IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 12861 of 2019

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M/S A AND S METAL
Versus
STATE OF GUJARAT

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Appearance:
MR.D K.PUJ(3836) for the Petitioner(s) No. 1
MR CHINTAN DAVE, AGP GOVERNMENT PLEADER(1) for the Respondent(s) No. 1,2

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CORAM: **HONOURABLE MR.JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 29/01/2020

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] be pleased to issue a writ of mandamus, or any other appropriate writ, order and/or directions in the nature of mandamus quashing and setting aside the order of detention dated 12.7.2019 passed by the respondent no.2 under section 129(1) of the GST Act of the goods and conveyance bearing Truck No.GJ-20-V-9564 at Bhavnagar at about 10:30 a.m. on 12.7.2019 as well as the notice issued by the respondent no.2 on 13.7.2019 for confiscation of goods or conveyances and levy of penalty under Section 130 of the GST Act as the said actions of the respondent no.2 are absolutely illegal, unlawful, contrary to the facts and evidence on record, violative of principles of natural justice and against the provisions of the Act and Rules framed thereunder;*
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> *[B] during the admission, hearing and final disposal of the present petition, be pleased to grant an interim relief directing the respondent no.2 to release the goods and conveyance in question forthwith on any terms and conditions as may be fixed by this Court;*

[C] be pleased to pass any other order or relief as may be deemed fit to the Hon'ble Court.

2. We take note of the order, passed by a Co-ordinate Bench of this Court, dated 26th July, 2019, which reads thus:

"1. Rule returnable on 7th August, 2019. Mr. Joshi, the learned AGP, waives service of notice of rule for and on behalf of the respondent No.1.

2. Having heard the learned counsel appearing for the parties and having gone through the materials on record, we are of the view that the writ applicant has been able to make out a strong prima facie case to have some interim order in his favour.

3. It appears that the writ applicant is a proprietor of a proprietary concern. The proprietary concern is engaged in the business of scrap. The proprietary concern is a registered dealer under the G.S.T Act. The writ applicant purchased the scrap from one Bharat Oman Refineries Ltd., situated at Madhya Pradesh. While the goods were in transit, the vehicle was intercepted by the authorities. The goods as well as the conveyance has been seized by the authorities for the alleged violation of the provisions of the G.S.T Act.

4. We are examining the larger issue with regard to sections 129 and 130 of the G.S.T Act, 2017. However, as the goods have been detained, we deem fit to order release of the goods at the earliest, keeping in mind that the writ applicant has deposited an amount of Rs.1,27,820/- towards the penalty and tax. This order is subject to the final outcome of this petition.

Direct service is permitted qua the respondent No.2."

3. While issuing notice, this Court directed that the vehicle as well as the goods be released, upon payment of the tax, 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 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."*
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> *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 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 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, 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 Form GST-MOV-10, deserves to be 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)

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