

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

FRIDAY, THE 2ND DAY OF DECEMBER 2016/11TH AGRAHAYANA, 1938

WP(C).No. 11712 of 2016 (L)

PETITIONER(S):

K. PRASANNAKUMAR,
KANDENKAVIL HOUSE, MARATHAKKARA. P.O.,
THRISSUR, REPRESENTED BY POWER OF
ATTORNEY HOLDER A.A. JOHAR,
S/O. ANTO, AINIKAL HOUSE, MARATHAKKARA. P.O.,
OLLUR, THRISSUR.

BY ADV. SRI.I.DINESH MENON.

RESPONDENT(S):

1. THE TRANSPORT COMMISSIONER,
THIRUVANANTHAPURAM - 695 001.
2. THE REGIONAL TRANSPORT OFFICER/
TAXATION OFFICER, ERNAKULAM - 682 035.

BY GOVT. PLEADER SRI.V.K. SHAMSUDHEEN.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 11-11-2016, ALONG WITH WP(C). NO. 21207 OF 2016 AND
WP(C).NO.34656 OF 2016, THE COURT ON 02/12/2016 DELIVERED
THE FOLLOWING:

rs.

WP(C).No. 11712 of 2016 (L)

APPENDIX

PETITIONER'S EXHIBITS:-

- EXHIBIT-P1: TRUE COPY OF THE JUDGMENT IN WP(C).NO.6922 OF 2015.
- EXHIBIT-P2: TRUE COPY OF THE ORDER DATED 24.03.2015.
- EXHIBIT-P3: TRUE COPY OF THE JUDGMENT IN WP(C).NO.11371 OF 2015.
- EXHIBIT-P4: TRUE COPY OF THE ORDER DATED 02.05.2015.
- EXHIBIT-P5: TRUE COPY OF THE ORDER DATED 25.06.2015 IN
WP(C).NO. 19132 OF 2015.
- EXHIBIT-P6: TRUE COPY OF THE STATUTORY REVISION FILED UNDER SECTION
24 OF THE TAXATION ACT.
- EXHIBIT-P7: TRUE COPY OF THE DECISION OF THE R.T.A. DATED 26.05.2015.
- EXHIBIT-P8: TRUE COPY OF THE JUDGMENT IN WP(C).NO. 22210 OF 2015
DATED 30.07.2015.
- EXHIBIT-P9: TRUE COPY OF THE JUDGMENT IN WP(C).NO.32836 OF 2010
DATED 21.10.2014.
- EXHIBIT-P10: TRUE COPY OF THE ORDER NO.B1/18270/TC/2015 DATED 17.02.2016
PASSED BY THE FIRST RESPONDENT.

RESPONDENT'S EXHIBITS:- NIL.

//TRUE COPY//

P.S. TO JUDGE

rs.

A.M.SHAFFIQUE, J

W.P.C.Nos.11712, 21207

&

34656 of 2016

Dated this the 2nd day of December 2016

J U D G M E N T

These writ petitions arise from a common issue and therefore heard and decided together.

2. In WP(C) No.11714/2016, the petitioner is the registered owner of a stage carriage bearing Reg.No.KL-07 AB-101. His regular permit was valid since 04/02/2005. He was granted renewal after three years in the meeting of the RTA held on 26/05/2015. Petitioner submits that after 05/02/2012, that is after the expiry of the regular permit, neither regular or temporary permits were issued to the petitioner. Therefore the petitioner is not liable to pay tax for those periods the vehicle was not used nor kept for use as a stage carriage. In the writ petition, the petitioner challenges Ext.P10, an order passed by the Transport Commissioner rejecting his revision placing reliance on the judgment in **Vipin v. Regional Transport Officer** [2015 (1) KLT 89].

W.P.C.Nos.11712/2016
& conn.cases

2

3. In WP(C) No. 21207/2016, the petitioner claims to be a stage carriage operator, whose regular permit was valid upto 26/08/2013. He also sought for exemption for payment of tax for the period during which he did not have a valid permit, which has been rejected by the Transport Commissioner as per Ext.P6 order dated 11/01/2016 placing reliance on the judgment in **Vipin** (supra).

4. In WP(C) No. 34656/2016, petitioner is the registered owner of vehicle bearing Reg.No.KL-8AF 4626. At the time when he purchased the vehicle, he did not have a permit. However, he was called upon to pay an amount of Rs.2,23,380/- being the tax from 01/07/2015 to 31/03/2016. Petitioner challenges the aforesaid demand as well as Ext.P8 order by which the Joint Regional Transport Officer had registered his claim for exemption from payment of tax.

5. Counter affidavit has been filed in W.P.C.No. 21207/2016 wherein the authorities supported the stand taken by them.

6. Heard the learned counsel for the petitioners and the learned Government Pleader appearing on behalf of the

W.P.C.Nos.11712/2016
& conn.cases

3

respondents.

7. Learned counsel for the petitioner submits that there is an apparent conflict between the two judgments of the learned Single Judge of this Court. It is submitted that in **Mini Dileep v. Regional Transport Officer, Kottayam** [2013(2) KHC 884], the learned Single Judge of this Court held at paragraphs 6 & 7 of the judgment as under:

“6. It is trite law that every vehicle in the state is presumed to be used or kept for use in the state unless the said statutory presumption flowing from Section 3 of the Act is rebutted by the procedure laid down under the Act. The rate of tax for such vehicle is however specified in the schedule to the Act wherein the class of vehicles and the rate of quarterly tax payable are indicated. Serial No.7 of the schedule deals with motor vehicles playing for hire and used for transport of passengers and in respect of which permits have been issued under the Motor Vehicles Act, 1988. The Vehicle cannot be said to have been 'used for transport of passengers ' when substitute temporary permits had admittedly been issued to other operators to conduct service in the defaulted vacancy. The operator

W.P.C.Nos.11712/2016
& conn.cases

4

of a defaulted service can at best be made liable to pay tax at the rate applicable to a non transport vehicle under the residuary clause in serial No.12 of the schedule to the Act. The liability to pay tax at the rate applicable to a transport vehicle arises only in respect of a vehicle plying for hire and used for transport of passengers and in respect of which permits have been issued.

7. A Division Bench of this Court had adopted the same view in R.P.No. 821/2011 in W.A No.113/2011 and R.P. No. 830/2011 in W.A.No. 114/2007 wherein it was observed as follows:

"If the vehicle was not operating and substitute vehicle only was operating then tax payable is only at the non-transport rate and not at the rate applicable to stage carriage ".

Similarly the vehicle could not have been used for transport of passengers in circumstances like the expiry of the validity of the fitness certificate or expiry of the route permit. Only tax at the rate applicable to a non-transport vehicle kept idle need be paid as per the residuary clause in serial No.12 of the schedule to the Act under the contingencies aforesaid. It was also the cause of the petitioner that the route permit granted to his vehicle was valid only upto 09.08.2010 and that it could not have

W.P.C.Nos.11712/2016
& conn.cases

5

been used as a transport vehicle beyond the month of December, 2010. The authorities had blindly fastened the liability to pay tax at the rate applicable to a transport vehicle for the whole period for the mere reason that intimation in Form G was nor given.”

8. However, taking a contrary view based on the judgment of the Apex Court in **State of Orissa v. Bijaya C.Tripathy** [2004 KHC 1482], another learned Single Judge, having referred to **Mini Dileep** (supra), took a contrary view in **Vipin** (supra) and held at paragraphs 4, 5 and 6 as under:

“4. In the decision Mini Dileep there was an observation in paragraph 7, to the effect that, when the vehicle could not have been used for transport of passengers, in circumstances like the expiry of validity of fitness certificate or expiry of the route permit, tax only at the rate applicable to a non-transport vehicle kept idle need be paid, as per the residual clause in Sl.No.12 of the Schedule to the Act. The petitioner in the said case contended that the route permit granted to the vehicle was valid only up to 9.8.2010 and that it could not have been used as a transport vehicle beyond the month of December 2010. The authorities

W.P.C.Nos.11712/2016
& conn.cases

6

proceeded with steps to impose tax liability for the whole period, for the reason that intimation 'Form G' was not given.

5. Whether the petitioner had actually operated the vehicle or not, even after the expiry of Permit or Fitness Certificate is a matter which is to be established on the basis of evidence to be let in and the burden is very heavy on the persons like the petitioner. This is for the obvious reason that, mere expiry of the 'Fitness Certificate' or the 'Permit' will not be and cannot be a tool to infer that the party has not used the vehicle for operation. The mandate of S.3 is something different, which is discernible from the provision extracted below:-

“3. Levy of tax.- (1) *Subject to the provisions of this Act, on and from the date of commencement of this Act, a tax shall be levied on every motor vehicle used or kept for use in the State, at the rate specified for such vehicle in the Schedule:*

Provided that no such tax shall be levied on a motor vehicle kept by a dealer in, or a manufacturer of, such vehicle, for the purpose of trade and used under the authorisation of a trade

W.P.C.Nos.11712/2016
& conn.cases

7

certificate granted by the registering authority.

[Provided further that in respect of a new motor vehicle of any of the classes specified in item numbers 1,2,6,10(iii) and II of the Schedule to this Act, there shall be levied from the date of purchase of the vehicle one-time tax at the rate specified in Annexure I, at the time of first registration of the vehicle and thereafter tax shall be levied at the time of renewal of such vehicle at the rate specified in the Schedule as per fourth proviso to sub-section(1) of Section 4:]

[Provided further that in respect of new motor vehicle of any of the descriptions specified in item No.1(a) of the Schedule to this Act, there shall be levied from the date of purchase of the vehicle a tax in advance for a period of five years at the rate specified in the Schedule, at the time of first registration of the vehicle, and thereafter tax shall be levied at the rate specified in the Schedule in

W.P.C.Nos.11712/2016
& conn.cases

8

accordance with the fourth proviso to sub-section (1) of Section 4:]

[Provided also that in respect of new autorickshaws specified in item number 7(i)(b) of the Schedule to this Act, there shall be levied from the date of purchase of the new vehicle, a tax in advance for a period of five years at the rate specified in Annexure II, at the time of first registration of the vehicle and thereafter tax shall be levied for 5 years or for one year at the rate specified in the seventh proviso to sub-section (1) of Section 4.]

(2) The Government may from time to time by notification in the Gazette, increase the rate of tax specified in the Schedule:

Provided that such increase shall not in the aggregate exceed fifty percent of such rate.

(3) The registered owner of, or any person having possession or control of a motor vehicle shall, for the purpose

W.P.C.Nos.11712/2016
& conn.cases

9

of this Act, be deemed to use or keep such vehicle for use in the State, except during any period for which no tax is payable on such motor vehicle under sub-section(1) of Section 5.

(4, 5, 6 are not relevant in this context)

6.The question whether expiry of the 'Fitness Certificate' or 'Permit' will automatically enable the party concerned to evade the tax liability, had come up for consideration before the Apex Court in State of Orissa & Ors. v. Bijaya C.Tripathy ((2004) 7 SCC 139 = AIR 2005 SC 1431= 2004 KHC 1482). After considering the relevant provisions of law, the Apex Court observed that, even in the absence of a permit, the vehicle remains a 'transport vehicle' which is capable of being used on a road. Paragraph 10 of the said verdict is very relevant; which hence is extracted below:-

“The High Court also appears to have misread S.66 of the Motor Vehicles Act. All that S.66 of the Motor Vehicles Act provides is that the owner of a motor vehicle cannot use the vehicle as a transport vehicle in

any public place without a permit. S.66, therefore, merely prevents use of the vehicle as a transport vehicle without a permit. It does not prohibit driving of such a vehicle on a public road. The vehicle can be driven on a public road so long as it is not used as a transport vehicle. To take an extreme example, the owner of such a vehicle may use that vehicle for taking his family out for a picnic. S.66 will not bar such a use. It is thus clear that even in the absence of a permit the vehicle remains a transport vehicle which is capable of being used on a road so long as the vehicle has a valid certificate of fitness and a valid registration certificate. In such cases it has to be presumed that such a vehicle has been "kept for use" irrespective of whether or not it was actually used on the road." The said decision was not brought to the notice of the learned Single Judge when the decision in Mini Dileep v. Regional Transport Officer (2013 (3) KLT 97) was rendered."

9. It is contended that the Apex Court judgment relied upon in **Vipin** (supra) could not have been made applicable to the facts of the case especially on account of certain differences between the statutory format which was considered by the Apex Court as well as the Orissa Motor Vehicle Taxation Act is concerned and therefore the contention is that **Mini Dileep** (supra) still holds the field.

10. Having regard to the aforesaid rival contentions, the question to be considered is as to what exactly is the liability of a registered owner of a vehicle to pay motor vehicle tax in terms of Motor Vehicle Taxation Act, 1976. The question is whether while the vehicles do not have a permit for either being used as a stage carriage or as a contract carriage, is there any obligation to pay tax. Levy of tax under the Taxation Act is under Section 3. Section 3(1) reads under :

“3. Levy of Tax.- (1) Subject to the provisions of this Act, on and from the date of commencement of this Act, a tax shall be levied on every motor vehicle used or kept for use in the State, at the rate specified for such vehicle in the Schedule.

11. Statute indicates that tax shall be levied at the rate specified in the schedule for vehicles used or kept for use in the State. In other words, merely for the reason that a person does not use the vehicle, does not mean that he is not liable to pay tax. It is enough that the vehicle is “kept for use”. Hence there is liability to pay tax unless a person contends that he has not kept the vehicle for use. In fact, the petitioners in these cases do not have such a case as well. Then the only question is at what rate tax has to be paid as specified for such vehicle in the schedule. Before proceeding further, it would be worthwhile to extract Section 5 also which provides exemption from tax. Sec. 5(1) reads as under:

“5. Exemption from tax.- (1) In the case of motor vehicle which is not intended to be used or kept for use during the first month or the first and second months of a quarter, or the whole of a quarter or year, as the case may be, the registered owner or the person having possession or control of such vehicle shall give previous intimation in writing to the Regional Transport Officer from whom the endorsement of tax has been obtained, that such vehicle would not be used for such period

and thereupon, the registered owner or such other person shall not be deemed to have used or kept for use the vehicle for such period, and no tax shall be payable in respect of such vehicle for such period."

12. The above provision gives a right on the registered owner or the person having control of such vehicle to claim exemption from payment of tax. If the registered owner or such other person in control of the vehicle gives previous intimation in writing to the Regional Transport Authority stating that such vehicle shall not be used for such period he shall not be deemed to have used or kept for use the vehicle for such period and no tax shall be paid in respect of such period. In other words, if a person has a case that he has not used or kept for use a motor vehicle and he should be exempted from paying tax, his only remedy is to submit an intimation in writing to the Regional Transport Officer in terms of Sec.5(1). This provision had been incorporated in order to enable non-users of the vehicle from payment of tax.

13. Now, coming to the schedule, learned counsel for the petitioner points out that Sl.No.7 relates to tax to be paid by

motor vehicle plying for transport of passengers and in respect of which permits have been issued under the Motor Vehicles Act, 1998. It is submitted that when the permits are in force, there is an obligation to pay tax as per Sl.No.7. However, the contention is that when there is no permit, for a vehicle to be used for transport of passengers, then the liability to pay tax is only in terms of Sl.No.12 that is motor vehicles other than those liable to tax under the provisions of the schedule which depends upon the unladen weight of vehicles. In **Bijaya C.Tripathy** (supra), the Apex court was considering a some what similar question. But Sec.3 of the Orissa Motor Vehicle Taxation Act had an explanation attached to it which is highlighted in paragraph 3 of the judgment which indicates that an owner who keeps a transport vehicle for which certificate of fitness and Certificate of Registration are valid or an owner who keeps any other motor vehicle to which Certificate of Registration is valid shall for the purpose of the Act, be presumed to keep such vehicle as stage carriage. It is pointed out that such an explanation is lacking in the Kerala Act.

14. Explanation provided under Section 3 of the Orissa Motor Vehicles Taxation Act 1975 reads as under:

“Explanation.- An owner who keeps a transport vehicle for which the certificate of fitness and the certificate of registration are valid, or an owner who keeps any other motor vehicle, of which the certificate of registration is valid, shall, for the purposes of this Act, be presumed to keep such vehicle for use:

Provided that if the taxing officer finds a motor vehicle having been used on any day during the period for which the registration certificate of a vehicle has been suspended or cancelled under the relevant provisions of the Motor Vehicles Act such vehicle shall be deemed to have been kept for use for the whole period without payment of tax.”

15. However, in **Bijaya C.Tripathy** (supra), the question considered was whether tax is levied on every motor vehicle which is used or kept for use. The Apex Court held that the explanation only clarifies that a transport vehicle having a valid certificate of fitness and a valid Certificate of Registration will be presumed to be kept for use. Even without such explanation, the meaning of the words 'used or kept for use within the State' cannot be given a different meaning. The explanation in the

W.P.C.Nos.11712/2016
& conn.cases

16

Orissa Act only gives a clarification to what is “kept for use”. It clarifies that a transport vehicle which has a valid certificate of fitness and Certificate of Registration is presumed to be “kept for use”. The Apex Court held that even in the absence of a permit, the vehicle remains a transport vehicle which is capable of being used on a road so long as the vehicle has a valid certificate of fitness and a valid Certificate of Registration in which event it has to be presumed that such a vehicle has been kept for use. In the cases on hand as well, petitioners do not have a case that the vehicles do not have valid certificate of fitness or valid Certificate of Registration. As I already indicated that in the Orissa Act, explanation only gives a clarity to the main provision and does not make any addition to the Statute or to the words “kept for use”. It is further held by the Apex Court that, in so far as the petitioner had not given intimation, it is to be presumed that the vehicle had been used or kept for use in the State. I am of the view that the judgment squarely applies to the Kerala Act as well and therefore the learned Single Judge, in the later judgment in **Vipin** (supra) was justified in deciding the case placing reliance upon the Apex Court judgment in **Bijaya C.Tripathy** (supra).

16. Therefore, merely for the reason that the petitioners' vehicle do not have a permit, by itself cannot be stated as a reason to hold that the vehicles were not kept for use.

17. Now the only question that remains to be considered is whether the petitioner's liability to pay tax is under Sl.No.7 or 12 of the schedule. The heading of Sl.No.7 reads as under:

“7. Motor Vehicles plying for hire & used for transport of passengers and in respect of which permits have been issued under the Motor vehicles Act, '88”

18. There is no dispute about the fact that the vehicles in question have been issued with permits for transport of passengers, in which event, petitioners are liable to pay tax under Sl.No.7 of the schedule. That the permits have not been renewed cannot be a reason for non-payment of tax and if the petitioners want to avail the benefit of exemption, they have to apply under Section 5.

19. In the above circumstances, I am of the view that the petitioners are under obligation to pay tax in terms of Sl.No.7 of the schedule unless exempted in terms of Sec.5. In the light of

W.P.C.Nos.11712/2016
& conn.cases

18

the above finding, I do not think that the authorities had committed any error in passing the interim order.

These writ petitions are hence dismissed.

(A.M.SHAFFIQUE, JUDGE)

jsr