

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN

THURSDAY, THE 24TH DAY OF AUGUST 2023 / 2ND BHADRA, 1945

WP(C) NO. 12503 OF 2021

PETITIONER:

QFROZ TRADES PVT. LTD., NO.XXII/623 (APII/857A),
INDUSTRIAL AREA, AROOR, ALAPPUZHA - 688 534,
REPRESENTED BY ITS MANAGING DIRECTOR, C. M.
SUBAIR.

BY ADVS.
HARISANKAR V. MENON
MEERA V.MENON

RESPONDENTS:

- 1 THE ASSISTANT STATE TAX OFFICER, SQUAD NO.V, STATE
GOODS AND SERVICES TAX DEPARTMENT, ERNAKULAM -
682 015.
- 2 THE STATE TAX OFFICER, SQUAD NO.V, INTELLIGENCE
WING, KERALA STATE GOODS AND SERVICES TAX
DEPARTMENT, ERNAKULAM - 682 015.
- 3 THE COMMISSIONER OF STATE TAX , STATE GST
DEPARTMENT, TAX TOWERS, KILLIPPALAM, KARAMANA,
THIRUVANANTHAPURAM - 695 002.

OTHER PRESENT:

SMT.RESMITHA THOMAS-GP

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR
ADMISSION ON 13.07.2023, THE COURT ON 24.08.2023 DELIVERED
THE FOLLOWING:

ANU SIVARAMAN, J.

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W.P.(C) No.12503 of 2021

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Dated this the 24th day of August, 2023

JUDGMENT

1.The petitioner, an exporter of sea food, had obtained registration under the Goods and Services Tax Act. He had transported frozen shrimp from Adoor to the Cochin Port for export to China. The consignment was detained en route at Panangadu by Ext.P2 to Ext.P2(c) proceedings. The reason stated in the said proceedings is that no E-way bill accompanied the goods in transit. Ext.P2(c) notice under Section 129(3) of the Central Good and Services Tax Act, 2017 (hereinafter referred to as 'CGST Act' for short) further provides that no letter of undertaking is endorsed in the tax invoice as required under Rule 46 of the Central Goods and Service Tax Rules, 2017 (hereinafter referred to as 'CGST Rules').

2. It is submitted by the learned counsel for the petitioner that a reply was given and Ext.P3 E-way bill was produced before the respondents with an explanation that it was on account of the triple lock down imposed in the area on the relevant date and technical glitches that the E-way bill could not be generated in time. Thereafter, the 2nd respondent issued Ext.P5 order which was served on 31.05.2001 by e-mail demanding tax and penalty totaling to an amount of Rs.8,68,736/- from the petitioner. Thereafter notice in FORM GST MOV-10 proposing to confiscate the goods and the vehicle and demanding tax and penalty and fine in lieu of confiscation of goods and conveyance dated 11.06.2021 is also served as Ext.P6.
3. The learned counsel for the petitioner submits that since the goods in transit were for export, such goods were not liable to tax and the finding in Ext.P5 that the goods are not exempted is not correct or legal. It is submitted that Section 129(1)(a) of the CGST Act provides for release of the detained consignment on payment of an amount equal to two percent of the value of the goods or twenty-five thousand whichever is less, in case, the goods in question are exempted goods. It is

submitted that the only violation alleged against the petitioner being that the consignment was not accompanied by an E-way bill and that the letter of undertaking was not recorded in the invoice and since the commodity in question was exempted from tax, only an amount of Rs.25,000/- could have been demanded from the petitioner. It is submitted that it is only in a case where penalty is willfully unpaid, that confiscation proceedings can be taken under Section 130. It is submitted that since there is no offence committed by the petitioner as provided under Section 130(i) to (v), the proceedings under Section 130 cannot be taken against the petitioner. It is further contended that after service of Ext.P5 order on 31.05.2021, the petitioner was immediately served with Ext.P6 notice on 11.06.2021 without giving the petitioner an opportunity to raise a challenge against Ext.P5.

4. A counter affidavit has been placed on record by the 2nd respondent stating that Section 129 of the CGST/SGST Act is a comprehensive code in itself prescribing the procedure for detention, seizure and release of goods. Section 130 provides for confiscation of goods or conveyance and for levy of penalty.

It is submitted that in the instant case the vehicle and the articles were detained on 21.05.2021 at 12.10 pm while it was carrying frozen processed shrimps and was traveling from Aroor to Cochin Port. It is submitted that Rule 138A provides that the person in charge of a conveyance should carry an invoice or bill of supply or delivery challan as the case may be and an E-way bill. It is submitted that only Ext.P1 invoice was produced by the driver at the time of interception and no E-way bill accompanied the transport. It is submitted that in Ext.P4 reply submitted by the petitioner the transportation without E-way bill was admitted and was sought to be justified on the ground that the goods were exempted goods meant for export to China and the E-way bill could not be generated due to the triple lock down imposed due to Covid.

5. It is stated in the counter affidavit of the 2nd respondent at paragraph 10 as follows:-

“It is humbly submitted that Section 2(47) of the CGST Act defines an exempt supply. Accordingly, exempt supply means supply of any goods or services or both which attracts nil rate of tax or which may be wholly exempt from tax under Section 11 or under Section

6 of the Integrated Goods and Service Tax Act and includes non-taxable supply. The contention of exempt supply is not applicable to the instant case and the present goods i.e., shrimps is not an exempt supply as provided for in terms of Section 2 (47). As per Rate notification No. 1/2017, the commodity carried in the conveyance in the instant case is classified under HSN Code 030617 and is taxable at 5% (CGST +SGST).”

6. It is submitted that the explanation of the petitioner was not found to be satisfactory since E-way bill itself had not been generated at the time of detention of the vehicle and that the petitioner had taken the vehicle away from Panangad to Cochin Port and goods were exported without the permission of the respondents and without proper authority of law. It is submitted that it was because the petitioner did not respond to Ext.P5 that further notice was issued under Section 130 to the petitioner. It is further contended that Ext.P5 is an appealable order and that the petitioner could not have approached this Court without availing the statutory appellate remedy.

7. The learned Government Pleader placed on record a notification dated 28th June, 2017 notifying the rate of tax in respect of different commodities. It is submitted that crustaceans, whether in shell or not, frozen, dried, salted or in brine.; crustaceans in shell cooked by steaming or by boiling in water, frozen, dried, salted in brine; flours, meals and pellets of crustaceans fit for human consumption are included at sub heading 0306 of Schedule 1 and is liable to tax at 2.5%. It is further submitted that Vannamei Shrimp which was the specific item transported by the petitioner is assigned with specific HSN Code of 030617 and the said commodity is taxable at the rate of 5%. It is submitted that all these aspects are specifically stated in the communications issued to the petitioner, especially in Ext.P6. It is, therefore, contended that since the consignment was not accompanied by the required documents and the order of penalty was also not complied with, the respondents were perfectly justified in having issued Ext.P6.

8. The learned counsel for the petitioner would rely on Notification No.2/2017 dated 28.06.2017 exempting the intra-

State supplies of goods included in the appended schedule from the whole of the central tax leviable thereon under Section 9 of the Central Goods and Service Tax Act 2017. The tariff item 0306 is included as item No.22 in the schedule and is described as crustaceans, whether in shell or not, live, fresh or chilled; crustaceans in shell, cooked by steaming or by boiling in water live, fresh or chilled.

9. The learned Government Pleader places reliance on a judgment of the Supreme Court in **Reckitt Benckiser (India) Ltd Vs. Commissioner, Commercial Taxes and others** [(2015) 7 SCC 126] to contend that since the GST Act is aligned with the Customs Tariff Act which in turn is aligned with HSN, it is submitted that where a HSN Code number is indicated against an item, such entries shall be interpreted in the light of the entries in the Customs Tariff Act, 1975 and also as per the judgments applicable to the responding entries in the Customs Tariff Act, 1975. It is submitted that each product is required to be considered in the context of the HSN Code and the liability to tax thereon.

10.The decision of a Division Bench of this Court in **The Assistant Sales Tax Officer and another vs. M/s. Indus Towers Limited** [W.A.No.371 of 2018] is also relied on to contend that the provisions of the Goods and Services Tax Act and the Rules framed thereunder have to be treated with the rigor it intends as against any violation; without reference to any *mens rea* contumacious conduct or even a suspicion of attempt to evade tax. In the light of the *non obstante* clause in Section 129, it is held that detention is provided in case of any contravention of the provisions of the Act and the Rules and the release of the goods so detained can be effected only on satisfying the provisions of either (a),(b) or (c) of sub-section 1 of Section 129.

11. A later judgment of the learned single judge of this Court in **Podaran Foods India Private Limited and others Vs. State of Kerala and others** [(2021) 1 KLT (SN 39)] is also relied on. Paragraph 29 of the said judgment reads as follows:-

“29. On consideration of the rival contentions, I am of the view that under Section 129 of the Act, if a proper officer who is entrusted with the task of detaining goods, finds that they have been transported in contravention of the rules, he does not have the discretion to condone the procedural lapse or relax its rigour in particular cases. He must interpret the Rule strictly keeping in mind the statutory scheme that aims to curb tax evasion. In as much as the adjudication that is expected of him is a summary one, he can do no more than determine whether or not on a literal reading of the statutory provisions, together with the circulars issued from time to time, there has been a breach occasioned thereof. Any person aggrieved by the order of the proper officer must necessarily approach the appellate authority before which an appeal against the adjudication order under Section 129(3) of the Act is maintainable. In the instant case too, the remedy of the petitioner is to approach the appellate authority under the Act against the finding of the proper officer.”

12. The learned Government Pleader would rely on the decision of the Apex Court in **State of H.P and others v. Gujarat Ambuja Cement Ltd. and Another** [(2005)6 SCC 499], in support of the contention that where an efficacious alternative remedy is provided for by the statute itself, the said remedy

can be bypassed only if palpable injustice would result if the extra ordinary original jurisdiction of the High Court is not exercised.

13. Having considered the contentions advanced, I notice that the fact that the commodity in question was frozen shrimp and was being transported to the Cochin port for export is not disputed by the respondents. The only allegation is that the person in charge of the conveyance could not produce valid E-way bill and letter of undertaking at the time of the detention. Ext.P4 attempts to explain the reason why an E-way bill did not accompany the conveyance.

14. The discrepancies noticed in Exhibit P5 are as follows:-

“i) No E-Way bill is accompanied with the consignment as required under Rule 138 of the CGST/KSGST Rules 2017.

ii) No letter of undertaking is endorsed in the tax invoice as required under Rule 46 of the CGST/KSGST Rules, 2017.”

The replies of the petitioner are referred to in Exhibit P5. It is specifically mentioned that the letter of undertaking number is mentioned in the tax invoice and the details could have been verified from the GST portal. Section 129(1) provides for detention of goods where such goods are transported in contravention of the provisions of the Act or the Rules made thereunder. Section 129 (1)(a) provides for release of the goods on payment of penalty equal to two hundred percent of the tax payable on such goods and in case of exempted goods, on payment of an amount equal to two percent of the value of the goods or twenty-five thousand rupees, whichever is less. In the instant case, the allegation that the goods were intended for export and were not exigible to tax not being under dispute, I am of the opinion that the contention of the respondents that the penalty payable is as calculated in Exhibit P5 cannot be accepted under any circumstances. Since the instant case involves a palpable erroneous exercise of jurisdiction and would result in miscarriage of justice, if this Court declines jurisdiction, the further contention that the petitioner ought to have availed the statutory remedy of appeal before approaching this Court also cannot be accepted.

15. Even if the contentions of the respondents are accepted, the petitioner would be liable to pay only an amount of Rs.25,000/- as penalty for transporting the consignment without due supporting documents. In the above view of the matter, Exhibits P5 and P6 orders are set aside. The amount claimed in Exhibit P5 is limited to Rs.25,000/- under Section 129(1) (a) of the GST Act. On payment of such amount, all proceedings against the petitioner with regard to the transaction in question shall stand dropped.

The writ petition is ordered accordingly.

sd/-

Anu Sivaraman, Judge

sj

APPENDIX OF WP (C) 12503/2021

PETITIONER EXHIBITS

- Exhibit P1 COPY OF INVOICE NO.QFT/03/2021-22 ISSUED BY THE PETITIONER.
- Exhibit P2 COPY OF ORDER IN FORM GST MOV 02 ISSUED BY THE 1ST RESPONDENT.
- Exhibit P2(a) COPY OF PHYSICAL VERIFICATION REPORT IN FORM GST MOV 04 ISSUED BY THE 1ST RESPONDENT.
- Exhibit P2(b) COPY OF ORDER OF DETENTION IN FORM GST MOV 06 ISSUED BY THE 1ST RESPONDENT.
- Exhibit P2(c) COPY OF NOTICE OF DETENTION UNDER SECTION 129(3) FORM GST MOV 07 ISSUED BY THE 1ST RESPONDENT.
- Exhibit P3 COPY OF E-WAY BILL NO.5112 6559 9245 GENERATED BY THE PETITIONER.
- Exhibit P4 COPY OF REPLY SUBMITTED BY THE PETITIONER BEFORE THE 1ST RESPONDENT.
- Exhibit P5 COPY OF ORDER IN FORM GST MOV 09 ISSUED BY THE 2ND RESPONDENT.
- Exhibit P6 COPY OF NOTICE IN FORM GST MOV 10 ISSUED BY THE 2ND RESPONDENT.

RESPONDENT'S EXHIBITS

- EXHIBIT R2(A) Copy of the circular dated 13.4.201 issued by the central board of indirect tax and customs
- EXHIBIT R2(B) TRUE Copy of the E.MAIL DATED 11.6.2021 ATTACHING MOV-10 I.EXHIBIT P6