

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN
&

THE HONOURABLE MR. JUSTICE DEVAN RAMACHANDRAN

WEDNESDAY, THE 26TH DAY OF OCTOBER 2016/4TH KARTHIKA, 1938

WA.No. 1965 of 2016 IN WP(C).22728/2014

JUDGMENT IN WP(C) 22728/2014

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APPELLANTS/RESPONDENTS IN THE W.P.(C):

1. THE INTELLIGENCE OFFICE, SQUAD NO.V,
DEPARTMENT OF COMMERCIAL TAXES,
PALAKKAD - 678 001.
2. THE STATE OF KERALA,
REPRESENTED BY ITS SECRETARY,
TAXES DEPARTMENT, GOVT. SECRETARIAT,
THIRUVANANTHAPURAM - 695 001.

BY SR. GOVT. PLEADER SRI.MOHAMMED RAFIQ

RESPONDENT/PETITIONER IN THE W.P.(C):

K.MARI, DOOR NO.4/195, MENASI,
PAPPIREDDDYPPATTI TALUK,
DHARMAPURAI DISTRICT, TAMIL NADU.

BY ADVs. SRI.HARISANKAR V. MENON
SMT.MEERA V.MENON

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 20-10-2016,
THE COURT ON 26-10-2016 DELIVERED THE FOLLOWING:

CR

Thottathil B.Radhakrishnan
&
Devan Ramachandran, JJ.

W.A.No.1965 of 2016

Dated this the 26th day of October, 2016

JUDGMENT

Devan Ramachandran, J.

This appeal has been filed by the Intelligence Officer and State of Kerala assailing the judgment of the learned single Judge, wherein the order of penalty initially imposed by the Tax Authorities at an amount of Rs.7,08,470/- was modified and reduced by the learned single Judge to an amount of Rs.1,00,000/-.

2. The appellants challenge the judgment on various grounds both legal and factual.

3. It is contended that the learned single Judge exceeded jurisdiction in reducing the penalty that was imposed as per the order of the Intelligence Officer to an amount of Rs.1,00,000/-, which amount, according to them, was woefully insufficient and without being

supported by discernible cause.

4. We have heard Sri.Mohammed Rafiq, learned Senior Government Pleader appearing on behalf of the appellants and Sri.Harisankar V.Menon, learned counsel appearing on behalf of the respondent.

5. The issue as to whether in all cases where evasion of tax has been established the maximum penalty stipulated under the Statute has to be imposed is a matter that has been considered by this Court in various judgments settled position is, as we will presently state, that the power to impose penalty being quasi judicial in its effect and ambit, will, therefore, have to be exercised with great circumspection and that the quantum of penalty imposed should depend upon the gravity of the offence.

6. The learned counsel for the respondent placed before us the decision of this Court in **Sudhi v. Intelligence Officer, Agricultural Income-tax and Sales Tax** ((1992) 85 STC 337 (Ker)) and invited our

attention to certain findings in the said judgment, which are extracted as under:

“From the various shades of meaning given in the above dictionaries for the word 'evasion', it is clear that it is not the mere default that is made the foundation for the liability (penalty); it is a contumacious or fraudulent or other blame-worthy or objectionable conduct of an assessee in fulfilling his obligations mentioned in section 45A(1) of the Act that will attract the levy of penalty. We have no doubt in our mind that mens rea or the mental element is embedded in the crucial word 'evaded' or 'sought to be evaded' occurring in section 45A(1) of the Act.”

Even though the referred judgment do not deal with the issue as to whether the maximum penalty has to be imposed in all cases, but states the law clearly that a penalty can be levied only if there is fraudulent or other blame-worthy or objectionable conduct on the side of the assessee. However, a Bench of this Court in **Gentle Joseph & Co. v. State of Kerala** ((1993) 89 STC 494) considered this issue in specific and held very clearly that the power of the authority in imposing penalty does not confer any uncanalised or unguided power in the statutory authority and it requires the authority to apply its mind to all relevant aspects of the default alleged to

have been committed by a dealer. Their Lordships stated the law that the order levying penalty is quasi judicial in character and that it involves exercise of judicial discretion. It was further observed that levy of penalty is not compulsive, but only enabling or permissive.

7. The unequivocal declaration of law on this issue is stated in paragraph 7 of the judgment in **Gentle Joseph & Co.** (supra), which is extracted as under for ease of reference:

“Penalty can be imposed under Section 29A(4) only if the officer finds that there has been an attempt to evade the tax due under the Act. The other two sections, viz., sections 19 and 45A contain the phrase 'is satisfied'. While interpreting that phrase this Court in Sudhi's case (1992) 85 STC 337, observed that the quantum of penalty should depend upon the gravity of the offence and if the maximum penalty is levied in a mechanical manner it is a pointer to show that the officer has not exercised the judicial discretion vested in him according to law. In other words, there should be independent evaluation and appraisal and the grounds should be disclosed before the maximum penalty is levied. Before imposing penalty under section 29A(4) of the Act the officer has, therefore, to find that there has been an attempt to evade the tax. Such finding can be rendered only on the basis of materials and the reasons for such finding should also be disclosed. The law laid down by the Court in Sudhi's case (1992) 85 STC 337, is, therefore, applicable to the present case also though the phrase used in section 29A(4) is slightly different from the

phrase used in section 45A which came up for consideration in that case.”

8. From the touch stone of the law as laid down above, the learned single Judge, as we can see indubitably from the impugned judgment, assessed all the relevant factors and came to a definite finding that there were sufficient mitigating circumstances favouring the assessee, which would then warrant reduction of penalty that has been imposed to a much lower one. We are essentially called upon by the appellants to answer whether such a course of action was available to the learned single Judge. We will examine that in the event there are sufficient reasons to show that the Assessing Officer and the other authorities had not considered the relevant materials and have not considered all the issues that are imperative for consideration in the facts and circumstances of the case and if the respondent was able to establish that his conduct was not fraudulent and that his omissions are not so grave so as to attract the maximum penalty, then it would be permissible, as has

been done by the learned single Judge, to reduce the penalty even below the alleged amount of tax.

9. For this, one has to only advert to Section 47(6) of the Act that empowers the Officer authorised to conduct the inquiry, under the said section, to impose penalty. Section 47(6) reads as under:

“The officer authorised under sub-section (5) shall, before conducting the inquiry, serve notice on the owner of the goods and give him an opportunity of being heard and if, after the enquiry, such officer finds that there has been an attempt to evade the tax due under this Act, he shall, by order, impose on the owner of the goods a penalty not exceeding twice the amount of tax attempted to be evaded, as may be estimated by such officer.”

10. It is perspicuous that Section 47(6) of the Act authorises the Officer concerned to impose a penalty not exceeding twice the amount of tax, but does not, in any manner, impose an obligation upon such Officer to impose the maximum penalty always. The discretion to impose penalty subject to a maximum of twice the amount of tax obviously gives to the Officer the power to impose such quantum as is warranted in the facts and circumstances of each case. The section does not

prescribe a minimum quantum of penalty to be imposed but only mandates that the penalty so imposed would not exceed twice the amount of tax. It is, therefore, axiomatic that the Officers concerned are under a statutory obligation to exercise the discretion vested with them under the Statute in a manner that would answer the tests of fairness and appropriateness based on the culpability of the assessee as has been determined by due process. The binding caution advised in **Gentle Joseph & Co.** (supra) should be the guiding principle of the assessing and other authorities under the taxation system for imposing and levying penalty.

11. We have to, therefore, examine whether in the circumstances that have been established on record, the authorities had exercised the discretion validly and properly in arriving at a conclusion that the maximum penalty under Section 47(6) was warranted.

12. The facts of this case, as is noticed by the learned single Judge, are that an Excavator Loader of

make JCB bearing Reg.No.TN-29/A 4161 in the name of the respondent was intercepted by the Intelligence Squad, headed by the Intelligence Inspector, Squad No.V, Commercial Taxes, Palakkad on 01.07.2013 at Eruthanpatty at about 6.30 A.M. on the allegation that the vehicle did not have the requisite documents under Section 46 of the Kerala Value Added Tax Act (referred to as 'the Act' for brevity). A notice under Section 17A of the Act was issued to the driver of the vehicle demanding a security deposit of Rs.7,08,470/-, being double the amount of tax on the invoice value of the vehicle. It appears that on receipt of the notice, the respondent approached this Court by filing W.P.(C)No.17123/2013, which was disposed of with a direction to the competent authority under the Act to dispose of the adjudication proceedings within a period of ten days under Section 47 (2) of the Act.

13. Thereafter, the order dated 25.07.2013 was passed by the Intelligence Officer imposing a penalty of

Rs.7,08.470/-, being double the amount of tax that is alleged to be evaded under Section 47(6) of the Act. The respondent carried this order in appeal before the Assistant Commissioner (Appeals), Palakkad, who confirmed the order and dismissed the appeal. The respondent, thereafter, filed a further appeal before the Kerala Value Added Tax Additional Appellate Tribunal ('the Tribunal' for brevity), Palakkad, which, on elaborate consideration of all the issues, allowed the appeal and set aside the orders of the Assessing Officer as well as the first appellate authority. The Tribunal appears to have been persuaded by the contention of the respondent that he had brought the vehicle not for the purpose of sale in Kerala but for the purpose of using it for excavation of laterite soil on the basis of an agreement that he had entered into with a certain Mr.Kumar at Panagara, Malappuram District. The Tribunal has concluded that in the absence of any positive material evidencing that the vehicle was brought to Kerala not for sale or transfer,

imposition of penalty was not legally sustainable.

14. The State, therefore, filed O.T.Rev.No.25/2014, which was allowed by a Bench of this Court setting aside the order of the Tribunal and remanding the matter back to the Intelligence Officer enabling the respondent herein to adduce evidence to establish that he had brought the vehicle to Kerala based on an agreement with Mr.Kumar for the purpose of executing the laterite quarrying work. Consequent to the remand, the respondent herein filed objections before the Intelligence Officer against the proposal under Section 47 initiated by him. He specifically contended that he purchased the new vehicle and got it registered with the Assistant Registering Authority, Harur on 25.06.2013. He maintains that he was approached by Mr.Kumar of Malappuram for taking the above excavator on hire. According to him, Mr.Kumar was already in possession of a quarrying permit dated 17.12.2012, issued by the Geologist, Mining and Geology Department, Manjeri. He then claimed that he had

entered into an agreement dated 25.06.2013 with Mr.Kumar for undertaking the work of excavation. He has also produced copies of the permit and agreement before the Intelligence Officer. It appears that the Intelligence Officer summoned Mr.Kumar also and a statement was obtained by him from Mr.Kumar along with that of the respondent herein. These statements are produced in the writ petition as Exhibits P5 and P5(a) respectively. The Intelligence Officer, however, again proceeded to impose a penalty of Rs.7,08,470/- as per order dated 02.07.2014 under Section 47(6) of the Act. This order, without invoking the remedy available under the Act, was challenged by the respondent herein by filing the above writ petition.

15. At the time when the writ petition was admitted on 03.09.2014, this Court had granted an interim stay not to sell the vehicle pursuant to the order of penalty and the matter was finally heard by the learned single Judge on 22.06.2016.

16. It appears that in the writ petition the State had taken a contention that the conduct of the respondent in filing a writ petition without invoking and seeking the effective and efficacious alternative remedy available under the Statute shall not be countenanced. The State also contended that the penalty was imposed without valid reasons and that it requires further modification.

17. The learned single Judge, however, proceeded to hear and dispose of the writ petition taking note of the fact that the matter was admitted and pending before this Court for more than two years and that, therefore, at this distance of time, it was not appropriate to relegate the petitioner to seek the alternative remedies available to him under the Statute. We are in complete agreement with this rationale and we are of the view that this Court, after having admitted the writ petition, being undoubtedly aware of the availability of alternative remedies and after issuing interim orders, it would not be

appropriate, procedurally and legally, to relegate the petitioner to the alternative remedies. We find no infirmity in the findings of the learned single Judge in this regard.

18. As regards imposition of penalty and its quantum, we see from the impugned judgment that the learned single Judge had considered all the relevant aspects and had, for specific reasons, thought it fit to reduce the penalty. It is true that the appellants have contended through out that the action under Section 47 (6) of the Act has been invoked because, at the time when the vehicle was intercepted, while being transported to Kerala, did not have any materials or documents accompanying it to show that it was being brought to Kerala for the purpose of excavation of laterite soil as is claimed. The fact that the vehicle was intercepted at Eruthenpathy, a transit route from Tamil Nadu to Kerala through Ellapattan Koil, not being a route that is being normally used for the purpose of travel from Tamil Nadu

to Malappuram, the Intercepting Officer and the competent authority under Section 47(6) came to the conclusion that the respondent was using the normal less preferred bye-route with the deliberate intention to evade tax. The appellants, therefore, contend that in view of sub clause (9) of Section 6 and Section 46 of the Act, a presumption runs in favour of the Revenue that the respondent was trying to evade tax.

19. Though we find considerable force in the contentions of the appellants, we are constrained to hold that, however, the competent authorities have not adverted to a few issues, which were specifically noticed by the learned single Judge. For the first, the vehicle was purchased by the respondent and registered in Tamil Nadu on 25.06.2013. Admittedly, the vehicle was intercepted on 01.07.2013, i.e., about six days after the purchase. The learned single Judge, therefore, rightly held that it cannot be seen as an instance where the respondent had any intention to effect sale of the vehicle

in Kerala and avoid tax. Further, even at the time of interception, the driver of the vehicle intimated the Intercepting Officer that it was being taken to Malappuram for a work of excavating laterite soil. It is true that the vehicle did not have any documents in support of this claim. However, this obvious lacuna was sought to be explained by the respondent by trying to establish that there was indeed a contract for excavating laterite soil using the vehicle in question on the basis of an agreement that he had produced before the competent authority under Section 47(5) of the Act. However, even though the agreement was dated 25.06.2013, the Officer found from the stamp paper that in fact it was purchased on 03.07.2013, i.e., two days after the interception. We agree that this circumstance in isolation would certainly give rise to a legitimate suspicion that the agreement so produced was created only for the purpose of creating a defence against the proceedings and that the same would not give rise to the evidence to the claim of the

respondent. However, various other attendant circumstances, namely, the quarrying permit dated 17.12.2012 favouring Mr.Kumar and the fact that the vehicle was absolutely brand new, would mitigate the suspicion to a large extent. It is true that the agreement has been entered into in a stamp paper that was purchased after the interception. Further, the learned single Judge took the view that even though the stamp paper was purchased subsequently, the contents of the document would indicate that the respondent had an agreement with Mr.Kumar for the purpose of undertaking the work of excavation of laterite soil using the intercepted vehicle at an earlier date. The respondent faced with the situation of having to answer the proceedings, issued under Section 47, appears to have obviously written an agreement with Mr.Kumar subsequently showing the date of agreement as 25.06.2013. We are definitely not in approval of the conduct of the respondent in attempting to create

documents in this manner, but we are in approval of the opinion of the learned single Judge that this has been done by the respondent only to establish that he had an agreement ante with Mr.Kumar and that the excavator was transported to Kerala only for the purpose of executing the said work.

20. A reading of Section 47(6) ineluctably leads to a conclusion that imposition of penalty can be based only on the establishment of guilt on the part of the assessee in attempting to evade tax. It is, therefore, axiomatic that once the intention to evade tax is established, penalty is to be imposed. The only question is how the discretion regarding the quantum has to be exercised. The Assessing Officer and the Appellate Authorities entered into the findings based on the guilt of the respondent and therefore, imposed the maximum penalty. However, the circumstances that would obviously mitigate the suspicion that was created against the respondent were not considered in its proper perspective and it is,

therefore, that the learned single Judge, on a proper examination of all the attendant and related circumstances, decided to reduce the penalty substantially to Rs.1,00,000/-. The learned single Judge also took note of the fact that the vehicle had been in the custody of the authorities for over three years, and he, therefore, reduced the penalty so as to enable the writ petitioner/respondent to take delivery of the vehicle. The fact that the learned single Judge has only reduced the penalty and did not exonerate the respondent from it completely, makes us to conclude that the learned single Judge found the respondent to have acted in culpability and that his action in attempting to prove a contract with Mr.Kumar by creating a document in a stamp paper subsequent to the interception has not been fully proved. It is, therefore, that the levy of penalty was upheld since in normal circumstances, if there was no culpability on the part of the respondent, no penalty ought to have been imposed.

21. We have also examined all the documents on record and the statements given by the respondent and Mr.Kumar before the assessing authority. We see that the case of the respondent that he brought the vehicle to Kerala for executing a work under a contract/agreement with Mr.Kumar appears to be probable. However, his conduct in creating a document, in support of his contention, on a stamp paper that was purchased subsequent to the interception would not give the benefit of exculpation. In such view of the matter, it is, therefore, necessary that he be mulcted with penalty, since he was only enjoying the benefit of doubt based on attendant circumstances. We see that it is in such circumstances the learned single Judge has also upheld the order of penalty, but reduced it to Rs.1,00,000/- based on the reasons and rationale recorded in the judgment, which, we are of the view, are totally justifiable and with sufficient reason and cause.

In the above circumstances, we obtain no reason to interfere with the judgment of the learned single Judge in any manner and the above appeal is, therefore, dismissed. In the nature of the disputes and controversy as has been indicated above, we do not think that this is a fit case to impose costs on either of them and therefore, direct the parties to suffer their respective costs.

Thottathil B.Radhakrishnan, Judge

Devan Ramachandran, Judge

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