(1982) 06 KL CK 0028

In the High Court Of Kerala

Case No : W.A. No. 106 of 1981

N. Vamadevan Pillai APPELLANT

Vs

The State of Kerala and others RESPONDENT

Date of Decision : 02-06-1982

Acts Referred:
Essential Commodities Act, 1955 — Section 3, 7, 7(1)(b), 8(1)

Citation : (1982) KLJ 304

Hon'ble Judges : P. Subramonian Poti, Acting C.J.;U.L. Bhat, J

Bench : Division Bench

Advocate : C.P. Sudhakara Prasad, for the Appellant;

Judgement

P. Subramonian Poti, Ag. C.J.

1. The learned single Judge dismissed the Original Petition challenging Ext. P1 order of the 4th respondent, the Assistant Excise Commissioner, ordering confiscation of Ambassador Car K.L.O. 5432 belonging to the petitioner in exercise of the power under S. 67B of the Abkari Act, as confirmed by Ext. P2 order passed in appeal by the Joint Commissioner of Excise and Ext. P3 order passed in revision by the 2nd respondent. The reason for the confiscation was that am Excise party detected an Abkari case involving the said oar. At the time of detection the car carried 260 litres of toddy in 11 plastic cans. The car, along with the material objects, was seized. The case against the driver was compounded. The owner of the car, the petitioner, approached the Assistant Excise Commissioner seeking the release of the car contending that the car was garaged for repairs and that was taken out by the driver without his consent or knowledge.'' Though the car did not stand registered in the name of the petitioner, the 4th respondent accepted the petitioner''s case that the petitioner was the owner of the car. The 4th respondent further found that the key of the car and other records were with the driver, Sasi. It was while so that the vehicle was used for transporting toddy at the instance of a toddy shop contractor. Appreciating the circumstances of the case the 4th respondent came to the

conclusion that (a) the owner of the car, the petitioner, was not responsible for the commission of the offence, (b) it was admitted that he had no knowledge about the offence nor was there any connivance by him (c) he had taken certain extent of precaution against the commission of the offence (d) the driver did not commit the offence during the course of the employment (e) the offence was only technical in the strict sense; had a permit been obtained the transport of toddy would not have been an offence under the Act (f) for the above reason the same yard stick cannot be applied here as in the case of a vehicle transporting illicit arrack which latter event adversely affects the revenue of the State (g) considering the technical offence involved in the case and also in views of the owner''s innocence the owner of the car deserves a sympathetic consideration. Having found all these the 4th respondent followed it up by saying that S. 67C(2) does not permit release of the vehicle as requested by the owner of the vehicle. Consequently he imposed the order of confiscation. The appellate authority found that the driver was involved in the commission of offence, that the part played by the owner was immaterial, the law on the point was clear, that the appellant had failed to take reasonable and necessary precaution against the misuse of the car and therefore the confiscation order was right. For coming to the conclusion that the appellant had failed to take precaution, neither the finding of the 4th respondent nor the evidence on it was even adverted to by the appellate authority nor did the appellate authority hold that the finding of the 4th respondent was unsustainable for want of evidence. The revisional authority found that no point of law had been pleaded before it. It referred to one and only circumstance, namely the owner leaving the key of the car with the driver instead of instructing him to entrust it to the workshop authorities.

2. Evidently the scope of S. 67B of the Abkari Act has not been properly understood by the 4th respondent. There has not been a proper appreciation of the scope of the provision by the Appellate and Revisional authorities. It would appear from the order of the 4th respondent, Ext. P1, that confiscation in assumed to be mandatory when once contravention is proved and there is no discretion in the authority considering the imposition of punishment to confiscate or not. It is this that should call for consideration in this Writ Appeal.

3. S. 65 of the Act provides for confiscation in any case in which an offence has been committed under the Act. It deals with confiscation of liquor, drug, materials, etc. with which we are not concerned. So far as it is relevant for the purpose of ''this case it is sufficient to notice that the section, interalia, provides that in any case in which as offence has been committed under the Act any conveyance used in carrying the liquor in respect of which the offence has been committed shall be liable to confiscation. That an offence has been committed under the Act in this case has been established. That the conveyance of the petitioner had been used in carrying the liquor in respect of which the offence was committed in also not in controversy. Hence the conveyance is liable to confiscation.

4. Now we turn to Ss. 67B and 67C. We extract these sections here:-

67B. Confiscation by Abkari Officers in certain cases - (1) Notwithstanding anything contained in this Act or in any other law for the time being in force, where any liquor, intoxicating drug, material, utensil, implement or apparatus or any receptacle, package or covering in which such liquor, intoxicating drug, material, still, utensil, implement or apparatus is found or any animal, cart vessel or other conveyance used in carrying the same in seized and detained under the provisions of this Act; the officer seizing and detaining such property shall, without any unreasonable delay, produce the same before an officer authorised by the Government in this behalf by notification in the Gazette, not being below the rank of an Assistant Excise Commissioner (hereinafter referred to as the authorised officer).

(2) where an authorised officer seizes and detains any property specified in sub-section (1) or where any such property is produced before an authorised officer under that sub-section and he is satisfied that an offence under this Act has been committed in respect of or by means of that property and that such property is liable to confiscation under this Act, such authorised officer may, whether or not a prosecution is instituted for the commission of such offence, order confiscation of such property and where such property consists of any receptacle or package, the authorised officer may also order confiscation of all contents thereof.

(3) When making an order of confiscation under sub-section (2), the authorised officer may also order that such of the properties to which the order of confiscation relates, which in his opinion cannot be preserved or are not fit for human consumption, be destroyed.

67C. Issue of show cause notice before confiscation u/s 67B. - (1) no order confiscating any property shall be made u/s 67B unless the person from when the same is seized-

(a) is given a notice in writing informing him of the grounds on which it is proposed to confiscate such property;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation; and

(c) is given a reasonable opportunity of being heard in the matter.

(2) Without prejudice to the provisions of sub-section (1), no order confiscating any animal, cart, vessel or other conveyance shall be made u/s 67B if the owner of the animal, cart, vessel or other conveyance proves to the satisfaction of the authorised officer that it was used in carrying the liquor or intoxicating drug or the material, still, utensil, implement or apparatus or the receptacle, package or covering without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the animal, cart, vessel or other conveyance and that each of them had taken all reasonable and necessary precautions

against such use.

S. 67B (1) deals with production before the Abkari officers. It may not be necessary to advert to this sub-section here. Sub-section (2) deals with confiscation. In order to enable confiscation to be made the authorised officer must be satisfied that an offence under the Act had been committed in respect of or by means of the property detained and that such property is liable to confiscation under the Act. If both these conditions are present irrespective of whether any prosecution has been instituted or not the authorised officer may order confiscation (emphasis supplied). We have already seen what renders a conveyance liable to confiscation. S. 67B(2) applies in the case of a conveyance only if the conveyance is liable to confiscation and on offence has been committed in respect of or by (means of that conveyance. It may be said that where the offence has been proved and the offending conveyance is seized the above conditions are satisfied so such so S. 67B(2) could be invoked. That could be said in this case also. But what remains to be noticed, in the face of the language employed in S. 67B(2), is that the authorised officer is not obliged in each and every case to order confiscation. He has to exercise direction is ordering confiscation. The word ''may'' indicates that be has a duty to consider the facts and circumstances of the case in determining whether it would be appropriate to order confiscation in the case before him. The power conferred on him to make such determination is not an arbitrary power. That could not be exercised ''by him according to his whims and fancies. No doubt in the absence of any guidelines indicated in the section itself as to the circumstances under which he would be justified in ordering confiscation the discretion is wide. But even so the exercise of the discretion must be on proper and relevant considerations. If am authorised officer takes the view that merely because commission of offence is proved and the conveyance is liable to confiscation under the Act he is obliged, irrespective of the facts of the case, to order confiscation such a view would be erroneous and unsustainable.

5. S. 67C is independent of S. 67B of the Act. Sub-section (1) of S. 67C deals with the procedure to be adopted in passing an order of confiscation. S. 67C(2) is in effect an exception to S. 67B(2). Where an authorised officer may otherwise order confiscation under S. 67B(2) this could be avoided by the owner proving to the former''s satisfaction that the conveyance was used for carrying the liquor without the knowledge or connivance of the owner himself, his agent and the person in charge of the conveyance and that each of them had taken all reasonable and necessary precautions against such use.

6. What is important and relevant to notice is that it is not as if the only ground for an order declining confiscation is the proof of matters mentioned in S. 67C(2). In other words it is not to be taken that when an owner does not invoke S. 67C there should be confiscation under S. 67B. Independent of S. 67C, S. 67B operates to confer a discretion on the authorised officer to confiscate or not to confiscate. He has a duty to exercise such discretion on relevant considerations.

If the owner invokes S. 67C and he is able to prove the matters mentioned in the section irrespective of whether otherwise the conveyance would have been confiscated or not, no order of confiscation could be passed because of the operation of S. 67C(2) of the Act. That is the reason why we notice that S. 67C(2) is independent of S. 67B(2).

7. Naturally we have to consider what are the circumstances under which an authorised officer may exercise the discretion not to confiscate the conveyance. The very fact that the concerned provision has not chosen to define the circumstances should caution us not to attempt it, for, it would be restricting the scope of the discretion which the statute did not intent to. It would be the facts of each case assessed property by the authorised officer that should determine whether the case is one where confiscation should be ordered or not. Instances where courts had occasion to consider that confiscation may not be called for may be illustrative and may guide the approach in applying the section. Reference may be made in this context to the decision of the Supreme Court in Sat Pal Vs. State of Haryana, . That was a case of confiscation of a truck under S. 7(1)(b) of the Essential Commodities Act as it stood in 1979. The truck was seized because there was a clear attempt to export cattle fodder in contravention of a notified order passed by the Haryana Government prohibiting the export of cattle fodder. S. 7(1) (b) of the Essential Commodities Act provided that any property in respect of which the order has been contravened or such part thereof as the court may deem fit including any packages, coverings or receptacles, in which the property is found and any animal, vehicle, vessel or other conveyance used in carrying the property, shall be forfeited to the Government. There is a proviso which enables the court to refrain from doing so for reasons to be recorded. This was understood as conferring a discretion in suitable cases for reasons to be recorded not to impose the penalty of confiscation. Referring to the facts of the case the Supreme Court said thus:

In the instant case there are special circumstances which clearly attract the application of the proviso and the order of confiscation ought not to have been passed by the Magistrate. To begin with, the appellant was not a party to the proceedings as he was not given an opportunity to show cause to the court the circumstances under which the order of confiscation could be passed. Secondly, the truck of the appellant was a very valuable property and to order its confiscation merely because an attempt was made to export cattle feeder through it, would indeed be a very harsh order so as to work serious injustice to the appellant. Thirdly, here is no evidence to indicate that the truck which was used to carry the fodder was hired with the knowledge or concurrence of the appellant.

Having regard to these circumstances the Supreme Court found that the court ought to have exercised its discretion by declining the imposition of the penalty of confiscation. In a case where there was a charge of contravention! of S. 8(1) of the Coconut Husks Control Order read with Ss. 3 and 7 of the Essential

Commodities Act this court had occasion to consider whether the conveyance which was involved in the offence of carrying cocoanut husks in contravention of the Cocoanut Husks Control Order ought to be confiscated. We are referring to the decision in Crl. R.P. No. 451/79 decided by this Court. The contravention was by transport of cocoanut husks worth about Rs. 350/- and a lorry which worth Rs. 1,00,000/- was being confiscated. The owner was not concerned with the transport and was not aware that the vehicle was being used for that purpose. These circumstances were held to be sufficient not to order confiscation.

The facts of the case have been dealt with in Ext. P1 order itself. If the authorised officer had any discretion not to confiscate the facts indicate that the discretion would have been exercised in favour of the petitioner. In other words the authorised officer indicates beyond doubt that there is a case of an innocent party who had unfortunately to face the serious consequence of confiscation for a technical offence with which he was not personally concerned. The car is quite valuable and the value of the 11 plastic cans of toddy has no comparison with the value of the car. The owner of the car was found to be innocent and it was further found that the driver was using the car not during the course of the employment. The appellate authority only finds that the driver could have been instructed to give the key to the workshop in the evenings. Taking into account these facts and the view expressed categorically by the authorised officer in Ext. P1 that he is directing confiscation only because confiscation is a must, we think this is a case where we are called upon to interfere with Ext. P1 order as confirmed by Exts. P2 and P3. There shall not be any confiscation of the vehicle. The order Ext. P1 as confirmed is vacated. The vehicle shall be released to the petitioner-appellant forthwith. No costs.

