

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR. JUSTICE ASHOK MENON

THURSDAY ,THE 08TH DAY OF NOVEMBER 2018 / 17TH KARTHIKA, 1940

WA.No. 2070 of 2018

AGAINST THE ORDER/JUDGMENT IN WP(C) 32237/2018 of HIGH COURT

APPELLANT/S:

NOUSHAD ALLAKKAT,
AGED 38 YEARS
PROPRIETOR, M/S.HIGH LINE TRADERS, 21/354,
VALIYAVARAMBU ROAD, KOTTAPADI, MALAPPURAM DISTRICT.

BY ADVS.
SRI.HARISANKAR V. MENON
SMT.MEERA V.MENON

RESPONDENT/S:

- 1 THE STATE TAX OFFICER (WC) ,
STATE GST DEPARTMENT,
MANJERI - 676121.
- 2 THE ASST. TAX OFFICER,
SQUAD NO.VII, STATE GST DEPARTMENT, PALAKKAD - 678001.
- 3 STATE TAX OFFICER,
SQUAD NO.VII, STATE GST DEPARTMENT, PALAKKAD - 678001.
- 4 STATE OF KERALA,
REPRESENTED BY ITS SECRETARY, TAXES DEPARTMENT,
GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM-695001.
- 5 THE MANAGER,
INDIAN BANK, MALAPPURAM BRANCH,
DOWN HILL.P.O., MALAPPURAM - 676 505.

OTHER PRESENT:

SRI MOHAMMED RAFIQ SR GP

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 08.11.2018, THE COURT
ON THE SAME DAY PASSED THE FOLLOWING:

JUDGMENT

Vinod Chandran, J.

The appellant, who obtained provisional release of the goods by furnishing bank guarantee for the applicable tax and penalty as spoken of under Section 129 of the Integrated Goods and Services Tax Act, 2017 (for short "IGST Act"), as also bond for production of the goods and furnishing security for the value of the goods as spoken of under Rule 140(2) of the Central Goods and Services Tax Rules, 2017 (for short "CGST Rules"), is before us aggrieved by the judgment of the learned Single Judge directing an appeal to be filed.

2. The learned Counsel for the appellant points out that the impugned order before the learned Single Judge directed payment of tax and imposed penalty under Section 129 on two grounds; viz: for the violation found of IGST having not been paid for the inter-state sales as also for non-production of the goods, when the same was directed under Rule 140(2).

3. On facts it has to be stated that the appellant, a dealer in timber, purchased goods inter-state and while the goods were transported, it was detained within the State of Kerala. The invoice accompanying showed collection of CGST and SGST, which is leviable on an intra-state sale. The goods were detained and notice was issued. The appellant also was given an opportunity under Section 129(4) and an order was passed under Section 129(3). During the proceedings, the appellant had furnished bank guarantee for applicable tax and penalty under Section 129 and also furnished bond for production of goods and security equivalent to the value of the goods under Rule 142. Before the order was passed under Section 129(3), according to the appellant, there was no direction to produce the goods. However, when the final order was issued, it contained two grounds for demanding tax applicable and imposing penalty. One of the grounds was violation as indicated herein above of the collection of CGST and SGST, when actually IGST should have been collected. The other ground alleged was that the goods were not produced under

Section 140. The order was challenged before this Court in a Writ Petition, in which the learned Single Judge found that there was no reason to invoke the extra-ordinary jurisdiction under Article 226, especially when there was an appellate remedy available.

4. We would have normally not interfered with the refusal to exercise discretion by the learned Single Judge. However, we notice that the appellant had specifically challenged Rule 140(2) of the CGST Rules. In such circumstances, it would have been appropriate, even if refusing to interfere with the impugned order on grounds of efficacious alternate remedy being available, to independently consider the challenge against the Rule itself. We also notice that the learned Single Judge had relied on the decision of the Division Bench of this Court in ***Commercial Tax Officer v. Madhu M.B., (2017) 105 VST 244 (Ker.)*** to find that the statutory mandate of production of the goods has been upheld by the Division Bench and hence there could be no further interpretation possible by the learned Single Judge.

5. We have gone through **Madhu M.B.** (*supra*). That was a case in which the goods were detained for reason of no nexus between the documents accompanied and the actual goods under transport. The Division Bench found that under Rule 140(2), there is a provision for release of goods on a provisional basis, but only on execution of a bond in the Form GST INS 04 and furnishing of security in the form of a bank guarantee equivalent to the amount of applicable tax and penalty payable. The Division Bench after considering the provision requiring production of goods on a demand made; also directed expeditious finalization of adjudication proceedings, since the dealer would not be entitled to deal with the goods till adjudication is over. We reiterate for emphasis that it was a case in which there was a discrepancy noticed with respect to the documents accompanied and the actual goods in transport. We also would observe that there was no declaration in the said judgment that there is an imperative mandate to produce the goods when there is an order passed under sub-section (3) of Section 129.

6. We also have to notice yet another bench decision of this Court in **W.A.No.509/2018 (Asst.STO v. Ibrahim K.K.)**, again by a Division Bench, ourselves, wherein the aforesaid question was considered. **Madhu M.B.** was also noticed and it was found so on the requirement for production of goods under Rule 140, as follows:-

"5. The further contention raised by the learned Government Pleader is based on Rule 140 of the Kerala Goods and Services Rules, 2017. Rule 140 speaks of the production of the goods on a specified time and day indicated by the appropriate officer for the purpose of confiscation proceedings under Section 130 of the Act. The learned Government Pleader specifically refers to Section 129(6) which speaks of proceedings enabled under Section 130 if the person transporting any goods or if the owner of the goods, fails to pay any amount of tax and penalty as provided in Sub Section (1) within 7 days of such detention and seizure. We do not think that there could be any such interdiction made of the goods in the present case, since there is a Bank Guarantee furnished for the tax, interest and penalty levied. The Bank Guarantee is also furnished in accordance with the orders of this Court. There can be no situation of failure to pay the amount of tax and penalty, after final adjudication, since already there is a Bank Guarantee furnished as mandated under Section 140 of the Act. In such circumstances, we are of the opinion that release of the goods can be made on the petitioner furnishing a Bank Guarantee for the entire tax and penalty and also executing a bond as provided in Form GST INS 04 but however without any liability to produce the goods, which can be dealt with by the petitioner. The interim order is modified to the above extent."

7. We notice from Section 129 that the confiscation proceedings under Section 130 would be possible only if the dealer fails to pay the applicable tax and penalty imposed by an order under Section 129(3). Confiscation is hence a coercive measure to ensure payment of the tax and penalty levied on a delinquent dealer; who otherwise is at threat of losing the goods itself. Confiscation is not an automatic consequence ensuing from detention and an order passed under Section 129(3), of there being a contravention of the provisions of the Act or rules made thereunder. We would not look at other situations, wherein confiscation is mandated, which is not relevant for the purpose of detention simplicitor under Section 129. When such applicable tax and penalty is not paid, there could be proceedings initiated under Section 130, which would lead to confiscation of the goods itself. This provision is applicable only, in the event of failure on the part of the dealer to pay the applicable tax and penalty. In the present case, the dealer was allowed release of the goods by furnishing bank guarantee for the tax and penalty. The

dealer has also furnished a security equivalent to the value of the goods. There is, hence, no question of the applicable tax and penalty being not paid, since at any time the bank guarantee could be enforced.

8. The Senior Government Pleader would contend that the penalty was not imposed on the ground that the goods were not produced. The adjudicating officer merely pointed out the fact that despite an order the goods were not produced. In any event, there is a security furnished by the dealer equivalent to the value of the goods which could be invoked in lieu of the confiscation proceedings.

9. We were also invited to look into Ext.P7 order by the learned Senior Government Pleader and his submission is that there is only a statement that the dealer had not produced the goods on a demand made and that is not a ground for which there is a penalty imposed. In any event, we hold that it cannot be a ground for imposition of a penalty and the other grounds as found in the order for imposition of penalty could be challenged before the statutory authority. Hence, we only observe that the production of goods under Rule 140 is only

for invocation of confiscation proceedings, which would not be necessary if the security equivalent to the value of the goods is furnished under Rule 140, in case of detention under Section 129. With the above observation, we dispose of the Writ Appeal, confirming the order of the learned Single Judge refusing to exercise discretion under Article 226 in interfering with an order, which could be properly challenged in an alternative remedy. In the context of the observations made, the learned Counsel for the appellant submits that he would not press the challenge under Section 140. We also make it clear that the non-production of goods as noticed in the order is not a ground for imposition of penalty and there would be no requirement to distinguish on facts the decision in **Madhu M.B.** No order as to costs.

Sd/-
K.VINOD CHANDRAN
JUDGE

Sd/-
ASHOK MENON
JUDGE