(2009) 10 KL CK 0070

In the High Court Of Kerala

Case No : ST. Rev. No. 315 of 2006

State of Kerala — APPELLANT

Vs

Hitesh M. Kothari — RESPONDENT

Date of Decision : 28-10-2009

Acts Referred:

Citation : (2011) 44 VST 104

Hon'ble Judges : V.K. Mohanan, J;C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : Mohammed Raffiq, Government Pleader, for the Appellant; C.K. Thanu Pillai, for the Respondent

Judgement

C.N. Ramachandran Nair, J.—Heard the learned Government Pleader and the learned counsel appearing for the respondent. The question raised is with regard to the rate of tax applicable for spray oil. While the case of the Department is that the spray oil sold by the respondent is a petroleum product, the case of the respondent is that it is a pesticide or fungicide. The Tribunal, by majority, held in favour of the respondent against which this S.T. revision is filed by the State.

2. We are unable to accept the claim of the respondent and the finding of the Tribunal that the spray is sold as pesticide or fungicide which are items manufactured under the licence issued under the Insecticides Act, 1968. There may be pesticides or fungicides made in oil base. However, in order to qualify an item as pesticide or fungicide, it has to be manufactured under licence obtained under the Insecticides Act and the respondent has no case that the item sold is an item manufactured and sold in containers and bottled by manufacturer under licence obtained under the Insecticides Act. Strangely, the Tribunal accepted the argument that the item given to pepper merchants for spraying on pepper to prevent fungus attack is the same one used by rubber planters to prevent leaf fall of rubber by spraying it. Though generally water based bordo mixture is used by planters to prevent leaf fall in rubber, for application at higher levels and for aerial spraying oil based fungicides are used. However, we are of the view that oil

based fungicide used in rubber plantation is a toxic material, which cannot be used to prevent the fungus attack on pepper which is an edible commodity. Therefore, in our view, the respondent misled the Tribunal to believe that the products are one and the same. In any case, application by spraying itself will not make the product fungicide or pesticide and it is for the respondent to produce the samples with containers which is sold in sealed bottles with manufacturer''s name to enable the Department to identify the product and levy the tax appropriately. If evidence is not produced to prove the identity of the commodity, then there is nothing wrong in the assessing officer assuming that spray oil is a petroleum product because oil other than vegetable and animal oil is essentially a petroleum product. We had in similar case, i.e., S.T. Rev. No. 9 of 2008 remanded the case to the assessing officer to give an opportunity to the assessee to prove the identity of the oil, We, therefore, allow this sales tax revision by setting aside the orders of the Tribunal and that of the first appellate authority and by remanding the matter to the assessing officer for giving an opportunity to the assessee to prove the case canvassed by them or otherwise to restore the assessment at higher rate.

