(1995) 06 KL CK 0046

In the High Court Of Kerala

Case No : O.P. No. 9337 of 1995-J

Nirmala Stores APPELLANT

Vs

Intelligence Officer and Another RESPONDENT

Date of Decision : 21-06-1995

Acts Referred:

Constitution of India, 1950 — Article 301
Kerala General Sales Tax Act, 1963 — Section 29(1), 29(2), 29(3), 29(4), 29(5)
Kerala General Sales Tax Rules, 1963 — Rule 35(10), 35(11), 35(12), 35(15), 35(3)

Citation : (1995) 06 KL CK 0046

Hon'ble Judges : P.A. Mohammed, J

Bench : Single Bench

Advocate : Roy Chacko, for the Appellant; V.C. James, Government Pleader, for the Respondent

Judgement

P.A. Mohammed, J.—The Petitioner is a registered dealer under the provisions of the Kerala General Sales Tax Act, 1963 (hereinafter referred to as ''Act'') on the files of the Sales Tax Officer, Cherthalai. It is dealing in "Unprocessed Nylon Knitted in length" used for the manufacture of nylon fishing net. The Petitioner-firm has purchased 105 kgs. of the aforesaid goods from Nagercoil as per Ext. P-2 bill dated 5th June 1995. The goods were brought to Cherthalai through railway and delivery of the goods was taken at Cherthalai railway station on 9th June 1995. Thereafter the same was carried in an autorickshaw to the business premises of the firm. On the way, the 2nd Respondent intercepted the vehicle and issued Ext. P-3 notice proposing to take action u/s 29A of the K.G.S.T. Act. By Ext. P-3, the Petitioner-firm was directed to produce the documents to prove the genuineness of the transport from Nagercoil to Cherthalai within a period of one hour from the time of issue of the notice (at 4.05 p.m. on 9th June 1995). In reply, the Petitioner-firm produced the original of Ext. P-2 bill at 4.50 p. m. on the same day. However, the 2nd Respondent did not release the goods and thus detention of the goods continued. In the aforesaid background the Petitioner came before this Court with the present writ petition praying to quash Ext. P-3 notice and to issue a direction to release the goods forthwith.

2. The writ petition came up for admission on 16th June 1995 and at the request of the Goverment Pleader the time was granted to obtain instruction and accordingly the case was adjourned to 21st June 1995. When it came up for hearing today, the Government Pleader again requested time for obtaining instructions. Since the goods were detained by the 2nd Respondent on 9th June 1995, the Counsel for the Petitioner, on the other hand pressed for the release of the goods in as much as the goods were detained unauthorisedly and the proceedings u/s 29A were initiated in an arbitrary and unreasonable manner.

3. The first and foremost point advanced by the Counsel for the Petitioner is that the ''unprocessed nylon knitted in length'' is an exempted item by virtue of Ext. P-1 order. By Ext. P-1 the Government have clarified that the nylon fish knitted fabrics sold in length will fall under entry 7 of the 3rd Schedule to the Act and is eligible for exemption from the levy of tax under the Act. The Counsel also points out that Ext. P-2 bill clearly shows that the goods in question is an exempted goods. Therefore, I feel, prima facie that this is an item in respect of which no sales tax can be collected under the provisions of the Act. However, I do not propose to give a final conclusion on this issue since it is a matter to be dealt with in the enquiry contemplated u/s 29A read with Rule 35A of the rules or in the regular assessment proceedings.

4. The next point canvassed by the learned Counsel is that in so far as the goods covered by Section 30 of the Act, the provisions of Section 29A cannot be enforced. In order to establish this point the Petitioner must produce the evidence to show that the goods were notified goods as contemplated u/s 30 of the Act. However, there is no material on record in that behalf. The provisions contained in section 29A will be attracted if there is violation of the provisions contained in Section 29(2) of the Act. The provisions contained in Section 29A can be enforced only when the person transporting the goods h not in possession of the documents requited by Sub-section (2) of Section 29. The Government Pleader contends that the prescribed documents shall be in the possession of the person-in-charge of the vehicle by which the goods were transported. In this case the goods were admittedly transported from the Cherthalai railway station to the business premises of the Petitioner-firm by an autorickshaw. Autorickshaw driver cannot be said to be a person transporting the goods. He is only carrying the goods on behalf of the person transporting the goods. That does not mean, the driver of the vehicle carrying the goods cannot have possession of the documents. He can also have the possession in order to avoid detention and delay in the transport of the goods. The documents can be in the possession of the owner or any other person accompanying the transport. Such owner or any other person need not always travel in the vehicle carrying the goods. The documents accompanying the goods does not mean that such documents shall be affixed on the goods.

5. It is contended that Sub-section (2) of Section 29 and Sub-section (1) of

Section 29A cannot be enforced against the exempted goods. I cannot agree. Those provisions are applicable in die case of exempted goods and non-exempted goods alike. What is relevant is the transportation of goods and authorised officer is not expected to verify whether the goods under transporth exempted or non-exempted at the time of interception of the vehicle. What is required to be satisfied under Sub-section (1) of Section 29A is whether any evasion of tax is involved in the transport of goods. While arriving at such satisfaction the character of the goods, whether exempted or non-exempted, will assume prominence and no doubt it is a relevant fact to be taken note of in the process of satisfaction by the officer.

6. The Counsel further points out that Sub-section (6) of Section 29 will apply in the facts of this case. It is arduous for this Court to accept this contention for obvious reasons.

The constitutional validity of the provisions contained in Section 29 was challenged before this Court in rogesh Trading Co. v. Intelligence Officer of Sales Tax ILR 1970 Ker 341 : 1970 K.E.T. 154. The Full Bench of this Court held that Sub-sections (3), (4) and (5) of Section 29 of the Act and Sub-rules (3) to (12) and (15) of Rule 35 of the Kerala General Sales Tax Rules are invalid and unconstitutional. However, Sub-sections (1) and (2) of Section 29 of the Act continue to be in force. It was after the aforesaid decision the Kerala General Sales Tax (Amendment) Act, 1972 (Act II of 1972) was promulgated on 30th March 1972. Section 29A was added as per the provisions of the said Act. Though the provisions contained in Sub-sections (3), (4) and (5) were invalidated by the Full Bench the entire provisions contained in that section were retained in the statute for the obvious reason that State of Kerala had filed a leave to appeal petition before the Supreme Court against the judgment of the Full Bench decision in rogesk Trading Company''s case ILR 1970 Ker 341 : 1970 K.E.T. 154 supra. Though the leave was granted by the Supreme Court no stay of operation of the judgment of the Full Bench was allowed.

7. Sub-section (6) of Section 29 runs thus:

(6) Nothing contained Sub-section (4) or Sub-section (5) shall apply in the case of goods transported which are exempted from tax under any of the provisions of this Act without any condition or restriction.

of course, the aforesaid section could have been applied in this case as contended by the Petitioner if Sub-sections (4) and (5) were in force. When the aforesaid Sub-sections are declared invalid it is not possible for the Petitioner to place reliance on Sub-section (6). Sub-section (6) starts with the words "nothing contained in Sub-section (4) or Sub-section (5)". That means a person who is ''claiming exemption under Sub-section (6) must first satisfy that those Sub-sections are in force. Sub-section (6) has no independent existence and it can exists only when Sub-sections (4) and (5) are there, therefore, when the provisions of Sub-sections (4) and (5) are declared unconstitutional, a person cannot claim the benefit of exemption on the basis of the said provisions.

8. The last point advanced by the Counsel is that the detention of the goods in this case is quite arbitrary and unreasonable. In support thereof the decision of this Court in P.K. Aboobacker v. State of Kerala (1979) 44 S.T.C. 250 is cited. That was a case where the constitutional validity of Section 29A of the Act was challenged. There the Division Bench of this Court while upholding the validity of the provisions, very poignantly stressed thus: "It was submitted that the power u/s 29A is conferred on a subordinate official and as there is a likelihood of the power being abused, this provision is invalid. A mere possibility of abuse is no ground to strike down the statutory provision. But we make it clear that the stringent powers given to the officers should not be exercised arbitrarily. They should exercise their powers bona fide only for the purpose for which they have been conferred and not for any ulterior purpose and, whenever there is a transgression by the authorities, they should not forget that the extraordinary powers of this Court are there to strike down their illegal action". The Counsel also points out the decision of this Court in H.M. Meera Sahib and sons v. Sales Tax Officer 1991 (1) KLT 896. In view of the principles laid down in the aforesaid decisions, I am persuaded to examine the action of the 2nd Respondent leading to the detention of the goods in this case. Admittedly, the goods were seized on 9th June 1995 at 4.05 p.m. It is also an admitted case that the goods were not yet released. The Ext. P-3 notice was issued to the Petitioner at 4.05 p.m. That was a notice issued by the 2nd Respondent u/s 29A read with Rule 35A(1) of the Rules. Rule 35A deals with the procedure for inspection of goods in transit through notified areas. If, on examination of the goods and the recrods connected with the goods under transport, the authorised officer has reason to suspect that the goods under transport are not coverd by proper and genuine documents or that the person transporting the goods is attempting to evade payment of the tax due under the Act, he may pass an order for the unloading and detention of the goods. Thereupon the owner of the goods or his representative or the driver or other person in charge of the vehicle shall unload the goods. The provisions contained in Section 29A of the Act and Rule 35A of the Rules confer power on the officer to detain the goods on interception of the vehicle. These provisions can be sustained only on the ground that they are regulations and not. restrictions. If it is a restriction definitely the provisions will impede the transport of goods. In such cases, it would be necessary to examine whether those restrictions are reasonable in the public interest. When those restrictions are found to be unreasonable they arc liable to be set aside. Therefore, every action of the officer u/s 29A and Rule 35A will have to be examined with meticulous care and caution while doing so the observation of the Court in P.K. Aboobacker''s case (1979) 44 S.T.C. 250 supra, quoted above will give guiding sustenance.

9. The proviso to Sub-rule (1) of Rule 35A is a sufficient safeguard to a person from whose possession the goods were seized by the officer. The said proviso provides that no order for detention of the goods under Rule 35A(1) shall be

passed without giving an opportunity of being heard to the owner of the goods or his representative or driver or other person in charge of the vehicle. This provision is mandatory in all respects and hence strict compliance can be insisted. It is a pre-decisional notice and post-decisional notice will not suffice at all. In this case, the Ext. P-3 is a notice issued by the 2nd Respondent under the said proviso. Pursuant to Ext. P-3, the Petitioner has produced Ext. P-2 invoice within the time granted by the 2nd Respondent. However, Ext. P-2 bill was not accepted even though it states that goods covered by it is an exempted goods. Therefore, it cannot be said that the Petitioner has not complied with the stipulations contained in Ext. P-3 notice. When there is prima facie evidence to show that the transport of the goods was accompanied by proper and genuine documents, the officer is bound to release the goods on executing a bond with or without sureties. After perusing the documents the officer has reason to suspect the genuineness of the transport or evasion of tax, he is empowered to detain the goods. But in such cases the officer shall pass an order of detention recording the reasons for doing so. This power has to be cautiously exercised because the further restriction for transport of the goods would amount to restriction which directly and immediately restrict or impede the free flow or movement of the trade. Such restrictions no doubt, are the restrictions freedom of which is guaranteed by Article 301 of the Constitution as laid down by the Supreme Court in Atiabari Tea Co., Ltd. Vs. The State of Assam and Others, In this case, I do not propose to examine any further because prima facie I am satisfied that this is a fit case where the 2nd Respondent ought to have released the goods on the production of Ext. P-2 bill. Therefore, I am persuaded to hold that the goods retained by the 2nd Respondent in this case as per Ext. P-4 is liable to be released forthwith. Accordingly, there will be a direction to the Respondents 1 and 2 to pursue the action in that behalf.

10. The Government Pleader submits that Respondents 1 and 2 may be allowed to complete the enquiry as required u/s 29A read with Rule 35A within a period of two months from today. This prayer made by the Government Pleader is allowed. In case it is found after the enquiry that the penalty pursuant to Ext. P-3 notice is payable by the firm, the Counsel for the Petitioner undertakes that such penalty will be paid subject to, of course, its right to file an appeal or revision as the case may be.

With the above direction, the O.P. is disposed of.

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