

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE SHAJI P. CHALY

TUESDAY, THE 9TH DAY OF JUNE 2015/19TH JYAISHTA, 1937

W.A.No. 285 of 2010 () IN WP(C).37366/2008

AGAINST THE JUDGMENT IN W.P(C) NO. 37366/2008 of HIGH COURT OF KERALA DATED
15-06-2009

APPELLANT(S)/PETITIONER:

M/S. AFL PRIVATE LTD.,
AFL HOUSE, LOK BHARATHI COMPLEX,
MAROL MAROSHI ROAD,
ANDHERI EAST, MUMBAI-400 059
(REP. BY POWER OF ATTORNEY HOLDER
SHRI.V.S.VISWANATHAN, LEGAL HEAD & COMPANY
SECRETARY OF M/S.AFL PVT. LTD.).

BY ADVS.DR.K.B.MUHAMED KUTTY (SR.)
SRI.JOSEPH KODIANTHARA (SR.)
SRI.B.MOHANLAL

RESPONDENTS/RESPONDENTS:

1. THE ASSISTANT COMMISSIONER (ASSESSMENT),
SPECIAL CIRCLE, COMMERCIAL TAXES, PALAKKAD.
2. A.R.ABDULLAH,
(AGE AND FATHER'S NAME NOT KNOWN TO THE PETITIONER
/APPELLANT), PROPRIETOR M/S.GOOD LUCK PARCEL SERVICE,
31/3, BLOCK-J, SAHARPUR COLONY,
NEW ALIPORE, KOLKATA-700 053.

BY SPECIAL GOVERNMENT PLEADER, SRI. SEBASTIAN CHEMBAPPILLY

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 09-06-2015, THE COURT
ON THE SAME DAY DELIVERED THE FOLLOWING:

P.T.O.

**ANTONY DOMINIC
&
SHAJI P. CHALY, JJ.**

W.A. No.285 of 2010

Dated this the 9th day of June, 2015

JUDGMENT

Antony Dominic, J.

Appellant filed W.P.(C) No.37366 of 2008, challenging the proceedings which resulted in Ext.P11 order passed by the 1st respondent, levying penalty on them under Sec.30(1) of the Kerala Tax on Paper Lotteries Act, 2005 (hereinafter referred to as "the Act" for short). The learned Single Judge having dismissed the writ petition, this appeal is filed.

2. We heard the learned Senior Counsel for the appellant and the learned Special Government Pleader appearing for the 1st Respondent.

3. As already stated, Ext.P11 is an order issued under Sec.30(1) of the Act, which provides for levy of penalty on fraudulent transport of lottery tickets. Against such orders, the statute provides for appellate remedy under Sec.14 of the Act and it is despite that remedy, the appellant had filed the writ petition. In the writ petition, the main contention raised

by the appellant is that Ext.P11 order is vitiated for non-compliance with the principles of natural justice in as much as the same was passed without affording the appellant an effective opportunity of hearing. The appellant has also raised other contentions on merits.

4. Since law is settled that a litigant can take recourse to proceedings under Article 226 of the Constitution, bypassing the statutory remedies only in exceptional cases, such as cases of violation of principles of natural justice, we shall confine our enquiry to the contention raised by the learned counsel for the appellant that Ext.P11 order was passed without affording them an effective opportunity of hearing.

5. In so far as it is relevant for the purpose of this judgment, the facts of the case are that the appellant is engaged in courier service, which had entered into an agreement with the 2nd Respondent to courier their parcel consignments to various places in India. According to the appellant, on 16.08.2008, 2nd Respondent entrusted to them five parcels for delivery to five distinct parties in Palakkad District. The truck carrying the consignments was intercepted at Walayar Check Post, Palakkad on 22.08.2008. On opening the consignment, it was found that it

contained lottery tickets of Arunachal Pradesh State Lottery. On the allegation that it did not comply with the requirements of the Act, the consignment was seized under the provisions of the Act. Thereupon, show cause notice was issued for levying penalty under Sec.30 of the Act, which finally resulted in Ext.P11 order and it is this order which was challenged and upheld by the learned Single Judge.

6. As we have already stated, the main argument raised is regarding violation of principles of natural justice and the contention is that the order was passed without affording the appellant an effective opportunity of hearing. In so far as this aspect of the matter is concerned, from Ext.P11 order itself, we notice that Ext.P5 show cause notice was issued to the appellant and the same was served on them on 01.09.2008. Upon receipt of notice, they engaged a lawyer to appear on their behalf and the lawyer appeared before the 1st respondent and filed objections on 29.09.2008. The matter was adjourned to 04.10.2008 and again to 07.10.2008 and to 10.10.2008. On 10.10.2008, the lawyer filed Ext.P7 application to implead M/s. Good Luck Parcel Service, Calcutta as a party to the proceedings. It would appear that the summons in Form No.20 was issued to

the proprietor of that concern and summons was also entrusted to the appellant for serving on that party. The case was posted to 15.10.2008. On 15.10.2008, the counsel for the appellant reported his inability to serve summons that was entrusted to him and the summons that was sent by registered post was not returned after service, though the same was returned with the endorsement indicating that the addressee refused to sign, at a later point of time.

7. It would appear that the matter was again adjourned to 31.10.2008 and thereafter Ext.P11 order was passed on 14.11.2008. Though it is vaguely stated in Ext.P11 that the counsel for the appellant "was also heard on all dates", the details of the alleged hearing granted to the appellant or the contentions that were urged, are not mentioned in the order. It is the specific case of the appellant that while they were expecting a further notice affording them an opportunity of hearing after the summons which was sent to the consignor is served, no such further notice was received and that finally what they received is Ext.P11 order.

8. Though a contention that Ext.P11 was passed without affording an opportunity of hearing to the appellant has been raised in the pleading, respondents neither have filed a counter affidavit in the writ petition, nor have they produced any material before this Court to contradict that plea. In such circumstances, particularly when Ext.P11 order does not disclose that an effective opportunity of hearing was afforded to the appellant, we are constrained to accept the case of the appellant that Ext.P11 order was passed without affording them an opportunity of hearing, and thus in violation of the principles of natural justice. In such circumstances, without going to the merits of the contentions raised by both the sides, and leaving all such contentions open, we have to conclude that Ext.P11 order is untenable.

9. For the aforesaid reasons, the judgment of the learned Single Judge dismissing the writ petition is set aside and the writ appeal is disposed of setting aside Ext.P11 order with liberty to the 1st respondent to pass fresh orders.

10. Since the dispute arose in the year 2008 and considering the long lapse of time, we direct the appellant or their representative to appear for a personal hearing before the

1st Respondent during the office hours on 6th July, 2015. On such appearance, it will be open to the 1st Respondent to afford the appellant an effective opportunity of hearing either on that day or on any other convenient date and pass final orders in the matter. We also direct that in the meanwhile, Rs.20 Lakhs deposited by the appellant pursuant to the order dated 08.04.2010 will be retained by the 1st respondent and its appropriation will be dependent upon the nature of the fresh order to be passed.

The writ appeal is disposed of as above.

Sd/-

**ANTONY DOMINIC
JUDGE**

Sd/-

**SHAJI .P. CHALY
JUDGE**

//true copy//

P.S. to Judge

St/-