

(2001) 02 KL CK 0006
In the High Court Of Kerala
Case No : T.R.C. No. 12 of 2001

Polakulath Tourist Home

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 26-02-2001

Acts Referred:

Citation : (2001) 124 STC 387

Hon'ble Judges : S. Sankarasubban, J;A. Lekshmikutty, J

Bench : Division Bench

Advocate : S.K. Devi, for the Appellant; V.V. Asokan, Special Government Pleader, for the Respondent

Judgement

S. Sankarasubban, J.—Assessee is the revision-petitioner, The assessment year is 1992-93. The assessee is running a bar attached hotel at Mulanthuruthy under the name and style "Polakulath Tourist Home". The accounts produced by the assessee were rejected by all the authorities. The place of business of the assessee was inspected by the Intelligence Officer on December 29, 1992 and recorded a number of stock variations in the inspection report. The assessing authority, after rejecting the accounts, added 25 per cent towards the purchase turnover of chicken, fish, prawn, etc. Further, so far as the liquor is concerned, 25 per cent addition to the turnover was made. The matter was taken in appeal. The appellate authority enhanced the sales turnover of Indian-made foreign liquor by 5 per cent towards omission and suppression and subjected to tax. The estimation of 25 per cent gross profit to the purchase cost of liquor made by the assessing authority was held to be without basis. The sales turnover of soda and soft drinks was enhanced by 10 per cent and subjected to tax. So far as the cooked food is concerned, the appellate authority held that there has to be an increase in the turnover.

2. The matter was taken before the Tribunal. Before the Tribunal, three points were argued. One was regarding the rejection of accounts. The second was regarding the adding of 5 per cent of conceded turnover of Indian-made foreign

liquor and the third is the addition of 10 per cent to the purchase turnover of chicken, All these contentions were rejected.

3. Learned counsel for the assessee Smt. S.K. Devi contended that so far as the liquor is concerned, the assessee is only a second seller and hence the assessee is not liable to tax. Hence, there was no wilful suppression on the part of the assessee. Learned counsel further submitted that even if there is suppression, the addition can be made only to the taxable turnover and not to the total turnover. Another contention was that the meat is exempted as per entry 38 of Schedule III. Learned counsel also brought to our notice a division Bench decision of this Court reported in *Lovely Thomas v. State of Kerala* [1999] 113 STC 505(sc). Learned counsel further submitted that the variation in stock included decrease in stock in certain cases and increase in stock in certain cases and hence, according to the assessee, there is no suppression. Learned Government Pleader submitted that the inspection showed that there has been suppression. Thus, the account books cannot be accepted. He further submitted that the addition made by the assessing authority was reduced by the appellate Tribunal and hence, there was no grievance for the assessee.

4. So far as the first contention of rejection of accounts is concerned, we are satisfied that no points have been made by the assessee to interfere with the concurrent orders passed by the authorities below. The accounts have been rejected on the ground that a number of irregularities have been detected. We also agree with the authorities below. The next contention is with regard to the addition sustained by the first appellate authority with regard to the Indian-made foreign liquor. Learned counsel for the assessee submitted that the assessee is only a second seller and the second seller is not subject to any tax. Further it was submitted that the liquor can be purchased only from the Beverages Corporation, which is a Governmental agency and nothing has been produced to show that the assessee purchased liquor from any other agency. As already stated, the learned counsel brought to our notice the decision in *Lovely Thomas v. State of Kerala* [1999] 113 STC 505 (Ker). In that case, the petitioner was an abkari contractor. She made purchases of arrack from the distilleries owned and controlled by the Government of Kerala during the year 1986-87 and had paid tax on such purchases at the point of purchase. The assessing officer found some discrepancies in the books of accounts of the petitioner and drew an inference therefrom that the petitioner had made unaccounted purchases of arrack. He therefore, made a best judgment assessment. On appeal, the first appellate authority reduced the addition. The Tribunal set aside the order of the first appellate authority and restored the addition made by the assessing officer. This Court held that since the arrack could be purchased only from the Government distilleries, it was for the respondents to explain as to wherefrom the unaccounted purchases were made by the revision petitioner. No cogent explanation whatsoever has been given by the respondents.

5. On a perusal of the case, it is seen that there has been shortage of liquor in

certain cases and excess quantity in certain cases. According to us, a comparison has to be made with regard to the short supply and excess supply. Further the division Bench has held that it is the duty of the assessing officer to find out where these products were purchased. According to us, normally, since the Beverages Corporation is the first seller, there cannot be any tax when the liquor is sold by the dealer at stage No. 2. Following the Division Bench decision in *Lovely Thomas v. State of Kerala* [1999] 113 STC 505 (Ker), we are of the view that the respondent has to adduce some evidence to establish that unaccounted purchases had been made by the petitioner. Hence, we are of the view that the addition made for the liquor cannot be sustained.

6. So far as the next contention is concerned, the case of the petitioner is that the meat is an exempted item under Schedule III to the Act. Hence, according to the petitioner, exemption ought to have been granted for the purchase turnover of chicken. We are not able to accept this argument. There is no case that meat was sold in the bar. It is true that meat is an exempted category coming under entry 38 of Schedule III. The Supreme Court had occasion to consider this position in the decision reported in *Deputy Commissioner of Sales Tax and Others Vs. A.B. Ismail and Others*, In paragraph 4 of the above decision, the Supreme Court stated as follows : "If a person goes to a butcher's shop and asks for mutton he will not be given goats nor will he be satisfied with goats. Equally so when he intends to purchase goats he will not be satisfied if mutton is supplied to him. This is because the two, both in commercial circles and in common parlance, are two different things having a distinct individuality of their own, one different from the other. It would therefore be wrong to assume, as the High Court has done, that these two goods are the same". Admittedly, the meat is not sold in the hotel. What is sold is cooked food. Hence, as rightly pointed out by the Tribunal, levy of purchase tax in respect of the turnover of chicken cannot be exempted on the ground that the meat is exempted.

7. In view of the above fact, the order of the Appellate Tribunal is modified to the extent of deleting the addition made for foreign liquor and sustaining the order in other respects. T.R.C. is disposed of.

Order on C.M.P. No. 1,35 of 2001 in T.R.C. No. 12 of 2001 dismissed.