

Abraham Mathai Vs. State of Kerala

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Court : Kerala

Decided On : Oct-21-2002

Reported in : [2004]138STC678(Ker)

Judge : G. Sivarajan and; K. Balakrishnan Nair, JJ.

Acts : Kerala General Sales Tax Act, 1963

Appeal No. : T.R.C. No. 144 of 2001

Appellant : Abraham Mathai

Respondent : State of Kerala

Advocate for Def. : Georgekutty Mathew, Government Pleader

Advocate for Pet/Ap. : K.B. Muhamed Kutty, Adv.

Disposition : Revision dismissed

Judgement :

1. The assessee was a dealer in arrack. The assessment concerned is for the year 1991-1992. There was an inspection at the business premises of the assessee by the Sales Tax Intelligence Squad, Ernakulam on May 27, 1991. On verification of the books of accounts of the assessee with reference to the shop inspection report prepared by the intelligence squad, it was found that there was shortage of arrack (Government sealed) to the extent of 620.950 liters and excess of arrack

(unsealed) to the extent of 620.950 litres. It was also noted that at the time of inspection, the assessee had not maintained any books of accounts and further, no sale bills were issued for sales. The assessing authority, in the assessment for the year 1992-93, on the basis of the stock variation and other defects mentioned above, proposed to reject the books of accounts of the assessee and to estimate the turnover by adding six times the suppression detected at the time of inspection amounting to Rs.12,19,123.50. The assessee filed objections stating that the difference in stock is on account of the fact that the sealed bottles were opened and arrack was filled in unsealed small bottles for the purpose of convenience of supply to the customers, which is evident from the fact that both the shortage and the excess are of equal quantity. The assessing authority rejected the said contention and completed the assessment as proposed. The first appellate authority, taking into account the circumstances that apart from the stock variation found in the inspection, no actual case of suppression of unaccounted arrack was found out by the assessing authority, modified the assessment by limiting the addition by three times the addition on the sales value of excess stock found at the time of inspection. In further appeal filed by the assessee, the Tribunal has confirmed the order of the first appellate authority.

2. Dr. K.B. Muhamed Kutty, learned Counsel for the petitioner submits that the assessee had purchased the entire arrack from the Kerala State Beverages Corporation Ltd., which was the sole agency in the State at the relevant time for supply of arrack to the authorised licensees. He further submitted that the shortage and excess found in the inspection was of equal quantity and that the assessee had clearly explained in his reply to the notice that there was no difference in the actual quantity of arrack, but the difference is only due to the fact that the sealed bottles were opened and it was filled in small unsealed bottles for the convenience of supplying it to the customers. The counsel also submitted that the first appellate authority has clearly found that the assessing authority has not considered the objections filed by the assessee objectively and that the assessing authority has disposed of the objections taken by the assessee in one sentence to the effect that there is no merit in the objections. The counsel also relied on the decision of this Court in *Lovely Thomas v. State of Kerala* [1999] 113 STC 505, as affirmed by the honourable Supreme Court in Civil Appeal Nos. 3558 and 3559 of

1998, (Reported as State of Kerala v. Lovely Thomas [2003] 131 STC 8). The counsel further submits that at any rate, in the absence of any other materials, the additions sustained by the first appellate authority is also on the higher side.

3. The learned Government Pleader appearing for the respondent, on the other hand, submits that though the assessee was expected to deal only in arrack purchased from the Kerala State Beverages Corporation, the inspection revealed that the assessee had purchased arrack from other sources also illegally and that is why, the Intelligence Squad has found excess of arrack on inspection. The Government Pleader also submits that when excess was found at the time of inspection, the burden is on the assessee to explain the circumstances under which the excess quantity of arrack was found in the assessee's premises. He further submitted that the decision relied on by the assessee in Lovely Thomas's case [1999] 113 STC 505 (Ker) was overruled by the Full Bench of this Court in Mary Antony v. State of Kerala (2000) 8 KTR 545. The Government Pleader also submits that the honourable Supreme Court has dismissed the appeal filed against the decision of the division Bench in Lovely Thomas's case [1999] 113 STC 505 (Ker.) without assigning any independent reason. He further submitted that the first appellate authority has given sufficient relief to the appellant in regard to the quantum of addition made by the assessing authority and therefore, no interference is called for in that regard.

4. The assessee was a licensee for sale of arrack during the year 1991-92. The dealer, for the purpose of sale of arrack, had to purchase arrack only from the Kerala State Beverages Corporation Ltd. According to the assessee, he was only a second seller of arrack purchased from the Kerala State Beverages Corporation Ltd., and therefore, he was not liable to pay sales tax, his sale being the second sale of the commodity. In the inspection conducted by the Sales Tax Intelligence Squad on May 27, 1991, variation in the stock of arrack was found. There was shortage of 620.950 litres of arrack as well as excess of equal quantity of arrack. The assessing authority has not accepted the explanation offered by the assessee in regard to the stock variation and had made an addition of six times the value of the actual suppression found to the returned turnover. The first appellate authority gave substantial relief to the petitioner by reducing the addition to three times the

sales value of the stock variation found. The main contention taken by the learned Counsel for the petitioner is that the assessing authority has not established any unaccounted purchase of arrack by the assessee during the relevant period and that the burden was on the assessing authority to establish unaccounted purchase, which is not established. Though this Court in *Lovely Thomas'* case [1999] 113 STC 505 mentioned above, has held that it is for the respondents to explain as to wherefrom the unaccounted purchases were made by the revision petitioner, the decision has to be understood in the background of the facts of that case. In that case, the assessing officer, on verification of the books of accounts, found that there are certain discrepancies in the books of accounts and that the assessee had made unaccounted purchase of arrack and accordingly, an addition of Rs. 4,03,000 was made. It is in those circumstances, this Court made an observation that the burden is on the Department to explain as to wherefrom the unaccounted purchases were made by the assessee. That apart, the Full Bench of this Court in *Mary Antony's* case [2000] 120 STC 224 mentioned above, noted the decision in *Lovely Thomas's* case [1999] 113 STC 505 and expressed its views as follows :-

'3. So far as the first aspect is concerned, source of unaccounted purchase is within the knowledge of the assessee and it is not possible on the part of the Revenue to show as to where from the unaccounted purchases were made. This is a fact which is exclusively within assessee's knowledge. Assessee is required to prove by proper and cogent evidence the source of purchase. The assessee is entitled to have evidence produced and an inference to be drawn therefrom. There is a *prima facie* presumption that one who is found in possession of an article or thing is the owner thereof unless that presumption is rebutted by cogent evidence. Section 110 of the Indian Evidence Act, 1872 (in short 'the Evidence Act') embodies a salutary principle of common law jurisprudence to that effect. (See *Chuharmal v. Commissioner of Income-tax, M.P.* : [1988]172ITR250(SC) . The expression 'burden of proof really means two different things. It means sometimes that a party is required to prove an allegation before judgment can be given in its favour ; it also means that on a contested issue one of the two contending parties has to introduce evidence. The burden of proof is of importance only where by reason of not discharging the burden which was put upon it, a party must

eventually fail. There is an essential distinction between 'burden of proof and 'onus of proof. Burden of proof lies on the person who has to prove a fact and it never shifts, but the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence.'

5. The Full Bench relied on the decision of the Supreme Court in *A. Raghavamma v. A. Chenchamma* : [1964]2SCR933 for disagreeing with the view taken by the Division Bench in *Lovely Thomas'* case [1999] 113 STC 505 (Ker.) Regarding the question of drawing adverse inference warranting addition, the Full Bench further observed as follows:-

'4. The other question is whether an adverse inference warranting addition can be drawn when books of accounts are found to be not fully posted at the time of inspection. It would depend upon fact situation of each case. If assessee explains the reason why books of accounts were found to be not fully posted, the explanation may be accepted and no adverse inference may be drawn. But if the assessee offers an explanation which is found to be unacceptable or contrary to the material on record, certainly adverse inference can be drawn by the assessing authority to doubt the correctness of the books of account. As indicated above, it would depend upon fact-situation of the case and no rule of universal application can be laid down. The initial burden of establishing correctness of books of accounts and return filed by an assessee is on him. If satisfactory, clinching and acceptable proof to substantiate figures in the return filed is forthcoming, then the revenue, if it intends to depart therefrom, should in its turn bring such materials on record, as would prove the contrary. As to what would be the measure of acceptable evidence on either side is a varying factor depending upon the facts of each case. No rigid or inelastic formula can be laid down. When accounts are not reliable, best judgment assessment can be done. To sum up if accounts are not fully posted at the time of inspection, unless contrary is established by the assessee, the inevitable conclusion is that accounts are not properly maintained and such an adverse inference can be drawn.'

6. Thus, the question raised in this case is also covered by the decision of the Full Bench. However, the contention of the counsel is that the decision of the division

Bench in Lovely Thomas's case [1999] 113 STC 505 (Ker) has been affirmed by the honourable Supreme Court in Civil Appeal Nos. 3558 and 3559 of 1998*. We have perused the judgment of the honourable Supreme Court. It is seen that the said appeals were dismissed without assigning any reasons. The order of the Supreme Court reads as follows :-

'We have heard learned counsel for the parties. We find no reason to interfere with the order of the High Court. The civil appeal is dismissed.'

7. Since the honourable Supreme Court has not independently considered the matter, it cannot be said that all the propositions stated in the division Bench decision has been accepted. Hence, it must be taken that the honourable Supreme Court* has only agreed with the conclusion arrived at by the division Bench in Lovely Thomas's case [1999] 113 STC 505 (Ker.)

8. In this case, as already noted, the accounts of the assessee were rejected solely on the basis of the stock variation found at the time of inspection. The estimate was also made on that basis. The assessee had obtained substantial relief on the quantum from the first appellate authority. In the above circumstances, we do not find any reason to interfere with the order of the Tribunal. The tax revision case is accordingly dismissed.

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