agreement regarding the same is available.

71. In the decision reported in Sorabji Hormusha Joshi and Co. Vs. V.M. Ismail and Another, it has been observed that in the case of sale of goods by description where the description of goods is the basis of the contract the falsity of the description would make the goods substantially different from those that were described so as to constitute a failure of consideration. Where the goods are bought by description, there is an implied condition that the goods shall be of merchantable quality. The Sale of Goods Act does not give any definition of the word "merchantable", yet the word has by long use, become a term of art in commercial law. Merchantable quality means that the goods comply with the description in the contract so that to a purchaser buying goods of that description, the goods would be good tender. Goods are of merchantable quality, if they are of such a quality and in such condition that a reasonable man, acting reasonably, would, after a full examination, accept them under the circumstances of the case in performance of the offer to buy them, whether he buys for his own use or to sell it again. In the same decision, it has been observed that the mere receipt of goods does not amount to acceptance and before the buyer can be called upon to accept the goods, he can claim a reasonable opportunity to examine the goods. That opportunity has to be given by the seller on request by the buyer. The right of examination is closely connected with the acceptance of goods and passing of the property.

72. In the decision reported in Commissioner of Customs, Kolkatta Vs. Grand Prime Limited and Others, it has been observed that if the import of certain goods by the importer is in violation of relevant rules and the documents produced are not genuine, then, the authorities are entitled to impose penalty and the exporter is not entitled to get back the articles.

73. Further, in the decision reported in Bharat and Company Vs. Trade Tax Officer and Another, it has been observed that mere entry of the purchaser's name in the consignment note is not sufficient to hold that the title in the goods has passed to the purchaser.

74. In the decision reported in The Commissioner of Income Tax, Madhya Pradesh and Bhopal, Nagpur Vs. Bhopal Textiles Ltd., Bhopal, , it has been held that a railway receipt is a document of title to goods and for all purposes, represents the goods. When the railway receipt is handed over to the consignee on payment, the property in goods is transferred and in this case, it is a matter of considerable doubt whether the property in the goods can be said to have passed to the buyer by the mere fact of railway receipt being in the name of the consignee, as has been held by the High Court.

75. Further, in the decision reported in Suchetan Exports P. Ltd. Vs. Gupta Coal India Limited and Others, it has been held that merely because the goods were delivered and the title and ownership passed to the buyer and lien over the goods stood terminated, cannot be accepted, as per the conditions. The title in the goods will pass to the buyer only on full payment of the goods.

76. In the decision reported in State of Kerala Vs. K.M. Abdul Gafoor, it has been held that the respondent cannot claim exemption from penalty by accounting goods after fraud was detected by the Department.

77. It is clear from the dictum laid down in the above decision that as to who is the owner of the goods, is a matter to be determined before imposing penalty and merely because the person against whom the proceedings have been initiated has paid the tax alleged to be evaded subsequent to the detection, will not exempt him from the penalty proceedings. So, the observation made by the Tribunal in the order that since the buyer has paid tax and subsequently, the seller also accounted the same by filing a return and thereby, there is no offence of evasion of tax and exonerating the appellant from the liability, appears to be not correct in view of the legal position discussed above. Neither the Tribunal nor the adjudicating officer nor the first appellate authority has considered the fact as to who is the owner of the goods at the relevant time and even if the purchaser has become the owner of the goods, whether there was any connivance or fraudulent act on his part with the seller in evading payment of tax, etc. The adjudicating officer found both the seller and the buyer responsible for the payment of penalty which was confirmed by the first appellate authority which appears to be not correct. Further, the Tribunal had, without the order being questioned by the seller, set aside the finding of the authority below that

there was an attempt on the part of the seller for evasion of the tax, but for the detection, he would not have paid the tax and making him liable for the penalty was also set aside by the Tribunal and it was left open to the authorities to proceed against the seller afresh, which also appears to be unsustainable in law. So, on those two grounds, the approach made by the Tribunal in exonerating the buyer from the liability, appears to be not correct, especially, when no reason has been given by the Tribunal for setting aside the finding of the authorities below that there was connivance between the seller and the buyer in evading tax by the seller as found by the first appellate authority.

78. Though the owner of the goods has not been defined under the Act, "sale" has been defined u/s 2(xliii) of the Act, which reads as follows:

"Sale" with all its grammatical variations and cognate expressions means any transfer whether in pursuance of a contract or not of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or for other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge.

79. Explanation III to the section says, "A transfer of goods on hire-purchase or other instalment system of payment shall, notwithstanding the fact that the seller retains the title in the goods as security for payment of the price, be deemed to be a sale on the date of delivery of the goods in pursuance of the agreement of such hire purchase or other system of payment in instalments. By virtue of this provision, the bank with whom the excavator was hypothecated as security for repayment of the loan, will not become the owner of the goods. Explanation V says, "A transfer of right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration, shall be deemed to be a sale. So, even if the excavator is given to a user on rent, then, that also will be exigible to tax under the Act. The buyer being a works contractor, the possibility of the buyer, giving it for rent to others as part of his work and collecting rent, cannot be ruled out. So, on that basis, it cannot be said that he is an end-purchaser and it is intended for his personal use alone as contended by the learned counsel for the buyer. Further, Explanation VIII(a) of the section says that "the sale or purchase of goods shall be deemed, for the purposes of this Act, to have taken place in the State where the contract of sale or purchase might have been made, if the goods are within the State,--(i) in the case of specific or ascertained goods at the time the contract of sale or purchase is made; and (ii) in the case of unascertained goods or future goods, at the time of their appropriation to the contract of sale or purchase by the seller or by the purchaser, whether the assent of the other party is prior or subsequent to such appropriation. So, in order to become a completed sale of ascertained goods, it must be available at the deliverable state at the time of sale and in such cases, sale will be complete on the date on which the sale has taken place.

80. Section 19 of the Sale of Goods Act says as to when the property intends to

pass in the case of sale of goods. Section 19(1) says that where 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. Sub-section (2) of that section says, for the purpose of ascertaining the intention of the parties regards shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case. Sub-section (3) says that unless a different intention appears, the provisions contained in sections 20-24 are the rules ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. Section 20 of the Sale of Goods Act says, whether there is an unconditional contract for the sale of specific goods in deliverable state, the property in the goods passes to the buyer, when the contract is made and it is immaterial whether the time of payment of the price or the time of delivery of goods or both is postponed. Section 26 of the Act says, unless otherwise agreed the goods remain at the sellers risk, until the property therein is transferred to the buyer but when the property therein it is transferred to the buyer, the goods are at the buyer's risk, whether delivery has been made or not. Provided that where the delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault: Provided also that nothing in the section shall affect the duties and liabilities of either seller or buyer as bailee of the goods of the other party. Section 36 deals with rules as to delivery. Sub-section (1) of that section says that, where it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract express or implied between the parties. Apart from any such contract, goods sold or to be delivered at the place at which they are at the time of the sale and the goods agreed to be sold are to be delivered at the place at which they are at the time of agreement to sell or if not then in existence, at the place at which they are manufactured or produced. Sub-section (2) says, where under the contract of sale, the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them with a reasonable time. Section 40 of the Act says, where the seller of the goods agrees to deliver them at his own risk, at the place other than that where they are when sold, the buyer shall nevertheless, unless otherwise agreed take any risk of deterioration in the goods necessarily incident to the course of transit.

81. Section 41 of the Act deals with buyers right of examining the goods. Sub-section (1) of that section says, where the goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. So, it is clear from the above that the question as to when the property passes will depend upon the facts of the case, intention of the parties, conduct of the parties and terms of the contract. When there is no written terms of the contract, then it has to be ascertained from the conduct of the parties and circumstances of the

case and with the help of the provisions of the Sale of Goods Act.

82. In the decision reported in *Contship Container Lines Ltd. Vs. D.K. Lall and Others*, it has been held that in the case of f.o.b. contract, the goods are delivered free on board the ship. Once the seller has placed the goods safely on board at his cost and thereby handed over possession of the goods to the ship in terms of the bill of lading or other documents, the responsibility of the seller ceases and the delivery of the goods to the buyer is complete. The goods are from that stage onwards at the risk of the buyer. In the decision reported in *Agricultural Market Committee Vs. Shalimar Chemical Works Ltd.*, it has been held that by virtue of sections 19 and 20 of the Sale of Goods Act, the title to goods passes to the purchaser as soon as the contract is made in respect of specific goods in deliverable state and does not depend on payment of price, and this is subject to the contract to the contrary. So it is clear from the above dictum that normally, the title of goods passes to the buyer in the case of an ascertained goods at deliverable state on the date on which the contract was made, and it will be deemed to have been delivered at that place. If there is contract to the contrary, then that will depend upon the terms of the contract.

83. In this case, though in the quotation given, it was mentioned that full payment was against delivery, as per the definition of "sale", deferred payment will not prevent passing of property to the buyer if the intention can be drawn from other circumstances. Further, it is also clear from the dictums laid down in the decisions cited supra that the buyer can waive the right of inspection of the goods to be delivered and if that was waived by him, then he will take the goods at his risk and he cannot claim any benefit of non-inspection later. In this case, it is clear from the evidence that there was no possibility of the excavator being inspected by the purchaser-consignee at the time of effecting the sale because, there was no stock of excavator available with the consignor at that time as revealed from the report of the Intelligence Officer and the finding on this aspect by the adjudicating officer as well as the first appellate authority, which were not challenged by the seller, namely, the consignor. Further, the statement of the driver recorded by the Intelligence Officer at the time of inspection as provided under the Rules also will go to show that the consignment was entrusted by Viswambharan, the consignee and he had also stated that the mobile phone number of the consignee was given to him by the consignee. That also gives an indication that the title in the goods passed to the buyer at the time of sale itself. So, he becomes the owner of the property. Further, the authorities below also have no case that the seller had retained the title in the goods and it never passed to the buyer and that was the reason why they had sent notice to the buyer and an opportunity was given to him before ordering penalty as well. So, under such circumstances, it can be safely concluded that the title in the goods passed to the buyer in this case and he has become the owner of the goods for the purpose of this section.

84. Since it is found that the buyer has become the owner of the goods, penalty

can be imposed on him only if it is proved that he had colluded with the seller in his attempt to evade payment of tax.

85. It is seen from the documents and the enquiry report of the Intelligence Officer, that the seller was not authorized to deal in excavator. Further, no purchase of excavator was shown in the stock of the seller in his return filed by him in the month of December 2011. Further, his stock statement also does not show that there was any excavator available with him as on the date when the quotation was drawn in favour of the buyer, i.e., on December 16, 2011. The invoice that accompanied the goods was dated January 20, 2012. There is nothing on record to show that the excavator was available with the seller even at that time as his stock statement does not reveal the existence of such excavator with the seller and he was not authorized to deal with the excavator as well.

86. Though the counsel for the buyer asserts that he had an opportunity to verify the excavator before the invoice was drawn, it was not possible in view of the evidence available which would indicate that he also wanted to help the seller in effecting the sale of the excavator for which he had no registration to sell as well. Being a purchaser paying huge amount, he ought to have verified whether the seller has got any registration for sale of this article before entering into a contract of sale with him, which he had not intentionally done. This would indicate that he also wanted to help the seller to effect the sale and avoid payment of tax by the seller if it was not intercepted by the authorities. So, it cannot be said that the article intended to be sold was at a deliverable state at the time when the contract was alleged to have been made between the buyer and seller. So, there is no possibility for the buyer to examine the excavator for his satisfaction, so as to come to a conclusion that it was delivered to him on that date. Further, the fact that payment was reserved on the date of delivery also reveals that there was no possibility for the buyer to examine the same and that was the reason why the payment was postponed. All these will go to show that the buyer is having connivance with the seller in making the sale of the article, for which he has no registration to sell and that the tax is not to be paid by the seller for this transaction.

87. Further, it is seen from the letter given by the transporter to the Intelligence Officer when he wanted to get back his vehicle in which the excavator was transported, that the entrustment of the excavator for delivery was made by M/s. Indian Motors, the seller, to be delivered to buyer, namely, Viswambharan. But the driver had given a different version that it was entrusted by Viswambharan, the buyer, as seen from the statement given. So, this will only go to show that even if the consignor made arrangement to transport, it is on behalf of and as entrusted by the buyer.

88. Further it was an admitted fact that the excavator was intercepted by the authorities on February 8, 2012, but admittedly the payment was effected by the bank only on February 13, 2012. The fact of interception of the excavator by the

authorities was not informed to the bank either by the seller or by the buyer. If really interception of the article was made known to the bank, they would not have effected payment of the amount till the excavator was released either by the seller or by the buyer from the authorities. This gives an indication that the buyer was also interested in making payment to the seller even before the article was released by the authorities and this gives an indication that he had colluded with the seller.

89. The fact that the purchase of excavator was not accounted by the seller in his return will go to show that but for the interception, he would not have paid the tax and he would have avoided payment of tax payable to the Government and appropriated the same for his purpose. Further, the fact that he is not an authorised dealer for dealing with such article also gives an indication that he would not have paid the amount collected towards tax from the bank, but for the intervention by the authorities.

90. The fact that the original invoice alone accompanied the goods along with the transport of goods is also an indication that if the article was not intercepted by the authorities, he would not have paid the tax. Further rule 58(11) of the Kerala Value Added Tax Rules says that in the case of transit as follows:

Every such bill or invoice or cash memorandum, shall be prepared in duplicate unless a different procedure is prescribed by the Central excise law or any other Central legislation, as applicable to such dealer, and shall be serially machine numbered. Where the goods sold are transported in a vehicle or vessel or where the goods are transported through any check-post, such bills, invoice or cash memorandum shall be issued in quadruplicate. Where the bill is issued in duplicate original shall be issued to the purchaser in the case of sale bill, and to the seller in the case of purchase bill, and the other copy shall be retained by the dealer. In the case of quadruplicate bills, the duplicate shall be used as transport copy, triplicate shall be filed at the check-post, in the case of transport of goods across the check-post and the quadruplicate shall be retained by the seller. The serial numbers assigned to the bills, invoice or cash memoranda shall run consecutively for the whole year. The dealers may use the same or different series of bills, invoice or cash memoranda for goods subject to (different rates of tax, provided that the dealer shall use a separate series for the bills issued for sales under a permit under sub-section (1) of section 19. The dealer shall) intimate the series and the opening numbers of bills or invoices or cash memoranda intended to be used by him in a year to the assessing authority during the month of April and the number of the first and last bills or invoices or cash memoranda issued during the month, quarter or year, under different series shall be noted in the monthly, quarterly or annual return, as the case may be, filed by the dealer. If a new series of bill, invoice or cash memoranda is started after having furnished the details to the assessing authority in April, the dealer shall intimate the details thereof within fifteen days from the date on which such new series is started.

91. So, he is expected to send the triplicate bill or duplicate bill along with the goods to satisfy the check-post authorities regarding payment of tax, which he has not done in this case. This also gives an indication that the seller had no intention to account this sale in his account, and he had an intention to attempt to evade payment of tax in this case.

92. Further, the fact that the seller had not co-operated in the proceedings also will go to show that his intention is very clear that he had intended to evade tax, and there was existence of attempt on the part of the seller to evade payment of tax due to the Government. So, it is clear from the above circumstances, that the finding arrived at by the authorities that there was an attempt on the part of the seller to evade payment of tax and subsequent filing of return on February 17, 2012 and payment of tax by the seller is an afterthought and in connivance with the buyer after getting the amount from the bank, but for the intervention of the authorities, and detention of the article by the authorities, he would not have paid the tax is perfectly justifiable and they were justified in coming to the conclusion that there was attempt on the part of the seller in evasion of payment of tax and as such the goods are liable to be proceeded against, and penalty has to be imposed.

93. It is clear from the circumstances that the buyer is also colluding with the seller in the attempt of evasion of tax. It may be mentioned here that he was alleged to have paid Rs. 17,60,000 as advance with the seller on December 21, 2011. He had not shown the source for payment of the same. Further in the invoice, the sale being by a registered dealer to another registered dealer, it must contain the TIN number of the buyer which has not been furnished by the buyer to the seller intentionally and that was not mentioned in the invoice by the seller as well. The contention of the counsel for the buyer that he being the end-purchaser, the non-mentioning of TIN number is not fatal cannot be accepted because he being a works contractor, the possibility of his giving the excavator on rent to others, which is also deemed to be a sale for the purpose of this Act cannot be ruled out and in such circumstances, it cannot be said to be obtained by the buyer for his own purpose alone. Further, he was not prepared to produce his accounts before the Intelligence Officer, when he was called upon to produce the same and he had submitted a reply stating that he was permitted to compound u/s 8 of the Act for the year 2011-12 and he requested the authorities not to insist for production of accounts for the year 2011-12 (See his reply dated March 6, 2012 as seen in the file). But, the first appellate authority, in paragraph X at page 13 of its order, has found that no such application has been filed and he filed even the questioning statement for the first time, after its detection. The fact that he had not intimated to the bank regarding the interception of the goods, namely, the excavator by the authorities and allowing the bank to pay the amount, which they would not have paid if the interception so made was known to them also would indicate that he colluded with the seller and wanted to see that the amount reaches the seller so as to make payment of tax at a later stage to avoid the proceedings by the authorities. Further, the non-insisting for

duplicate bill for accompanying the goods as required under rule 58(11), though being a registered dealer he was aware of the procedure not insisted for the same, would also indicate that he is also helping the seller in avoiding payment of tax in this transaction. The fact that he had overdrawn by showing an excess amount as loan from the bank and the value required for the purchase of the article also would indicate that there was a fraudulent intention on the part of the buyer in making unlawful gain in this transaction and there was an under-dealing between the buyer and the seller regarding the excess amount obtained through bank. So, all these things will go to show that there was a collusion and fraudulent intention on the part of the buyer as well, in helping the seller in avoiding payment of tax, and as such it cannot be said that he is a bona fide purchaser, without any intention to collude with the seller in avoiding payment of tax and the finding to that effect by the Tribunal appears to be unsustainable in law. So, even assuming that he becomes the owner of the goods, as proceeded by the authorities in this case and as found by this court as well, he is also liable to be proceeded against for the act of the seller as he had colluded with him for this purpose, and as such he will be liable to pay the penalty and the exoneration made by the Tribunal of the buyer is also unsustainable in law and hence the same is also liable to be set aside on this ground. The question as to whether even if the buyer is a bona fide purchaser and he had not colluded with the seller in his attempt to evade payment of tax, whether the goods can be proceeded with for the attempt to evade payment of tax by the seller, need not be considered in the circumstances of the case and this question is left open to be decided in an appropriate case.