

(2008) 01 KL CK 0023
In the High Court Of Kerala
Case No : O.P. No. 7655 of 2003 (J)

V.K. Rajeev

APPELLANT

Vs

The Asst. Excise Commissioner and Others

RESPONDENT

Date of Decision : 30-01-2008

Acts Referred:

Kerala Abkari Act, 1077 — Section 67, 67B, 67E, 67E(2), 67E(3)

Citation : (2008) 1 ILR (Ker) 780 : (2008) 1 KarLJ 638 : (2008) 1 KLJ 638

Hon'ble Judges : Thottathil B. Radhakrishnan, J

Bench : Single Bench

Advocate : C.C. Thomas and M.G. Karthikeyan, for the Appellant; M.K. Pushpalatha, GP, for the Respondent

Final Decision : Allowed

Judgement

Thottathil B. Radhakrishnan, J.—Exercising authority u/s 67E of the Abkari Act, hereinafter referred to as the "Act", the second respondent issued Ext.P3 order on 28-2-2002, setting aside Ext.P2 order of confiscation passed by the first respondent. On 27-11 -2002, the third respondent Excise Commissioner issued Ext.P4 show cause notice proposing to invoke the sua motu revisional power u/s 67F of the Act. Following that, the impugned Ext.P6 order was issued on 31-12-2002, setting aside the appellate order.

2. Leaving aside the challenge to the decision on its merits based on facts, it is argued by the learned Counsel for the petitioner that Ext.P4 show cause notice is issued only after the period of limitation fixed for the suo motu action u/s 67F. He, accordingly, argued that the impugned order is without jurisdiction and is hence void.

3. Per contra, the learned Government Pleader, relying on the counter affidavit, argued that the word "may" occurring in Section 67F indicates that the Commissioner can take action even after expiry of 30 days. It is further argued that the Commissioner has taken the impugned action not of his own motion, but

on the file being sent by the authority which passed the appellate order and hence, the prescription as to time limit, in Section 67F does not apply.

4. At the outset, I may notice that Ext.P4 show cause notice itself is one calling upon the petitioner to show cause against action being taken suo motu to revise the appellate order. Even otherwise, the argument that it was not the suo motu power that was exercised does not stand. This is because, by virtue of Sub-section (3) of Section 67E, an order of appellate authority under Sub-section (2) of that Section shall be final and shall not be called in question in any court, subject only to the provisions of Section 67F, which provides only for the exercise of a revisional jurisdiction by the Commissioner of his own motion. This means that the only manner in which an appellate order u/s 67E can be called in question by the department is for the Commissioner to invoke the suo motu, power u/s 67F. Therefore, there is no question of the Commissioner exercising any revisional power otherwise than suo motu, even if the file is forwarded by the appellate authority, without it being requisitioned for by the Commissioner.

5. Section 67 of the Act provides that the Commissioner may, before the expiry of thirty days from the date of an order passed u/s 67B or 67E, of his own motion, call for and examine the record of that order and may make such inquiry or cause such inquiry to be made and may pass such orders as he deems fit; provided that the Commissioner shall not call for and examine the record of any order passed u/s 67B if an appeal against such order is pending before the appellate authority; and provided further that no order prejudicial to a person shall be passed under that section without giving him an opportunity of being heard. Therefore, the interdiction is against the calling for and examining the records of an order in exercise of power u/s 67F. The word "may" occurring after the word "Commissioner" in Section 67F does not give the freedom to the Commissioner to exercise revisional power beyond the period of thirty days. If the argument on behalf of the respondents, in this regard, is to be accepted, and if I may substitute the word "may" in Section 67F(1) by the word "shall", the Commissioner shall be duty bound to take suo motu revision in all cases. This is just not any acceptable principle of interpretation.

6. An order of confiscation is a penal action. The provision authorising it is a penal provision. If an appeal is allowed, setting aside the confiscation order, a statutory provision conferring authority to revise that order against the interest of the person in whose favour the appellate order is passed, is also a penal provision. The second proviso to Section 67F gives him an opportunity of pre-decisional hearing. It has necessarily to be concluded that the said penal provision in Section 67F has to be strictly construed and the time limit fixed for invoking the revisional jurisdiction is strictly applied.

7. The contents of Section 67F(1), already noticed in para (5) above, show that the exercise of authority by the Commissioner under that provisions is two fold. Firstly, it is to call for and examine mat provision is two fold. Firstly, it is to call for and examine the records of an order passed u/s 67B or 67E. Such power shall

not be exercised as regards an order u/s 67B, if an appeal u/s 67E is pending against that order before the appellate authority. The second limb of the power is to pass such orders as the Excise Commissioner may deem fit as regards the order, the records of which have been called for and examined. However, such order ought not to be issued without further enquiry being made by him or being caused to be made. No order prejudicial to a person shall be passed without giving him an opportunity of being heard. These provisions clearly show that the power of the Commissioner to call for and examine the record of an order, of his own motion, is one that may lead, either to an order adverse to any person or an order leaving the file as it is, without issuing any further order. Having regard to the fact that if the Commissioner proposed to pass an order prejudicial to a person, such person has to be given an opportunity of pre-decisional hearing and the provision which enjoins the making of enquiry or causing enquiry to be made before passing order, it could be safely concluded that the time limit of 30 days does not apply regarding the enquiry, extending opportunity of hearing and passing of orders. It applied only to the calling for and examination of the records. The moment it is expressed on such records, either by, the Commissioner or under his instruction, that further enquiry thereon is required, the subsequent proceedings can go beyond the time limit of 30 days prescribed in Section 67F(1).

8. A clear reading of Sub-section (1) of Section 67F would show that the time limit of 30 days prescribed therein is for the Commissioner to call for and examine the record of an order of the subordinate authority and not for passing an order in revision, interfering with the order being revised.

9. In the case in hand, proposing to revise Ext.P3 appellate order issued on 28-02-2002, Ext.P4 show cause notice was issued on 27-11-2002. It is not the case in the counter affidavit that the Commissioner had called for the records and decided to proceed u/s 67F within a period of 30 days. The case of the respondents is that the file having been forwarded by the appellate authority, the time limit prescribed in Section 67F(1) does not apply. So much so, it could be safely concluded that such exercise was after the period of 30 days prescribed in Section 67F. Issuance of Ext.P4 show cause notice and the consequential Ext.P6 order are, therefore, without jurisdiction.

In the result, the writ petition is allowed quashing Exts.P4 and P6. No costs.