

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 14TH DAY OF MARCH, 2019

BEFORE

THE HON'BLE MRS.JUSTICE S.SUJATHA

WRIT PETITION NO. 6445 OF 2019
AND WRIT PETITION NO. 7370 OF 2019 (T – RES)

BETWEEN :

1. SHREE ENTERPRISES
A PROPRIETARY CONCERN
K.H. NO. 355, GALI NO.2,
KHALDA COLONY, SAROOP NAGAR,
DELHI-110 036,
REPRESENTED BY ITS PROPRIETRIX
MRS. KUSUMLATA
2. M/S. VICKY ROAD CARRIER
A PROPRIETARY CONCERN,
501, PADMA TOWER II,
5TH FLOOR, RAJINDAR PLACE,
NEW DELHI-110 008,
REPRESENTED BY ITS MANAGER,
MR. AJIT KUMAR MISHRA,
S/O. SHAMANAND MISHRA,
AGED ABOUT 50 YEARS.

... PETITIONERS

(By Sri.HARISH.V.S, ADV.)

AND

THE COMMERCIAL TAX OFFICER
(GM) (ENF),
VANIJYA THERIGE BHAVAN,

GOPALA GOWDA EXTENSION,
SHIVAMOGGA-577 205.

... RESPONDENT

(By Sri.VIKRAM A.HUILGOL, HCGP)

THESE WRIT PETITIONS ARE FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE IMPUGNED ORDER OF CONFISCATION ISSUED BY THE RESPONDENT IN FORM GST VIG-10, R/S 130 [1], 130[2] AND 122[1][ii] AND [IV] OF THE CGST ACT, DTD:29.1.2019 i.e., ANNEXURE-G; DECLARE THE ENTIRE PROCEEDINGS CONDUCTED BY THE RESPONDENT AGAINST THE PETITIONERS AND THE DETENTION OF THE GOODS AND THE VEHICLES AS ILEGAL; AND ETC.

THESE PETITIONS COMING ON FOR PRL. HEARING IN 'B' GROUP THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

Petitioners have challenged the order of confiscation issued by the respondent in Form GST VIG-10 under Section 130(1), (2) and 122 (1)(ii) and (iv) of the Central Goods and Service Tax Act, 2017 (for short 'CGST Act') dated 29.01.2019 as illegal, seeking all consequential reliefs.

2. The petitioners are claiming to be the consignee and transporter of the goods in question. It is the contention of the petitioners that the respondent

has detained the goods and vehicle illegally for more than a month, in violation of the procedure prescribed by the Government of India through Circulars and confiscated the goods and vehicle without there being any order of confiscation or there being arrears of tax and penalty.

3. The petitioners submit that one M/s Manish Enterprises sold 230 bags of Areca nut consisting of 16,100 kgs to petitioner No.1. The said transaction suffered IGST. Respondent intercepted the vehicle carrying the said goods on 4.12.2018 at 10.30 p.m. at Chennagiri near Tarala Balu Circle. Despite the driver, in-charge of the vehicle produced the tax invoices and e-way bill to the respondent, the respondent suspected the genuineness of the said documents and initiated an enquiry. It is the grievance of the petitioners that the respondent came to an unilateral presumption that the consignor is indulging in issuing tax invoices

fraudulently without causing any movement of goods in violation of Section 122(1) of KGST Act which was unwarranted. Respondent passed a confiscation order after issuing the penalty notice without considering the objections filed by the petitioners and there being no penalty order passed. Hence, petitioners seek for setting aside the order impugned being *ex-facie* illegal.

4. Learned HCGP appearing for the revenue would submit that the contents of the impugned order indicates the quantification of the penalty and fine payable under Section 130(1) or 130(2) of CGST Act. It is a bonafide mistake committed in quoting a wrong provision of law. Indeed the said penalty and fine quantified relates to the penalty liable to be paid by the petitioners under Section 129 of CGST Act. Reference is made to Section 160 of CGST Act to contend that no assessment, re-assessment, adjudication, review, revision, appeal, rectification, notice, summons or other

proceedings done in pursuance of any of the provisions of CGST Act shall be invalid or deemed to be invalid merely by reasons of any mistakes, defects or omissions therein, if said assessment, re-assessment, adjudication, review, revision, appeal, rectification, notice, summons or other proceedings are in substance and effect, in conformity with or according to intents, purposes and requirements of the Act or any existing law. Any mistake committed in the order would not be invalid in terms of Section 160 of the CGST Act.

5. It is also submitted that on enquiry, it was noticed that the consignor was indulged in bill trading activities. Issuing tax invoices without there being any supply of goods is an offence falling under Section 122 (ii) of the CGST/KGST Act, 2017. Construing the confiscation order as the penalty order, the writ petitions require to be dismissed.

6. I have carefully considered the submissions of the learned counsel for the parties and perused the material on record.

7. It is apt to refer to relevant provisions of the CGST Act, which reads thus:

“Section 129 – Detention, seizure and release of goods and conveyances in transit:

Statutory provision

(1) Notwithstanding anything contained in this Act, where any person transports any goods or stores any goods while they are in transit in contravention of the provisions of this Act or the rules made thereunder, all such goods and conveyance used as a means of transport for carrying the said goods and documents relating to such goods and conveyance shall be liable to detention or seizure and after detention or seizure, shall be released,—

- (a) on payment of the applicable tax and penalty equal to one hundred per cent. of the tax payable on such goods and, in case of exempted goods, on payment of an amount equal to two per cent. of the value of goods or twenty-five thousand rupees, whichever is less, where the owner of the goods comes forward for payment of such tax and penalty;

- (b) on payment of the applicable tax and penalty equal to the fifty per cent. of the value of the goods reduced by the tax amount paid thereon and, in case of exempted goods, on payment of an amount equal to five per cent. of the value of goods or twenty-five thousand rupees, whichever is less, where the owner of the goods does not come forward for payment of such tax and penalty;
- (c) upon furnishing a security equivalent to the amount payable under clause (a) or clause (b) in such form and manner as may be prescribed:

Provided that no such goods or conveyance shall be detained or seized without serving an order of detention or seizure on the person transporting the goods.

(2) The provisions of sub-section (6) of section 67 shall, mutatis mutandis, apply for detention and seizure of goods and conveyances.

(3) The proper officer detaining or seizing goods or conveyances shall issue a notice specifying the tax and penalty payable and thereafter, pass an order for payment of tax and penalty under clause (a) or clause (b) or clause (c).

(4) No tax, interest or penalty shall be determined under sub-section (3) without giving the person concerned an opportunity of being heard.

(5) On payment of amount referred in sub-section (1), all proceedings in respect of the notice specified in sub-section (3) shall be deemed to be concluded.

(6) Where the person transporting any goods or the owner of the goods fails to pay the amount of tax and penalty as provided in sub-section (1) within seven days of such detention or seizure, further proceedings shall be initiated in accordance with the provisions of section 130:

Provided that where the detained or seized goods are perishable or hazardous in nature or are likely to depreciate in value with passage of time, the said period of seven days may be reduced by the proper officer.

Section 130 – Confiscation of goods or conveyances and levy of penalty:

Statutory provision

(1) Notwithstanding anything contained in this Act, if any person –

- (i) supplies or receives any goods in contravention of any of the provisions of this Act or the rules made thereunder with intent to evade payment of tax; or
- (ii) does not account for any goods on which he is liable to pay tax under this Act; or
- (iii) supplies any goods liable to tax under this Act without having applied for registration; or
- (iv) contravenes any of the provisions of this Act or the rules made thereunder with intent to evade payment of tax; or
- (v) uses any conveyance as a means of transport for carriage of goods in contravention of the provisions of this Act or the rules made thereunder unless the owner of the conveyance proves that it was so used without the

knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance,

then, all such goods or conveyances shall be liable to confiscation and the person shall be liable to penalty under section 122.

(2) Whenever confiscation of any goods or conveyance is authorised by this Act, the officer adjudging it shall give to the owner of the goods an option to pay in lieu of confiscation, such fine as the said officer thinks fit:

Provided that.....

8. The Circular instructions issued by the Government of India, Ministry of Finance Department of Revenue, Central Board of Indirect Taxes and Customs, GST Policy Wing, dated 31.12.2018 indicates who will be considered as the 'owner of the goods' for the purposes of Section 129(1) of CGST Act. The same is clarified that if the invoice or any other specified document accompanying the consignment of goods, then either the consignor or the consignee should be deemed to be the owner. In the Circular No.41/15/2018-GST dated 13.4.2018 issued by the

Government of India, procedure for interception of conveyances for inspection of goods in movement, and detention, release and confiscation of such goods and conveyances is prescribed, wherein at clause (g) it is observed that in cases where no discrepancies are found after inspection of the goods and conveyance, the proper officer shall issue forthwith a release order in Form GST MOV-05 and allow the conveyance to move further. Where the proper officer is of the opinion that the goods and conveyance need to be detained under Section 129 of the CGST Act, he shall issue an order of detention in Form GST MOV-06 and a notice in form GST MOV-07 in accordance with the provisions of Sub-section (3) of Section 129 of the CGST Act, specifying the tax and penalty payable. The notice shall be served on the person in charge of the conveyance.

In terms of Clause (h), where the owner of the goods or any person authorized by him comes forward

to make the payment of tax and penalty as applicable under clause (a) of sub-section (1) of Section 129 of the CGST Act, or where owner of the goods does not come forward to make payment of tax and penalty as applicable under clause (b) of sub-section (1) of the said section, the proper officer shall, after the amount of tax and penalty has been paid in accordance with the provisions of the CGST Act and CGST Rules, release the goods and conveyance by an order in Form GST MOV-05. Further the order in form GST MOV-09 shall be uploaded on the common portal and the demand accruing from the proceedings shall be added in the electronic liability register and the payment made shall be credited to such electronic cash ledger or credit ledger of the concerned person in accordance with the provisions of Section 49 of the CGST Act.

9. In terms of clause (j), where any objections are filed against the proposed amount of tax and penalty

payable, the proper officer shall consider such objections and thereafter pass a speaking order in Form GST MOV-09, quantifying the tax and penalty payable. On payment of such tax and penalty, the goods and conveyance shall be released forthwith by an order in Form GST MOV 05.

10. As per clause (k), in case the proposed tax and penalty are not paid within seven days from the date of the issue of the order of detention in Form GST MOV-06, action under section 130 of the CGST Act shall be initiated, proposing confiscation of the goods and conveyance and imposition of penalty.

11. In the present set of facts, it is not in dispute that the notice under Section 129(1)(b) of CGST/KGST Act, 2017 was issued by the respondent on 2.01.2019, to which objections were filed by the petitioners. In such circumstances, it was incumbent on the part of the respondent to consider the said objections and pass

a speaking order quantifying the tax and penalty and thereafter to release the goods subject to payment of tax and penalty or to confiscate the goods. However, the respondent considering the objections filed by the petitioners proceeded to pass the impugned order of confiscation of goods and conveyance under Section 130(1)(ii) r/w 122(1)(ii) and (iv) of the CGST Act, whereby penalty and fine payable by the petitioner is quantified. At this juncture, reference made by the learned HCGP to Section 160 of the CGST Act to treat the said impugned order as an order of penalty cannot be countenanced for the reason that it is not mere wrong quotation of provisions of law in passing the order impugned but the procedure prescribed is disturbed. It is well settled law that unless the tax and penalty are quantified, no confiscation order could be passed. It is necessary to provide an opportunity to the owner of the goods or person incharge of the goods vehicle to make payment of tax and penalty subsequent

to the objections filed, if any. Without providing such an opportunity, proceeding to pass confiscation order directly would not be construed as any mistake, defect or omission to come within the ambit of Section 160 of the CGST Act. It is a fundamental flaw which goes to the root of the matter and the said lacuna cannot be cured by referring to Section 160 of the CGST Act. More particularly, when the Circular instructions issued by Government of India clarifies the procedure to be followed by the proper officer while dealing with these matters. Passing of the penalty order being *sine qua non* in the proceedings initiated by the respondent under Section 129(1)(b) of the Act and the same being missing, the confiscation order impugned herein cannot be held to be justifiable.

12. However, considering the totality of circumstances of the case and the GST regime being in the initial stages which necessarily requires to be

examined and analyzed by the Proper Officers in the right perspective while interpreting the provisions of the Act, this Court deems it appropriate to quash the order impugned and restore the notice issued by the respondent under Section 129(1)(b) of the Act, albeit the said notice is withdrawn by the respondent while passing the order impugned. Even viewing it from a different angle inasmuch as quashing the order of confiscation, it is obvious that the penalty notice issued under Section 129(1)(b) of CGST Act, 2017 would be revived. Hence, the following:

ORDER

- i) The impugned order dated 29.01.2019 at Annexure-G is quashed;
- ii) The penalty notice dated 2.01.2019 issued under Section 129(1)(b) of CGST Act, KGST Act, 2017 at Annexure-C is restored to the file of the respondent;
- iii) Respondent shall consider the objections/reply filed by the petitioners and pass appropriate orders in accordance

with law in an expedite manner after quantifying the tax and penalty for the purpose of Section 129 of the Act. On quantification of penalty, goods and conveyance shall be released to the petitioners subject to payment of the penalty quantified.

This exercise shall be done by the respondent in an expedite manner, preferably within a period of seven days from the date of receipt of the certified copy of this order.

**Sd/-
JUDGE**

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