

Mary Antony Vs. the State of Kerala

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Court : Kerala

Decided On : Aug-25-2008

Reported in : 2008(3)KLJ823; 2009(1)KLT119

Judge : C.N. Ramachandran Nair and; V.K. Mohanan, JJ.

Acts : Abkari Act; Abkari Rules

Appeal No. : T.R.C. Nos. 392 of 1998 and 237 of 1999

Appellant : Mary Antony

Respondent : The State of Kerala

Advocate for Def. : Vinod Chandran, Spl. GP

Advocate for Pet/Ap. : K. Sudhakaran, Sr. Adv.,; V. Jayakumar,; V.P. Sukumar

Disposition : T.R.C. dismissed

Judgement :

C.N. Ramachandran Nair, J.

1. The dispute arising in both the revision cases is against the addition to the turnover made in the sales tax assessment of the petitioners, confirmed by the Tribunal. While the petitioner in T.R.C. No. 237 of 1999 was a dealer in arrack and toddy during the relevant year, the petitioner in T.R.C. No. 392 of 1998 was

engaged in retail sale of Indian Made Foreign Liquor in the bar hotel. In both the cases, there was an inspection by the intelligence Wing of the Sales Tax Department in the business premises of both the petitioners during the relevant year and in the course of inspection, variation of physical stock with accounts was noticed. Both the petitioners admitted the incorrectness and incompleteness of the accounts and compounded the offence by paying the compounding fee and avoided prosecution. While the compounding fee paid by the petitioner in T.R.C. No. 237 of 1999 for the assessment year 1988-89 was Rs. 44,300/- the compounding fee paid by the petitioner in T.R.C. No. 392 of 1998 was only Rs. 500/-.

2. Since both the petitioners admitted non-maintenance of proper accounts in the course of inspection and paid compounding fee, the assessing officer rejected the books of accounts and estimated the sales turnover making certain additions. In both the cases, successive appeals before the two appellate authorities including the Tribunal led to reduction in the turnover and consequently reduction in tax liability. We do not find any question of law arising from the order of the Tribunal because the Tribunal has only modified the turnover fixed by the first Appellate Authority.

3. However, the petitioners contend that by virtue of the decision of this Court in *Lovely Thomas v. State of Kerala* 113 STC 505 (T.R.C. Nos. 47 and 48 of 1996) which was confirmed by the Supreme Court by a decision in S.L.P., no addition to the turnover could be made unless the Department establishes the actual unaccounted purchase and sale of liquor by the petitioners. The revision petitioners were once referred to Full Bench and by judgment dated 22.3.2000, the Full Bench dismissed the T.R.Cs. holding that the position stated by this Court in *Lovely Thomas's* case is not acceptable. However, the petitioners filed review petition before the Full Bench stating that the Division Bench judgment was confirmed by the Supreme Court dismissing the appeal filed by the State before it and therefore, the Division Bench decision cannot be overruled. The review petitions were disposed of by the Full Bench deleting that part of Full Bench judgment dealing with the correctness or otherwise of the decision of the Court in *Lovely Thomas's* case (referred above). Thereafter, the Full Bench remitted the

T.R.Cs. for decision by the Division Bench.

We have heard Counsel appearing for the petitioners as well as the Special Government Pleader appearing for the respondents.

4. The contention raised by Counsel appearing for both the petitioners is that the petitioners were admittedly engaged in liquor trade source of which was from Government distilleries and from Government distribution shop. Therefore, according to them, even though accounts were not properly maintained and shortage or excess in the quantity of liquor was detected in their own business premises, still, their turnover has to be accepted unless the Department proves the source where from they purchased the unaccounted liquor. In Lovely Thomas's case (referred above), the Division Bench held that the onus the proof of liquor sourced from any place other than the Government agencies is on the Department. In that case, the Division Bench has not taken note of the fact that liquor is not a subject handled by the Sales Tax Department and it is under an entirely different Department i.e., the State Excise Department. The production and marketing of liquor in all forms are controlled by the Abkari Act and Rules and without a licence, no dealer can carry on business in liquor. Cases get frequently reported about the Excise Department detecting production of spurious liquor in the State, import of liquor from outside State through clandestine operation. Therefore, it is a notorious fact known to all concerned that along with sale of liquor supplied by Government agencies, there is sale of spurious or illicit liquor sourced through local production or from outside State. In fact, on several occasions, tragic cases of death of a large number of people have taken place in the State on account of consumption of spurious liquor traded in the State. If a dealer accounts purchase and sale of liquor other than from authorised channels of supply, he will be liable for prosecution besides forfeiture of licence for carrying on business. Therefore, production, distribution and sale of illicit and unauthorised liquor are done in the most clandestine manner. Even though this is the ground reality, unfortunately these facts were not brought to the notice of the Division Bench which led to this Court casting burden on the Sales Tax Department to prove unaccounted purchase and sale of liquor to make addition to the turnover. Since the judgment of the Division Bench is confirmed by the Supreme Court,

though not through a speaking judgment, but after notice in S.L.P., we do not want to go into the correctness of what is held by the Division Bench. However, we do not find the facts based on which the Lovely Thomas's case was decided applies to the facts of the petitioners' case because in the case decided by this Court, there is only shortage on inspection and the party explained it by stating that accounts were not regularly posted. However, there was no admission or compounding of offence in the said case. On the other hand, in these two cases, the petitioners have conceded that their accounts are not correct and complete and have paid the compounding fee. The effect of compounding an offence is that accounts are not reliable and therefore, what is left to the assessing officer is only to estimate the turnover. There are large number of judgments of this Court and the Supreme Court holding that after rejecting the books of accounts, the assessing officer has to make an estimation of turnover and estimation in all cases involved some guess work. Unless the estimation is found to be arbitrary and not based on any material, there is no scope for interference by this Court. In one case, we find the assessing officer has made the estimation based on the suppressed turnover and in two levels on appeal, the first Appellate Authority and the Tribunal changed the pattern of addition based on declared turnover. In the other case, the addition to turnover is only a very small amount and that is based on the suppression noticed. So long as the estimation is made on a rational basis, there is no justification for this Court in modifying the same in a revision proceedings where the jurisdiction is confined only to questions of law. Since the Tribunal is the final fact finding authority and since it has modified the orders of the First Appellate Authority reducing the addition, we do not find any ground to interfere with the order of the Tribunal. We therefore dismiss the T.R.Cs.