

C.R.

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

MONDAY ,THE 10TH DAY OF SEPTEMBER 2018 / 19TH BHADRA, 1940

WP(C).No. 29019 of 2018

PETITIONER/S:

- 1 M/S.KUN MOTOR CO. PVT.LTD.
1, CUDALLORE MAIN ROAD,
MURUNGAPAKKAM
PUTHUCHERRY 605004,
REP BY
COLLIN ELSON,
SALES MANAGER
- 2 VISHNU MOHAN,
RANI BHAVAN, KELSON ROAD,
KOWDIAR, THIRUVANANTHPURAM-695003.

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

RESPONDENT/S:

- 1 THE ASST.STATE TAX OFFICER
SQUAD NO.III
KERALA STATE GST DEPARTMENT
THIRUVANANTHAPURAM AT NEYYATTINKARA-
695121
- 2 STATE OF KERALA
REPRESENTED BY ITS SECRETARY, TAXES DEPARTMENT,
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM-695001.

OTHER PRESENT:

DR THUSHARA JAMES GP

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
10.09.2018, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Introduction:

A person from Trivandrum goes to Pondicherry, purchases a car, and entrusts it to the car dealer to transport it to Trivandrum. On the way, in Kerala, the officials under the GST Act, intercept the vehicle and detain the goods, for no e-way bill accompanies the consignment. After responding to the statutory notice and after suffering a penalty order under section 129 of the GST Act, both the dealer and the purchaser file this writ petition.

2. Should the transport at the behest of an individual, an unregistered person, suffer the same statutory limitations as does the transport by a registered person or transporter? Does the second proviso to subrule (3) of Rule 138 of the KSGST Rules save the transaction? And can we treat the car, sought to be transported without an e-way bill, as an item of "used personal and household effects"?

Facts:

3. KUN Motors, the first petitioner, a company with a branch in Pondicherry, deals in luxury cars; Vishnu Mohan, the second petitioner, a resident of Trivandrum, purchased a car—Mini Cooper S Hatch—from KUN Motors ("the Company"). On 23 August 2018, the Company raised the Exhibit P1 invoice and sold the vehicle to Mohan. Then Mohan had the vehicle temporarily registered in Pondicherry on 27 August 2018, as seen from Exts.P2 and P2 (a). Mohan wanted the car transported to Trivandrum, where he intends to use it. So he requested the Company to transport the

vehicle. Responding to Mohan's request, the Company raised Exhibit P3 invoice, collected the transport charges, paid the IGST, and then dispatched the vehicle through its lorry to Trivandrum.

4. But *en route*, on 28 August 2018, the Assistant State Tax Officer, the first Respondent, intercepted the vehicle at Amaravila and detained it, invoking Section 129 of the KSGST Act. When the officer detained the consignment, he took a statement from the lorry driver and also passed a formal order of detention, besides issuing a notice under Section 129 (3) of the Act. Exts.P4, P4 (a) and P4 (b) are the statement of the driver, the detention order, and the statutory notice respectively.

5. Through the Ext.P4(b) notice, the State Tax Officer demanded tax and penalty of Rs.33,59,056/-. The next day, that is on 29 August 2018, the Company and Mohan replied to the statutory notice. On the subsequent day, once again, the Company sent another reply. These are the Exhibits P5, P5 (a), and P5 (B). In turn, the Tax Officer on 1st September 2018 informed the Company and Mohan, through Exhibit P6, that their explanation was rejected, but he re-fixed the penalty—reducing it by about Rs.3 lakh.

6. Aggrieved, the Company and Mohan have filed this Writ Petition.

Submissions:

Petitioners':

7. Sri Harisankar V. Menon, the petitioners' counsel, has submitted that Mohan, as the purchaser, wanted to transport the vehicle to Trivandrum, in his "independent capacity". Because of the distance, Mohan played it safe and requested the very

dealer that sold the car to transport it. According to him, the company transported the vehicle only as a transporter, but not as a dealer. In other words, with the sale of the vehicle, and its immediate registration in Mohan's favour, the Company's has ceased to have anything to do with the vehicle. Had Mohan driven the car down to Trivandrum by himself, Sri Menon rhetorically responds, the authorities would have had no objection; only because Mohan wanted a safe transport of his vehicle, he has been made to suffer.

8. To elaborate, Sri Menon contends that Mohan, as an individual, and without ever trading in cars, was found transporting the vehicle, so the entire GST regime remains inapplicable to him. He also stresses on, what he calls, Mohan's honesty in getting the vehicle transported to Trivandrum, rather than have it permanently registered at Pondicherry, by paying less tax. On the Company's paying the IGST on the car sale, Sri Menon, once again, asserts that it was a generous gesture so Kerala, too, gets a share in the tax 'pie'.

9. Sri Menon, then, took me on a tour of semantic exploration; he tried to explain the significance of "used personal and household effects". In the end, and as an alternative plea, Sri Menon has urged the Court to take a lenient view of the transaction because of Mohan's bona fides. He wants the Court to let Mohan have the car released by his providing a personal bond, rather than bank guarantee.

Respondents':

10. Dr. Thushara James, the learned Government Pleader, has strongly countered Sri Menon's submissions on all counts. She has contended that the Ext.P1

tax invoice unmistakably shows that the sale is an inter-state transaction. Had it been a simple intra-state sale, and with no inter-state impact, she also argues, the Company would not have paid IGST.

11. Dr. James has taken me through various statutory provisions, including Section 129 and Rule 55A, as well as Rule 138, to refute the petitioners' contentions that the goods ought not to have been detained. According to her, the statutory mandate is clear, and it admits of no adjudicatory discretion—say, to scale down either the tax or penalty, as an interim measure. She has also attacked the petitioners' defence that the car being transported is a used vehicle. She maintains that a used vehicle must have had a prior owner. Here, the Company sold the car, paid the IGST, and sought to deliver the vehicle at its destination. Dr. James, in that context, asserts that the Company could not have completed the transaction until it delivered the car to the purchaser at the agreed destination.

12. In the end, Dr. James has submitted that if the Court accepts, what she calls, the spin the petitioners put on the concept of “used cars”, every piece of movable property becomes a used item the moment it is purchased. In this regard, she has referred to certain provisions in the Motor Vehicles Act, too, besides the Value Added Tax Act. Relying heavily on some precedents of this Court, Dr. James has urged the Court to dismiss the writ petition.

Discussion:

13. Let us first see out the grounds of detention. Exhibit P4, the notice issued under Section 129 (3) of the Act, contains these allegations: (1) the consignment is an

interstate supply of more than Rs.50,000/- value, so e-way bill is mandatory; (2) the temporary registration at Pondicherry is suspicious; (3) compensation cess is seen collected at 20% instead of 25%. The last two grounds the petitioners strongly refute. According to them, the statutory position is otherwise; the official assertion is only a mistake of fact. Let us not dwell deep on it, for the principal issue is the first one.

14. Now we will see which law governs these allegations. Recently, this Court had to examine the provisions of GST that concern detention in *Garuda Timber Traders v. The Asst., State Tax Officer (Intelligence)*.¹¹ I draw from its analysis. Chapter XVI of the KSGST Act deals with inspection, search, and seizure. Section 129, under this Chapter, provides the mechanism for detention, seizure, and release of goods and conveyances in transit. It begins with a *non-obstante* clause and goes on to lay down the procedure. If any person transports or stores any goods contravening this Act or its rules, all those goods and means of transport and documents relating to those goods and conveyance will be detained or seized. They will, however, be released to the owner of the goods (a) on its paying the applicable tax and penalty equal to one hundred percent of the tax payable on the goods. If the goods belong to an exempted category, a different rate applies, though.

15. If a person other than the owner—for example, a transporter—comes forward, it will have the goods released (b) on its paying the tax and penalty equal to the fifty percent of the goods value reduced by the tax amount paid. Of course, the exempted goods do carry a different rate. Clause (c) of Section 129 permits the

¹¹ MANU/KE/2091/2018

consignor or the other party to furnish a security equivalent to the amount payable under clause (a) or clause (b) “in such form and manner as may be prescribed.” The proviso to Section 129 ensures the principles of natural justice: there will be no detention or seizure without the officer’s serving an order on the person transporting the goods.

16. And after considering the aggrieved person’s objections under subsection (4), the officer passes another order, under subsection (3), specifying the tax and penalty payable under clauses (a), (b), or (c). Once the consignor or any other person pays the amount referred to in sub-section (1), all detention or seizure proceedings must stand concluded.

17. If the person concerned fails to pay the tax and penalty under sub-section (1) within seven days from detention or seizure, the officer will initiate further proceedings under Section 130 of the Act.

18. For us, sub-section (2) is vital; it refers to sub-section (6) of Section 67. For interim custody, say, of goods and vehicle, the procedure laid down under Section 67 (6) will apply. So we will examine that provision.

19. Section 67 comes under Chapter XIV dealing with inspection, search, seizure, and arrest. Sub-section (6) mandates that the seized goods will be released, provisionally, upon the person’s executing a bond and furnishing 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.”

20. If the consignor or the consignee transports the goods, either in its own

conveyance or a hired one, it may generate an e-way bill in FORM GST INS-01, after furnishing information about the transporter and the vehicle in Part B of that Form. If it does not generate the e-way bill but hands over the goods to a transporter, the registered person must furnish the information to the transporter. Then, the transporter will generate Part B, based on that information. If the value of goods sought to be transported exceeds Rs. 50,000/-, every supplier, recipient, and the transporter must generate the e-way bill. For the value below Rs. 50,000/-, e-way bill is optional.

21. Under Rule 2 (1) of the Rules, the person in charge of a conveyance must carry—(a) the invoice or bill of supply or delivery challan; and (b) a copy of the e-way bill or the e-way bill number, either physically or mapped to an RFID,^[2] embedded on to the conveyance.

22. Rule 138 of Kerala State Goods and Services Tax Rules, 2017 (the Rules), deals with "information to be furnished prior to commencement of movement of goods and generation of e-way bill". Under the subrule (2) of the Rule, if a registered person transports the goods as a consignor or as the consignee (after receiving the supply), he should generate the e-way bill in FORM GST EWB-01 electronically, on the common portal. He must do so after furnishing information in part B of FORM GST EWB-01. The transportation by road can be either in the registered person's own conveyance or a hired one, besides public conveyance.

23. Subrule (3) assumes importance for our purpose. If the consignor or the

² Radio-frequency identification (RFID) uses electromagnetic fields to automatically identify and track tags attached to objects. The tags contain electronically-stored information.

consignee has not generated the e-way bill, the registered person shall furnish the information about the transporter on the common portal. And the transporter shall generate the e-way bill on the same portal, based on the information the registered person has provided in Part A of FORM GST EWB-01.

24. The second proviso to subrule (3) mandates that if an unregistered person transports the goods either by his own conveyance or by a hired one, or transports through a transporter, he or the transporter *may* generate the e-way bill in FORM GST EWB-01 on the common portal. In the same breath, we will examine subrule (14), too. It enlists the occasions when “no e-way bill is required to be generated.” Clause (a) of this sub-rule exempts the goods specified in *Annexure* from the requirement of e-way bill. And item 7 of the annexure reads thus: *used personal and household effects*. Indeed, the petitioners contend that what was transported is a car, and that car is a used personal item.

25. Now we may as well examine Rule 55A of the Rules. If the law compels no person in charge of the conveyance to carry an e-way bill, Rule 55A sets out what other documents that person should carry along with the goods: a copy of the tax invoice or the bill of supply issued under Rules 46, 46A, or 49.

26. So the petitioners maintain that the statute itself contemplates the circumstances under which a person transporting the goods need not carry the e-way bill. Here, Mohan persists with his plea that he entrusted the car to the company, after his purchasing it, only for its transportation to Trivandrum. As it is a used personal item, Rule 55A applies, and it obviates any e-way bill.

27. Now, let us examine the precedential position. A Division Bench in *Commercial Tax Officer v. Madhu M.B.*,^[3] considered the scope and ambit of section 129 of the CGST Act read with Rule 140 of the CGST Rules. To begin with, a learned Single Judge directed the release of detained goods on the petitioner's paying 50% of the demanded tax, besides his executing a simple bond. The Department appealed. The Division Bench analysed Section 129 of the then Simultaneous Ordinances. It also noted that Rule 140 permits the authorities to release the seized goods on the person's executing "a bond for the value of goods in FORM GST INS-04 and furnishing security in the form of a Bank Guarantee, equivalent to the amount of applicable tax, interest, and penalty payable provisionally." After referring to both Section 67 (6) of the Act and Rule 140 of the KSGST Rules, the Division Bench observes that there is an effective mechanism for provisional release of goods; so the Courts cannot compel the authorities to stray from that mechanism. Then, it reversed the impugned judgment.

28. In *The Assistant State Tax Officer v. Indus Towers Limited*^[4], the question is whether there could be detention and seizure under Section 129 of the Act, when there is, obviously, no tax liability on the goods. Goods seized, the officer found only a delivery challan with the goods, as provided under Rule 55 of the KSGST Rules. But the consignment contained no declaration in KER-I seen uploaded or physically carried, as Rule 138 mandates. The learned Single Judge noted that the detaining officer did not dispute the delivery challan. Nor did the transaction amounted to a

³ (2017) 64 GST 9 (Kerala)

⁴ MANU/KE/1685/2018

taxable supply. So the finding goes thus: a mere infraction of the procedural Rules like Rules 55 and 138 of the State GST Rules cannot compel the detention of goods, though they may compel the imposition of penalty. The goods were ordered to be released. The Department assailed that direction.

29. The learned Division Bench in appeal,^{5]} after examining the statutory and the precedential positions, has observed that sub-section (3) of section 55 particularly speaks of a declaration as specified in Rule 138. When goods are transported on a delivery challan, instead of an invoice; that violates the Act and the Rules. The Division Bench did not agree with the learned Single Judge's view that the Department accepted the genuineness of the delivery challan. A delivery challan under section 55, it observes, is not one issued by the Department but is one "prepared by the assessee, who is only obliged to maintain it serially numbered. It does not lie in the detaining officer's mouth to suspect the genuineness of the delivery challan when the consignor swears by it." The Division Bench, in fact, observed that non-taxable nature of the transaction would be justified under the Rules only if the party declares according to Section 138. It held:

"[o]nly when there is a declaration uploaded in Form KER-1 the transaction, which is non-taxable, would be intimated to the Department and available in its site. If not, there could definitely be a sale effected without an invoice; if the delivery challan goes undetected, resulting in evasion of tax."

30. On facts, the Division Bench has held that the transaction, as projected, is non-taxable. Yet the statutory rules prescribe certain documents to accompany the goods, even with a non-taxable transport. Rule 55 and 138 are the prescriptions. As to

^{5]}[2018] 5S GSTR 404 (Kerala)

the delivery challan, the consignor issues it, and the Department has no say in it. Nor can it vouch for its genuineness. The Division Bench, then, felt unable to sustain the finding that mere infraction of the procedural rules cannot result in the detention of goods. Finally, the learned Division Bench has held:

If the conditions under the Act and Rules are not complied with, definitely Section 129 operates and confiscation would be attracted. The respondents are entitled to an adjudication, but they would have to prove that in fact there was a declaration made under Rule 138 before the transport commenced. If they do prove that aspect, they would be absolved of the liability; otherwise, they would definitely be required to satisfy the tax and penalty as available under Section 129. We, hence, vacate the judgment of the learned Single Judge and allow the appeal. The vehicle and the goods having been already released unconditionally, further notice shall be issued and the adjudication under sub-section (3) completed; upon which if penalty is imposed, definitely the respondents would have to satisfy the same.

31. Indeed, the transaction here is plain and simple. The Company, at Pondicherry, deals in motor cars. Mohan purchased a car. Ext.P1 is the tax invoice, seen with 28% IGST. That transaction was completed, as Mohan had the vehicle temporarily registered at Pondicherry itself. Ext.P2 is the Temporary Certificate of Registration. That was ostensibly to facilitate the task of transporting the car. Mohan had two options: one to drive down the vehicle all the way to Trivandrum; the other, to get it transported safely. He chose the latter. He, then, entrusted the car to the Company for its transportation to Trivandrum. The Company undertook the task. It paid IGST @18% because it is an interstate transport. Ext.P3 is the invoice.

32. Ext.P3, the pivotal document, shows the Company as the Dealer; it undertakes to “supply” the vehicle at “Kerala”—Trivandrum. The Company charges Rs.75,000/- towards “Logistics & Handling Charges.” It pays IGST of Rs.11,532.24.

33. As we can see, the second proviso to sub-rule (3) of Rule 138 stipulates that

if an unregistered person transports the goods either by his own conveyance or by a hired one, or transports through a transporter, he or the transporter may generate the e-way bill in FORM GST EWB-01 on the common portal. And sub-rule (14) of Rule 138 enlists the occasions when “no e-way bill is required to be generated.” The goods specified in Annexure stand exempted from the requirement of the e-way bill. And item 7 of the annexure covers used personal and household effects. To apply Rule 55A, which lets the person in charge of goods to carry other documents than the e-way bill, first we must ensure that Rule 55A applies. To have it applied, we must also steer clear of the mandatory requirements of Rule 138.

34. True, Mohan is an unregistered person getting his car transported. He can transport the car “either by his own conveyance or by a hired one”. He *may* transport it through a transporter. That he did. In that event, he or the transporter may generate the e-way bill in FORM GST EWB-01 on the common portal. But the question is, does the Ext.P3 invoice, coupled with the Ext.P1 Tax Invoice, leads us to conclude that the purchase of the car was, in the first place, a completed intra-state sale and that only the transport was an inter-state event? Venturing into that adjudication is premature, for both the Company and Mohan have the issue pending before the authorities concerned. They have an effective remedial measure of appeal, too. Any observation, at that stage, may prejudice their cause or may render the administrative adjudicatory mechanism otiose. All that the petitioners wanted is an interim release of the goods, pending further adjudication. Suffice if I confine myself to that.

35. Granted, Mohan could have driven the vehicle to the destination by

himself. Then, this tax regime will not have affected him. But that has not happened. He did entrust the vehicle to a transporter—I assume, at least. So that alternative fact of his driving the vehicle to destination remains in the conjectural realms. That should not trouble us.

36. Sub-rule (2) of Rule 138 compels the “registered person”, as a consignor or as a consignee, to generate the e-way bill. If he does not generate e-way bill and hands over the consignment to a transporter, sub-rule (3) applies: the registered person as the consignor upload the information about the transporter in the common portal. And that transporter must, then, generate the e-way bill. Here, Mohan is not a “registered person,” nor is he dealing in the cars—he is a consumer. To proceed further, we must assume, without prejudice, that the Ext.P3 is only a document witnessing transport of a pre-owned vehicle—rather than a vehicle whose sale could not be completed until it was delivered at its destination—at the instance of an unregistered person. Then, we need to examine whether the second proviso to sub-rule (3) of Rule 138 applies.

37. By undertaking that exercise, I cannot stymie the statutory mechanism provided for adjudicating the detained goods. So it is, for me, premature to venture into that hypothetical field. Besides that, the petitioners also bring in the concept of “used personal and household effects.” I must appreciate Sri Menon on his thorough exposition of the semantic nuances of the term “used.” He cited from dictionaries and decisions, too. But, regrettably, I cannot rule on that aspect. Let the authorities decide on it, besides their deciding whether the petitioners could take advantage of Rule 55A

of the Rules, as well.

38. Now the question is, does the statutory mandate under section 129 of the GST Act admit of any discretion to let the affected party pay a reduced amount of tax and penalty pending further adjudication, for having the interim custody of the detained goods?

39. But the Division Bench in *Indus Towers* has held that “if the conditions under the Act and Rules are not complied with, definitely Section 129 operates and confiscation would be attracted. The respondents are entitled to adjudication, but they would have to prove that” the goods being transported stand exempted from the rigours of the GST regime.

40. Under these circumstances, I fail to persuade myself that I can take a different course from what has been judicially mandated in *Indus Towers*, for that case-holding squarely binds me. As a matter of abundant caution, I reiterate that I have not touched on the merits; nor should the authorities construe this judgment as expressing any view on the petitioners’ claims and contentions. The matter, as I have observed, concerns, interim custody of the goods. Section 129 and other provisions of the Act the Rules prescribe the procedure for that purpose. The petitioners can follow that procedure and secure the interim custody of the goods. Then, they can assail the Ext.P6 at the higher administrative echelons. This judgment will not prejudice them. Harsh it may be to hold that the petitioners pay heavily, even interim, for minor lapses. But the law, at times, can be harsh, and the Courts, usually, defer to the legislative wisdom. So I do.

As a result, I only hold that either petitioner can get the goods released by complying with section 129 and the relevant rules, and seek an early adjudication of the dispute.

Sd/-

DAMA SESHADRI NAIDU

JUDGE

APPENDIX

PETITIONER'S/S EXHIBITS:

EXHIBIT P1	COPY OF NOTICE NO. MINI/PY/18-19/012 ISSUED BY THE 1ST PETITIONER DATED ON 23.08.2018
EXHIBIT P2	COPY OF TEMPORARY REGISTRATION CERTIFICATE NO.PY/1/TMP/2018/356 DATED ON 23.08.2018
EXHIBIT P2 A	COPY OF INSURANCE PROPOSAL FORM OF HDFC ERGO GENERAL INSURANCE COMPANY LTD DATED ON 23.08.2018
EXHIBIT P3	COPY OF INVOICE NO.DNHC/PY-18-19/042 ISSUED BY THE 1ST PETITIONER DATED ON 23.08.2018.
EXHIBIT P4	COPY OF NOTICE IN GST MOV-01 ISSUED BY THE 1ST RESPONDENT.
EXHIBIT P4 A	COPY OF NOTICE IN FORM GST MOV -06 ISSUED BY THE 1ST RESPONDENT.
EXHIBIT P4 B	COPY OF NOTICE IN FORM GST MOV-07 ISSUED BY THE 1ST RESPONDENT.
EXHIBIT P5	COPY OF LETTER SUBMITTED BY THE 1ST PETITIONER BEFORE THE 1ST RESPONDENT.
EXHIBIT P5 A	COPY OF LETTER SUBMITTED BY THE 1ST PETITIONER BEFORE THE 1ST RESPONDENT.
EXHIBIT P5 B	COPY OF LETTER SUBMITTED BY THE 2ND

PETITIONER BEFORE THE 1ST RESPONDENT.

EXHIBIT P6

COPY OF LETTER ISSUED BY THE 1ST RESPONDENT
TO THE PETITIONER.