IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 18007 of 2019

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M/S KOHITOOR TRANSPORT LLP
Versus
STATE OF GUJARAT
==
Appearance:
MR VARIS V ISANI(3858) for the Petitioner(s) No. 1
MR. SOHAM JOSHI, AGP for the Respondent(s) No. 1,2,3
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CORAM: **HONOURABLE MR.JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 04/03/2020

ORAL ORDER
(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)

1. By this Writ Application under Article 226 of the Constitution of India, the writ applicant has prayed for the following reliefs:

> *"(A) This Hon'ble Court may be pleased to issue a writ of certiorari or a writ in nature of certiorari or any other appropriate writ, order or direction quashing and setting aside detention order dated 17.09.2019 in Form GST MOV-6 (annexed at Annexure A) and confiscation notice dated 24.09.2019 in Form GST MOV-10 (annexed at Annexure B)*
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> *(B) This Hon'ble Court may be pleased to issue a writ of mandamus or a writ in nature of mandamus or any other appropriate writ or order directing the learned Respondent authorities to forthwith release truck No. RJ-GC-7676 along with the goods contained therein without directing any payment of tax and penalty and/or security and bond.*
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> *(C) Pending notice, admission and final hearing of this*

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petition, this Hon'ble Court may be pleased to stay operation of the impugned detention/confiscation orders / notices (annexed at Annexure A/B) and this Hon'ble Court be pleased to further direct the learned Respondent authorities to forthwith release truck no.RJ-27-GC-7676 along with the goods contained therein;

(D) Ex parte ad interim relief in terms of prayer C may kindly be granted;

(E) Such further relief (s) as deemed fit in the facts and circumstances of the case may kindly be granted in the interest of justice for which act of kindness your petitioner shall forever pray."

2. We take note of the order passed by a coordinate Bench of this Court, dated 23rd October, 2019, which reads thus:

"1. Heard Mr. Varis Isani, learned advocate for the petitioner and Ms. Maithili Mehta, learned Assistant Government Pleader for the respondents.

2.From the original record, which has been produced for the perusal of this court, it appears that a physical verification report Form GST-MOV-04 has been prepared on 14th September 2019, wherein the description of goods as per invoice including HSN code and description of goods in the conveyance is stated to be as per the list attached. However, in the original record there is no list attached to the same. The learned Assistant Government Pleader has submitted that the details on the page after the Form GST-MOV-06, are the details of the physical verification dated 16th September 2019. On a perusal of the said document dated 16th September 2019, it is not possible to ascertain that there is any discrepancy noticed by the concerned officer in the goods which were being transported in the conveyance.

3.The learned Assistant Government Pleader has produced Annexure-1 to the Form GST-MOV-10 wherein the market value of the goods has been stated by the concerned officer. However, on a perusal of the original file, there is nothing to show as to on what basis such market value has been arrived at.

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4.Under the circumstances, issue rule, returnable on 28th November 2019. By way of interim relief, the second respondent is directed to forthwith release the conveyance bearing number RJ-27-GC- 7676 together with the goods contained therein.

5.The petitioner shall file an undertaking before this court that in case the petitioner is ultimately held liable to pay any tax, penalty or fine, the petitioner shall duly pay the same subject to its right to challenge the same before the appropriate Forum.

6.Direct service is permitted, today."

3. While issuing rule, this Court directed that the vehicle as well as the goods be released upon payment of the tax, fine or penalty, if held liable to be paid, in terms of the impugned notice.

4. The writ applicant availed the benefit of the interim-order passed by this Court and got the vehicle, along with the goods released on payment of the tax amount. The proceedings, as on date, are at the stage of show cause notice, under Section 130 of the Central Goods and Services Act, 2017. The proceedings shall go ahead in accordance with law.

5. It shall be open for the writ applicant to point out the recent pronouncement of this Court in the case of ***Synergy Fertichem Pvt.Ltd V/s. State of Gujarat,*** [Special Civil Application No.4730 of 2019]. It shall be open for the writ applicant to rely on the observations made by this Court in paragraph Nos.99 to 104 of the said judgment, which read thus:

"99.It is practically impossible to envisage various types of contravention of the provisions of the Act or the Rules for the purpose of detention and seizure of the goods and

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conveyances in transit. The contravention could be trivial or it may be quite serious sufficient enough to justify the detention and seizure. This litigation is nothing but an outburst on the part of the dealers that practically in all cases of detention and seizure of goods and conveyance, the authorities would straightway invoke Section 130 of the Act and thereby would straightway issue notice calling upon the owner of the goods or the owner of the conveyance to show-cause as to why the goods or the conveyance, as the case may be, should not be confiscated. Once such a notice under Section 130 of the Act is issued right at the inception, i.e, right at the time of detention and seizure, then the provisions of Section 129 of the Act pale into insignificance. The reason why we are saying so is that for the purpose of release of the goods and conveyance detained while in transit for the contravention of the provisions of the Act or the rules, the section provides for release of such goods and conveyance on payment of the applicable tax and penalty or upon furnishing a security equivalent to the amount payable under clause (a) or clause (b) to Clause (1) of Section 129. Section 129(2) also provides that the provisions of sub-section (6) of Section 67 shall mutatis mutandis apply for detention and seizure of goods and conveyances. We quote Section 67(6) as under;"67(6) The goods so seized under sub-section(2) shall be released, on a provisional basis, upon execution of a bond and furnishing of a security, in such manner and of such quantum, respectively, as may be prescribed or on payment of applicable tax, interest and penalty payable, as the case may be."

100. Section 129 further provides that the proper officer, detaining or seizing the goods or conveyances, is obliged to issue a notice, specifying the tax and penalty payable and, thereafter, pass an order for payment of such tax and penalty. Clause (4) provides that no tax, interest or penalty shall be determined under sub-section (3) without giving the person concerned an opportunity of being heard. Clause (5) provides that on payment of the amount, referred to in sub-section (1) of the proceedings in respect of the notice, specified in sub-section (3) are deemed to be concluded, and in the last, clause (6) provides that if the tax and penalty is not paid within 14 days of detention or seizure, then further proceedings would be initiated in accordance with the provisions of

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Section 130.

101. We are of the view that at the time of detention and seizure of goods or conveyance, the first thing the authorities need to look into closely is the nature of the contravention of the provisions of the Act or the Rules. The second step in the process for the authorities to examine closely is whether such contravention of the provisions of the Act or the Rules was with an intent to evade the payment of tax. Section 135 of the Act provides for presumption of culpable mental state but such presumption is available to the department only in the cases of prosecution and not for the purpose of Section 130 of the Act. What we are trying to convey is that in a given case, the contravention may be quite trivial or may not be of such a magnitude which by itself would be sufficient to take the view that the contravention was with the necessary intent to evade payment of tax.

102. In such circumstances, referred to above, we propose to take the view that in all cases, without any application of mind and without any justifiable grounds or reasons to believe, the authorities may not be justified to straightway issue a notice of confiscation under Section 130 of the Act. For the purpose of issuing a notice of confiscation under Section 130 of the Act at the threshold, I.e,. at the stage of Section 129 of the Act itself, the case has to be of such a nature that on the face of the entire transaction, the authority concerned is convinced that the contravention was with a definite intent to evade payment of tax. We may give one simple example. The driver of the vehicle is in a position to produce all the relevant documents to the satisfaction of the authority concerned as regards payment of tax etc., but unfortunately, he is not able to produce the e-way bill , which is also one of the important documents so far as the Act, 2017 is concerned. The authenticity of the delivery challan is also not doubted. In such a situation, it would be too much for the authorities to straightway jump to the conclusion that the case is one of confiscation, I.e, the case is of intent to evade payment of tax.

103. We take notice of the fact that practically in all cases, after the detention and seizure of the goods and the conveyance, straightway notice is issued under

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Section 130, and in the said notice, one would find a parrot like chantation " as the goods were being transported without any valid documents, it is presumed that the goods were being transported for the purposes of evading the tax". We have also come across notices of confiscation, wherein it has been stated that the the driver of the conveyance is presumed to have contravened the provisions of the Act or the Rules with an intent to evade payment of tax. This, in our opinion, is not justified. The resultant effect of such issue of confiscation notice at the very threshold, without any application of mind or without there being any foundation for the same, renders Section 129 of the Act practically otiose. We take cognizance of the fact that once the notice under Section 130 of the Act is issued, then the vehicle is not released even if the owner of the goods is ready and willing to pay the tax and the penalty that may be determined under Section 129 of the Act. Such approach leads to unnecessary detention of the goods and the conveyance for an indefinite period of time. Therefore, what we are trying to convey is that all cases of contravention of the provisions of the Act or the Rules, by itself, may not attract the consequences of such goods or the conveyance confiscated under Section 130 of the Act. Section 130 of the Act is altogether an independent provision which provides for confiscation in cases where it is found that the intention was to evade payment of tax. Confiscation of goods or vehicle is almost penal in character. In other words, it is an aggravated form of action, and the object of such aggravated form of action is to deter the dealers from evading tax.

104. In the aforesaid context, we would like to clarify that we do not propose to lay down, as a proposition of law, or we should not be understood to have taken the view that, in any circumstances, the authorities concerned cannot invoke Section 130 of the Act at the threshold, I.e., at the stage of detention and seizure. What we are trying to convey is that for the purpose of invoking Section 130 of the Act at the very threshold, the authorities need to make out a very strong case. Merely on suspicion, the authorities may not be justified in invoking Section 130 of the Act straightway. If the authorities are of the view that the case is one of invoking Section 130 of the Act at the very threshold,

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then they need to record their reasons for such belief in writing, and such reasons recorded in writing should, thereafter, be looked into by the superior authority so that the superior authority can take an appropriate decision whether the case is one of straightway invoking Section 130 of the Act. Any opinion of the authority to be formed is not subject to objective test. The language of Section 130 of the Act leaves no room for the relevance of an official examination as to the sufficiency of the ground on which the authority may act or proceed for the purpose of confiscation at the very threshold. But, at the same time, there must be material based on which alone the authority could form its opinion in good faith that it has become necessary to call upon the owner of the goods as well as the owner of the conveyance to show-cause as to why the goods and the conveyance should not be confiscated under Section 130 of the Act. The notice for the purpose of confiscation must disclose the materials, upon which, the belief is formed. It could be argued that it is not necessary for the authority under the Act to state reasons for its belief. For the time being, we proceed on the basis of such argument. But, if it is challenged that the notice is bereft of the necessary details or the satisfaction of the authority is imaginary or based on mere suspicion, then the authority must disclose the materials, upon which, his belief was formed as it has been held by the Supreme Court in Sheonath Singh's case [AIR 1971 SC 2451]. In Sheonath Singh (supra), the Supreme Court held that the Court can examine the materials to find out whether an honest and reasonable person can base his reasonable belief upon such materials although the sufficiency of the reasons for the belief cannot be investigated by the Court. The formation of the opinion by the authority that the goods and the conveyance are liable to be confiscated should reflect intense application of mind. We are saying so because it is not any or every contravention of the provisions of the Act or the Rules which may be sufficient to arrive at the conclusion that the case is one of an intention to evade payment of tax. In short, the action must be held in good faith and should not be a mere pretence."

6. It is now for the applicant to make good his case that the show cause notice, issued in GSTMOV- 10, deserves to be

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discharged.

7. In view of the above, this writ application stands disposed of. Rule is made absolute to the aforesaid extent.

(J. B. PARDIWALA, J)

(BHARGAV D. KARIA, J)

Vahid

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