

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN
&
THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN**

THURSDAY, THE 18TH DAY OF DECEMBER 2014/27TH AGRAHAYANA, 1936

WA.No. 1216 of 2007 () IN OP.3500/2001

**AGAINST THE ORDER/JUDGMENT IN OP 3500/2001 of HIGH COURT OF KERALA
DATED 02-03-2007**

APPELLANT(S)/RESPONDENTS:

- 1. THE SUB REGISTRAR, PALAKKAD**
- 2. THE DISTRICT REGISTRAR, PALAKKAD.**
- 3. THE COMMISSIONER, LAND REVENUE,
GOVERNMENT OF KERALA, THIRUVANANTHAPURAM.**
- 4. THE TAHASILDAR,REVENUE RECOVERY,
ERNAKULAM.**

BY ADVS. SRI.TOM K.THOMAS, SPL. GOVT. PLEADER

RESPONDENT(S)/PETITIONER:

**THE KERALA STATE CO-OPERATIVE CONSUMERS
FEDERATION LIMITED, GANDHI NAGAR KOCHI
682 020, REPRESENTED BY ITS MANAGING DIRECTOR.**

**BY ADV. SRI.M.PATHROSE MATHAI
R1 BY ADV. SRI.M.SASINDRAN
BY ADV. SRI.JOY GEORGE,SC,STATE CO-OP.CONSUMERS FEDERATION
BY SMT.MARIAM MATHAI**

**THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 20-11-2014, ALONG
WITH WA. 211/2008, AND CONNECTED CASES, THE COURT ON 18-12-2014
DELIVERED THE FOLLOWING:**

“C.R.”

ANTONY DOMINIC, K.RAMAKRISHNAN & ANIL K.NARENDRAN, JJ.

W.A.Nos.1216 of 2007,
211 of 2008,941 & 1517 of 2009, 1248 of 2013
W.P(C) Nos.1914, 7773, 17480, 19210 & 19751 of 2012,
19919, 23688, 29519 & 30548 of 2013,
619, 5314, 5374, 7078, 7087, 7303, 7350, 7546,
7560, 7561, 7811, 8101, 8202, 8869, 9035, 9063,
9185, 9949, 9950, 9951,10089, 10090, 10144,
10394, 10456, 13609, 24546, 27316, 29040,
29135 & 29644 of 2014

Dated this the 18th day of December, 2014

O R D E R

Antony Dominic, J.

- 1.The scope of SRO.No.75/1960 dated 8.10.1960 issued by the Government of Kerala, providing for remission of stamp duty payable under the Kerala Stamp Act, 1959 in respect of instruments executed by or on behalf of any registered co-operative society or by any officer or member of such society and relating to the business thereof is what is referred for consideration of the Full Bench.
- 2.W.A.No.1216/07 arises from the judgment of the learned single Judge in O.P.3500/01 [Kerala State Co-operative Consumers Federation Ltd. v. Sub Registrar (2007 (2) KLT 629)]. By the said judgment, learned single Judge upheld the entitlement of the petitioner

therein, the Kerala State Co-operative Consumer Federation Ltd., for the benefit of remission of stamp duty as provided in SRO.No.75/60. In the appeal filed by the Sub Registrar and other official respondents in the OP, taking note of the different interpretations given to the provisions of the notification by different Benches, a Division Bench of this Court felt that the interpretation of the notification is required to be settled authoritatively. It was accordingly that, by order dated 15.6.2011, the appeal was referred to be heard by a Bench of appropriate strength. Since the issues raised in the other cases are similar, those cases were also tagged on to W.A.1216/07.

3. We heard the Government Pleader for the State and its officials and the respective counsel who appeared for the parties.

4. Section 35 of the Travancore-Cochin Co-operative Societies Act, 1951, hereinafter the 'TC Act', for

short, in so far as it is relevant, provided that the Government, by notification in the gazette, may in the case of any society or class of societies, remit the stamp duty with which, under any law for the time being in force, instruments executed in favour of or by or on behalf of a society or by an officer or member and relating to the business of such society or any class of such instruments or awards of the Registrar or Arbitrators under the Act are respectively chargeable.

5. Similarly, section 30(2) of the Madras Co-operative Societies Act, 1932, hereinafter referred to as the 'Madras Act', for short, provided that the Government, by notification in the official gazette, may in the case of any registered society or class of registered societies remit the stamp duty with which, under any law for the time being in force, instruments executed by or on behalf of a registered society or by an officer or member and relating to the business of such society or any class of such

instruments or decisions, awards or orders of the Registrar or arbitrators under this Act are respectively chargeable; and any fee payable under the law of registration for the time being in force.

6. In exercise of the powers conferred by sub-sections (1) and (2) of section 35 of the TC Act and by sub-sections 2(a) and 2(b) of section 30 of the Madras Act and in supersession of all notifications issued on the subject, the Government of Kerala, by SRO.No.75/60 dated 8.10.1960, directed that in respect of a co-operative society registered in the State, the whole stamp duty with which under the Kerala Stamp Act 1959 (Act 17 of 1959) instruments executed by or on behalf of any registered Co-operative Society or instruments executed by officer of such society or member in his own capacity or/and in the capacity of a Guardian of minor and relating to the business thereof and decisions, award or orders of the Registrar or the Arbitrators under the said Co-operative Societies Act.

7. It would appear that the original notification underwent several modifications and after effecting all such changes, the Government have re-published the notification in the Kerala Registration Manual, Part I Volume I, in which, clause 1 (a) to the notification reads thus:

"S.R.O. No.75/60.- In exercise of the powers conferred by sub-sections (1) and (2) of section 35 of the Travancore-Cochin Co-operative Societies Act, 1951 (Act X of 1952) and by sub-sections (2) (a) and (2) (b), Section 30 of the Madras Co-operative Societies Act (VI of 1932) and in supersession of all notifications issued on the subject, the Government of Kerala direct in respect of Co-operative Societies registered in the State as follows:-

1. The stamp duty, registration fees and fees for Encumbrance Certificate payable under the Stamp Act and the Registration Act in force in the State shall be remitted to the Co-operative Societies, in the following cases to the extent indicated in each case.

(a) The whole stamp duty with which under the Kerala Stamp Act, 1959 (Act 17 of 1959) instruments executed by or on behalf of any registered Co-operative Society or instruments executed by "any officer of such Society or member in his own capacity or/and in the capacity of a guardian of minor" and relating to the business thereof and decisions, awards or orders of the Registrar or the arbitrators under the said Co-operative Societies Act."

8. In these cases, we are called upon to examine the scope of clause 1 (a) of SRO 75/60.

9. We have already mentioned that the Notification in question was issued under the TC Act and the Madras Act. By the Kerala Co-operative Societies Act, 1969, hereinafter referred to as the 'Kerala Act', for short, which came into force on 15.5.1969, the TC Act and the Madras Act were repealed. Section 110 of the Kerala Act dealing with repeal and savings reads thus:

"110. Repeal and savings - The Madras Co-operative Societies Act, 1932 (VI of 1932), as in force in the Malabar District referred to in sub-

section (2) of S.5 of the State Reorganisation Act, 1956 (Central Act 37 of 1956) and the Travancore-Cochin Co-operative Societies Act, 1951 (X of 1952) are repealed.

(2) Notwithstanding the repeal of the Madras Co-operative Societies Act, 1932 and the Travancore-Cochin Co-operative Societies Act, 1951 and without prejudice to the provisions of Ss.4 and 23 of the Interpretation and General Clauses Act, 1125 (VII of 1125):

(i) all appointments, rules and orders made, notifications and notices issued, and suits and other proceedings instituted, under any of the Acts hereby repealed shall, so far as may be, be deemed to have been respectively made, issued and instituted under this Act;

(ii) any society existing in the state on the date of commencement of this Act which has been registered or deemed to be registered under any of the aforesaid repealed Acts shall be deemed to be registered under the Act, and the bye-laws of such society shall, so far as they are not inconsistent with the provisions of this Act, continue in force until altered or rescinded."

Reading of section 110(2)(i) shows that notwithstanding the repeal of the Madras Act and the TC Act and without prejudice to the provisions of sections 4 and 23 of the Interpretation and General Causes Act, 1125, all notifications issued under the repealed Acts shall, so far as may be, be deemed to have been respectively issued under the Kerala Act.

10. Section 110(2) shows that all notifications issued under the repealed Acts shall 'so far as may be' deemed to have been respectively issued under the Kerala Act. While examining the scope of this provision, necessarily, the meaning of the expression 'so far as may be' will have to be understood first. This expression has come up for consideration of the Apex Court in Partap Singh v. Director of Enforcement, F.E.R. Act [AIR 1985 SC 989]. In that case, considering Section 37(2) of the Foreign Exchange Regulation Act, 1973, which provided that the provisions of the Cr.P.C relating to searches, shall so far as may be, apply to searches directed

under S.37(1) of the Foreign Exchange Regulation Act, the Apex Court held that, the expression 'so far as may be' has always been construed to mean that those provisions may be generally followed to the extent possible. This principle is laid down in para 12 of the judgment, which reads thus;

“12. Sec. 37(2) provides that the provisions of the Code relating to searches, shall so far as may be, apply to searches directed under Sec. 37(1). Reading the two sections together it merely means that the methodology prescribed for carrying out the search provided in Sec. 165 has to be generally followed. The expression 'so far as may be' has always been construed to mean that those provisions may be generally followed to the extent possible. The submission that Sec. 165(1) has been incorporated by pen and ink in Sec. 37(2) has to be negated in view of the positive language employed in the section that the provisions relating to searches shall so far as may be apply to searches under Sec. 37(1). If Sec. 165 (1) was to be incorporated by pen and ink as sub-sec. (2) of Sec. 37, the legislative draftsmanship will leave no room for doubt by providing that the provisions of the Code of

Criminal Procedure relating to searches shall apply to the searches directed or ordered under Sec. 37(1) except that the power will be exercised by the Director of Enforcement or other officer exercising his power and he will be substituted in place of the Magistrate. The provisions of sub-sec. (2). of Sec. 37 has not been cast in any such language. It merely provides that the search may be carried out according to the method prescribed in Sec. 165 (1). If the duty to record reasons which furnish grounds for entertaining a reasonable belief were to be recorded in advance, the same could have been incorporated in Sec. 37 (1), otherwise a simple one fine section would have been sufficient that all searches as required for the purpose of this Act shall be carried out in the manner prescribed in Sec. 165 of the Code by the officer to be set out in the section. In order to give full meaning to the expression 'so far as may be', sub-sec. (2) of Sec. 37 should be interpreted to mean that broadly the procedure relating to search as enacted in Sec. 165 shall be followed. But if a deviation becomes necessary to carry out the purposes of the Act in which Sec. 37(1) is incorporated, it would be permissible except that when challenged before a court of law, justification will have to be offered for the

deviation. This view will give full play to the expression 'so far as may be'.

11. In the light of the above principles, we must necessarily accept that in view of the language used in section 110(2)(i), the provisions of SRO No.75/60 will have to be generally followed to the extent permissible under the Kerala Act.

12. Section 110(2) of the Kerala Act came up for consideration of a Division Bench of this Court in Deputy Registrar of Co-operative Societies, Cannanore v. Kunhikannan [1979 KLT 152]. In that judgment, considering the validity of proceedings initiated under section 49 of the Madras Act, the Division Bench held thus:

"The continuance of the proceedings initiated under the earlier Act, under the Kerala Act is directed only subject to the provisions of Ss.4 and 23 of the Interpretation and General Clauses Act; and also only to the extent to which (so far as may be) they can be deemed to have been made or

instituted under the provisions of the new Act. Ss.4 and 23 of the Interpretation and General Clauses Act give certain vested rights to persons in respect of proceedings instituted under the earlier Act, and provide that they are liable to be continued under the earlier Act. That is one reason why in this case the proceedings are liable to be continued under the Madras Act and cannot be dealt with under the Kerala Act. Further, S.68 of the Kerala Act is the provision for taking surcharge proceedings, (corresponding to S.49 of the Madras Act). But the scope and the content of the Section under the Kerala Act is quite different from that of the Madras Act. Under S.49 of the Madras Act, surcharge proceedings can be taken if any one of three acts of misconduct are found against the persons sought to be surcharged, namely: (1) misappropriation (2) fraudulent retention of money and (3) breach of trust. Under S.68 of the Kerala Act, the range of action appears to be wider. Liability is attracted for payment made contrary to the Act, Rules or bye laws, or causing any deficiency in the assets of the Society by breach of trust or wilful negligence, or for misappropriation or fraudulent retention of money or property belonging to the Society. Wilful negligence and other matters are new grounds of liability under the Kerala Act not known to or, -at least specifically- recognised by the Madras Act.

Therefore, in so far as wilful negligence can be attributed to, or found against the petitioner, the continuance of the proceedings under the Kerala Act would not be consistent with, or warranted by, the provisions of S.110 of the Kerala Act. Especially would it be so, when, as in this case, the charge, or show cause notice did not attribute negligence or wilful negligence, but the order of surcharge proceeded, somewhat indefinitely, on the ground of negligence."

13. Reading of the above paragraph of the judgment of the Division Bench shows that orders and notifications issued under the Madras Act or the TC Act will stand saved only to the extent to which they can be deemed to have been made under the provisions of the Kerala Act. In other words, a provision of the notification issued under the repealed Acts, which is at variance or inconsistent with the provisions of the Kerala Act is not saved by section 110(2) of the Kerala Act.

14. The provision of the Kerala Act providing for exemption from certain taxes, fees and duties is section 40. Remission of stamp duty is provided in section 40(1)(a), which alone, being relevant, is extracted below for reference:

40. Exemption from certain taxes, fees and duties - (1) The Government may, by notification in the Gazette, remit in respect of any class of societies-

(a) the stamp duty chargeable under the Kerala Stamp Act, 1959 (17 of 1959), in respect of any instrument executed by or on behalf of a society or by an officer or member thereof and relating to the business of such society, or any class of such instruments, or in respect of any award or order made under the Act, in cases where, but for such remission the society, officer or member, as the case may be, would be liable to pay such stamp duty;

15. Reading of this provision shows that under the Kerala Act, the benefit of remission can be allowed in respect of any class of societies in respect of an

instrument executed by or on behalf of the society or by an officer or member thereof. Such instrument should be relating to the business of such society. Further, the last part of this section also provides that remission is available only in cases where but for such remission, the society, the officer, or the member who has executed the instrument, as the case may be, would be liable to pay such stamp duty.

16. We have already found that in terms of Section 110 (2), SRO.No.75/60 issued under the repealed Acts is saved only to the extent it is consistent with the provisions of the Kerala Act. Therefore, the notification is valid only to the extent the exemption provided in section 40 of the Kerala Act finds incorporation in the notification. We are also conscious of the settled legal position that an exemption notification should be construed strictly.

17.If clause 1(a) of SRO.No.75/60 is literally examined, it can be seen that the clause takes in the following instruments:

1. Instruments executed by or on behalf of any registered co-operative society;
2. Instrument executed by any officer of such society.
3. Instrument executed by a member in his own capacity or and in the capacity of a guardian of minor.
4. Instrument so executed shall be relating to the business of the society.

18.It was argued before us that if the object of the notification is to be achieved, the benefit of remission as provided in the notification shall be available to societies which purchase immovable properties. When an immovable property is purchased, execution of the document conveying title to the buyer is the statutory liability of the vendor. This

is evident from the provisions of section 55(1)(d) of the Transfer of Property Act, which reads thus:

"55. Rights and Liabilities of buyer and seller - In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:-

(1) The seller is bound -

(a)

.....

(d) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place;"

Therefore, the executant of the document or the instrument is the title holder of the property, who is the vendor.

19. Section 30 of the Kerala Stamp Act provides as to who is liable to pay stamp duty. Sub-section 30(b) reads thus:

"30. Duties by whom payable.- In the absence of an agreement to the contrary, the expense of providing the proper stamp shall be borne,-

(a) in the case of any instrument described in any of the following Articles of the schedule, namely:-

.....

(b) In the case of a conveyance (including a reconveyance of mortgaged property) by the grantee; in the case of a lease or agreement to lease by the lessee or intended lessee;"

20. It is true that when a property is purchased in terms of the provisions contained in section 30 of the Kerala Stamp Act, unless otherwise so provided in an agreement between the parties, the liability to pay stamp duty is that of the grantee who is the purchaser. Therefore, in a case where a society purchases an immovable property, in terms of the

provisions contained in section 30 of the Stamp Act, the liability to pay stamp duty is that of the society and as provided in section 40 of the Kerala Act, to get the benefit of remission, the society should be liable to bear the stamp duty.

21. However, both under section 40 (1)(a) of the Kerala Act and clause 1(a) of SRO.No.75/60, the benefit of remission is allowed only in respect of documents executed by or on behalf of the society or by its officer or member. In cases where societies purchase properties, in view of section 55 of the Transfer of Property Act, since the executant of the instrument is not the society but the vendor of the property, the requirement of execution of the instrument by or on behalf of the society as provided in section 40 (1)(a) of the Kerala Act and clause 1(a) of SRO.No.75/60 is not satisfied.

22. It was argued that in view of section 30 of the Kerala Stamp Act, if, by an agreement, a society

undertakes the liability to bear the stamp duty, it should be entitled to the benefit of exemption. It may be possible for a society to undertake the liability to bear the stamp duty. But such a society can get the benefit of exemption only if section 40(1)(a) of the Kerala Act is attracted. Therefore, by a mere agreement between the society and another, the stamp duty due to be paid to the Government cannot be avoided.

23. It was contended that section 40(1)(a) provides for benefit in favour of member and that SRO.No.75/60 also provides member in his own capacity or/and in the capacity of a guardian of minor as the beneficiaries of the notification. First of all, we have already stated that the notification cannot be understood divorced from the statutory provisions of section 40(1)(a). If that be so, in the absence of any further enabling provisions, the Government could not have made the member in his own capacity and/or in the capacity of a guardian of minor as the

beneficiaries of exemption or remission of stamp duty. Here, the provisions of the notification understood in the context of section 40 of the Kerala Act makes it clear that the member mentioned therein should be acting on behalf of the society and executing an instrument in that capacity to claim the benefit of exemption as provided therein. Therefore, if a member of the society is executing a document in his own capacity or in the capacity of a guardian of a minor, he cannot avail the benefit of remission of stamp duty.

24. Reference was made to the order passed by the learned single Judge in W.P(C).23688/13, where, the learned single Judge has doubted the correctness of the judgment in Federal House Construction Co-operative Society Ltd. v. State of Kerala [2013 (3) KLT 643]. In the reference order, learned single Judge has made reference to the observations in the judgment in Federal House Construction Co-operative Society Ltd. (supra) that no notification has been

issued by the Government in terms of section 40(1)(a) of the Kerala Act. Thereafter, learned single Judge has made reference to SRO.749/73, 750/73 and 658/82 issued under section 40(1) of the Kerala Act. Learned Judge has also made reference to SRO.1194/00 issued in terms of section 9(1)(a) of the Kerala Stamp Act that remitting stamp duty with which the documents to be executed by co-operative societies of the Scheduled Castes and Scheduled Tribes for the business purposes are chargeable under the Stamp Act. Apparently, learned single Judge seems to have inferred that by virtue of the Notification above mentioned issued under section 40(1) of the Kerala Act, SRO.No.75/60 stands superseded.

25. In so far as the above doubt expressed by the learned single Judge is concerned, we are of the view that it, at best, is a situation where the Government have issued further notifications in exercise of their powers under section 40(1) of the Kerala Act. These notifications do not lead to an inference that

SRO.No.75/60 stands recalled or withdrawn. Further, in answer to a specific query made to him, the learned Government Pleader confirmed to this Court that SRO.No.75/60 still remains in force. According to us, the observations in the judgment in Federal House Construction Co-operative Society Ltd. (supra) that are noticed by the learned Judge were made only to indicate that the Government have not superseded or recalled SRO.No.75/60. Therefore, we are not satisfied that, for the reasons stated in the order dated 26.11.2013, the judgment in Federal House Construction Co-operative Society Ltd. (supra) requires reconsideration.

26.For the aforesaid reasons, we answer the question referred to the Full Bench thus:

(1)SRO.No.75/60 issued under section 35 of the TC Act and section 30 of the Madras Act is saved by virtue of section 110(2) of the Kerala Act only to the extent it is not

inconsistent with the provisions of the Kerala Act.

(2) SRO.No.75/60 should be understood within the limitations of sections 110(2) and 40(1)(a) of the Kerala Act.

(3) The benefit of remission of stamp duty is available only in respect of instruments executed by or on behalf of a society or by an officer or member thereof and instrument so executed should be relating to the business of the society.

(4) The benefit of remission can be claimed by the society only if, but for such remission, the society, an officer or the member as the case may be, would have been liable to pay such stamp duty.

27. It is clarified that the conclusions in this order shall not be made use of for re-opening transactions which have become final or to make fresh demands on that basis.

The question referred to the Full Bench is answered as above. The cases are returned to the Registry for posting before the appropriate courts for disposal in accordance with law and in the light of this order.

ANTONY DOMINIC, Judge.

K. RAMAKRISHNAN, Judge.

ANIL K.NARENDRAN, Judge.

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