Joseph Vs. Intelligence Officer

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SooperKanoon Citation : sooperkanoon.com/722389

Court : Kerala

Decided On : Mar-01-2006

Reported in : 2006(2)KLT444; [2006]145STC479(Ker)

Judge : K.S. Radhakrishnan and; K.T. Sankaran, JJ.

Acts : Kerala General Sales Tax Act, 1963 - Sections 27, 28(3), 28(4), 28(5) and 45A; Code of Criminal Procedure (CrPC) , 1973 - Sections 100, 100(5) and 100(6); Customs Act; Kerala General Sales Tax Rule, 1963 - Rule 32

Appeal No. : W.A. Nos. 2300, 2303 and 2304 of 2005

Appellant : Joseph

Respondent : intelligence Officer

Advocate for Def. : Raju Joseph, Government Pleader (Taxes)

Advocate for Pet/Ap. : K.B. Muhamed Kutty, Sr. Adv. and; K.M. Firoz, Adv.

Disposition : Appeal dismissed

Judgement :

K.T. Sankaran. J.

1. The appellant challenges the judgment of the learned single Judge in O.P. Nos. 5020 of 1995, 5019 of 1995 and 5034 of 1995 in these Writ Appeals. The Writ

Petitions were filed by the appellant against the common revlsional order passed by the Commissioner of Sales Tax, Board of Revenue, Thiruvananthapuram.

2. The appellant runs a jewellery under the name and style 'M/s. Velliappally Jewels' at Palai. On 21.10.1986, eleven shops at Palai town were inspected by the Central Intelligence Squad, Agricultural Income Tax and Sales Tax, Ernakulam. It is admitted that on that day, the shop of the petitioner was also inspected. A shop inspection report (hereinafter referred to as 'SIR') (Annexure B in the Writ Appeal) was prepared incorporating the stock of goods available in the business place. It was signed by the appellant endorsing that he received the copy. In the 'SIR', it is recorded thus: 'Separate receipt issued for records received.'' However, the appellant refused to sign the receipt for having seized the records. It is stated that ten records were recovered from the business place of the appellant. On verification, it was suspected that there was attempt of evasion of sales tax. The accounts of the dealer were verified by the Central Intelligence Officer, Ernakulam with reference to 'SIR' and the seized records. After hearing the appellant, the Intelligence Officer imposed a penalty under Section 45A of the Kerala General Sales Tax Act (hereinafter referred to as 'the KGST Act'). The penalty proceedings were challenged by the appellant before the Deputy Commissioner, Kottayam, who as per his order dated 30.6.1988 modified the penalty. The order of the Deputy Commissioner, Kottayam was challenged before the Board of Revenue in revision and the order impugned was set aside and the matter was remitted back to the Deputy Commissioner for fresh disposal. The appellant challenged the order of the Board of Revenue in O.P. Nos. 1555, 1556 and 1557 of 1991 before this Court. This Court set aside the orders passed in the case and remitted the matter to the Intelligence Officer for de novo consideration.

3. Thereafter, the Intelligence Officer considered the matter afresh and passed Ext.P2 orders dated 26.4.1993 imposing penalty under Section 45A of the KGST Act. For the year 1984-85, a penalty of Rs. 41,396/- was imposed for violation of Section 27 of the KGST Act read with Rule 32 of the Rules on the suppressed turnover of Rs. 3,59,950/-. For the year 1985-86, the Intelligence Officer imposed a penalty of Rs. 1,27,658/- being double the amount of tax due on the estimated suppressed turnover of Rs. 10,63,822/-. For the year 1986-87, the Intelligence

Officer imposed a penalty of Rs. 3,09,150/- being double the amount of tax due on the estimated suppressed turnover of Rs. 25,48,999.50. Ext.P2 orders were challenged by the appellant before the Deputy Commissioner, Agricultural Income Tax and Sales Tax, Kottayam, who confirmed Ext.P2 orders by the common order dated 5.4.1994, marked as Ext.P3 in the Writ Petitions. However, the Deputy Commissioner reduced the penalty and imposed the penalty of Rs. 20,590/- for the year 1984-85, Rs. 63,629/- for the year 1985-86 and Rs. One lakh for the year 1986-87.

4. The contention raised by the appellant is that no records were recovered from his shop and that the records relied on by the authorities do not relate to the appellant. The learned single Judge rejected the contentions raised by the appellant and dismissed the Writ Petitions.

5. Apart from the contentions raised before the learned single Judge, learned Counsel for the appellant raised a contention before us that the seizure of the records was not in accordance with law and, therefore, no reliance could be placed on those records for imposing penalty under Section 45A of the KGST Act. This contention is not seen raised before the learned single Judge. However, we propose to consider the same on the merits.

6. It is not in dispute that the business place of the appellant was searched on 21.10.1986 by the Intelligence Squad. It is also not in dispute that Annexure B Shop Inspection Report was prepared and that the appellant put his signature in the SIR. The contention of the appellant is that the statement in the SIR indicating issuance of separate receipt for the records seized is not true and that no such receipt was issued to him. That the appellant did not receive the receipt was raised for the first time when notice proposing penalty was issued to him after verification of the books produced and records seized. Learned single Judge noticed in the judgment that the petitioner stated in the letter dated 19.1.1987 issued by him as follows:

When I appeared before you on 20.12.1986 you had shown that 10 items of books and records referred to in the notice under reference and you permitted me to pursue those records also. On perusal it was found that those books and records

are not belonging to me or relating to my business. In any of the books or records referred to in the notice neither my name nor the name of my business are mentioned.

The denial of seizure of records is clearly an after thought on the part of the appellant. The Deputy Commissioner verified the records recovered and the stock registers and found that 'certain stock position of gold noted in the recovered records and that recorded in the stock register GS 12 are almost similar'. It is, therefore, clear that the records seized and relied on as having been recovered from the business place of the appellant do really belong to the appellant and pertain to his business transactions.

7. The 'SIR' was signed by the appellant wherein it is recorded that separate receipt was issued for the records seized. Therefore, it is futile for the appellant to contend that no records were seized from his business place. The refusal to sign the receipt by the appellant would not vitiate the seizure of records. The 'SIR' which was signed by the appellant without demur and the entries therein would establish that there was seizure of records. There is no case for the appellant that the statement in 'SIR' that separate receipt was issued for records received is a subsequently manipulated entry.

8. Sri. K.B. Mohammed Kutty, Senior Advocate, contended that the search and seizure were not made as per Section 28(4) and (5) of the KGST Act. Sub-sections (4) and (5) of Section 28 read as follows;

4. All searches under this Section shall, so far as may be, be made in accordance with the provisions of the Code of Criminal Procedure, 1973 (Central Act 2 of 1974).

5. The officer making the inspections or search may seize such accounts, registers, records or other documents as he considers necessary and on such seizure shall grant the dealer a receipt of the things seized.

Section 100 of the Code of Criminal Procedure provides for the procedure for search. Sub-sections (5) and (6) of Section 100 are as follows:

(5) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.

(6) The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend d during the search, and a copy of the list prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person.

Learned senior counsel for the appellant contended that no mahazar was prepared in respect of the search and, therefore, the search and seizure are invalid under Section 100(5) of the Code of Criminal Procedure read with Section 28(4) of the KGST Act. The counsel also relied on Circular No. 20/95/TX dated 10.8.1995, issued by the Department wherein it is stated thus:

Mahassar shall be prepared invariably in all cases where search is conducted under Section 28(3) of the Act and also in cases where the dealers do not co-operate with inspections.

9. The word 'mahazar' is not defined in the Code of Criminal Procedure. It is not even mentioned in any of the Sections in Chapter VII of the Code of Criminal Procedure. The Law Lexicon, The Encyclopedic Law Dictionary with Legal Maxims by P. Ramanatha Aiyar, Reprint Edition 1992, defines 'mahzar' as follows:

'Mahzar' A general application orrepresentation, a statement laid before a Judge, apublic attestation, or a document attested by a number of persons professing to be cognisant of the circumstances of the case, and submitted with their signatures, to the Court; also in the Northern Sirkars, a written agreement given by the Ryots conjointly to the Government for the performance of any duty.

The Intelligence Officer need not submit the mahazar before any Court. On the other hand, the Intelligence Officer could rely on 'SIR' and the records seized on the search, while imposing penalty under Section 45A of the KGST Act. In the

'SIR' it is recorded as to what the Officer did at the time of inspection and it is also evident that certain records were seized. The details which would normally be incorporated in a mahazar are incorporated in the SIR. Sub-section (5) of Section 100 does not stipulate that a mahazar should be prepared while conducting a search and seizure. The requirement is only that a list of all the things seized in the course of search shall be prepared. Such a list is the SIR prepared by the Officer who made the search. The SIR is a printed form in which there are seven columns indicating name and address of the dealer; name of the person in charge; details of the records available for verification and the records verified and defects, if any, noted; description of records seized, if any; details of stock taken and variations, if any, noticed; remarks; and signature of the dealer or representative. There is a space provided for the signature and designation of the Officer and also a space for place, date and time. When all these details are recorded in the SIR, to our mind, it would satisfy the requirement of a mahazar and it is not a mandatory requirement that a separate mahazar should be prepared. In our view, preparation of a separate mahazar, though would be ideal, is not a legal requirement in -view of Sub-section (5) of Section 100 of the Code of Criminal Procedure read with Section 28(4) of the KGST Act.

10. Sri. Raju Joseph, Special Government Pleader for taxes, submitted that the Shop Inspection Report could be treated as a mahazar and that even if the procedural formalities are not fully complied with in the search and seizure, the documents and materials obtained by such search and seizure could be looked into and relied on for the purpose of assessment or for the purpose of proceedings under Section 45A of the KGST Act. He relied on the decision in Sivaramakrishnan v. State of Kerala and Ors. I.L.R, 1995(1) Ker. 92, Deputy Commissioner of Sales Tax (Law) Board of Revenue (Taxes), Emakulam v. C. Prasad (1994) 92 STC 361, The New Street Oil Mills Ltd. v. State of Kerala (1978) 41 STC 36. In 92 STC 361, it was held as follows:.The decisions brought to our notice by the Revenue- Annamalai Chettiar and Co.'s case New Streer Oil Mills' case and Pooran Mal's case : [1974]93ITR505(SC) are to the effect that even if a search and seizure of documents or account books is illegal, the documents or materials obtained on search or seizure can be looked into and relied on for the purpose of making the assessment. They have got probative value. It is a public

document prepared by a public officer in the performance of his official duties. Law presumes that the proceedings so recorded are accurate and were made as reflected in the documents. It is certainly open to a party, who is aggrieved by the said record, to assail the same in appropriate proceedings and lead evidence and demonstrate that the official record so prepared is unreliable or cannot be relied on. But the said official record can be discarded only for cogent, valid and proper reasons and not in a light-hearted manner.

In Sivaramakrishnan v. State of Kerala and Ors. I.L.R. 1995 (1) Ker.92, it was held thus:

I do not think it necessary to labour long on this submission for the reason that the challenge in the main is to the imposition of the penalty under Section 45A. The question for consideration is whether the authority concerned had materials with him which would justify the imposition of the penalty. The means by which the materials were gathered or came into the possession of the authority concerned are not quite relevant in the matter of adjudication of the validity of the penalty. 1 need not dwell much on this proposition as the matter is concluded so far as I am concerned by the decision of the Division Bench in Deputy Commissioner of Sales Tax v. Prasad 1993 (1) KLT 935 where relying inter alia on the decision of the Supreme Court in Pooran Mal v. Director of Inspection : [1974]93ITR505(SC) it was held that even if the search and the seizure were illegal, the documents or materials obtained on the search or seizure could be looked into and relied on for the purpose of making the assessment....

In State of Maharashtra v. Natwarlal Damodardas Soni : 1980 CriLJ429 , while dealing with the case under the Customs Act, it was held by the Supreme Court thus:Taking the first contention first, it may be observed that the police had powers under the Code of Criminal Procedure to search and seize this gold if they had reason to believe that a congnizable offence had been committed in respect thereof. Assuming arguendo, that the search was illegal, then also, it will not affect the validity of the seizure and further investigation by the Customs Authorities or the validity of the trial which followed on the complaint of the Assistant Collector of Customs.

11. Explanation I of Seection 45A of the KGST Act provides that the burden of proving that any person is not liable to the penalty under the Section shall be on such person. Records were seized from the business place of the appellant. It is admitted that he had an opportunity to peruse those records. The Deputy Commissioner found on verification of the seized records as well as the stock registers of the assessee that the stock position of gold noted in the stock registers is almost similar as that mentioned in the seized records. The appellant has not discharged the burden of proof under Explanation I to Sub-section (1) of Section 45A of the KGST Act. In our view, the learned single Judge was justified in dismissing the Writ Petitions.

The Writ Appeals are devoid of merit and are accordingly, dismissed with costs.