Item No.5.

IN THE HIGH COURT OF JUDICATURE AT CALCUTTA

CIVIL APPELLATE JURISDICTION

APPELLATE SIDE

HEARD ON: 12.05.2022

DELIVERED ON:12.05.2022

CORAM:

THE HON'BLE MR. JUSTICE T. S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

MAT 470 of 2022
With
I.A. No.CAN 1 of 2022

Assistant Commissioner, State Tax, Durgapore Range, Government of West Bengal.
VERSUS
Ashok Kuamr Sureka, Proprietor of Subham Steel

Appearance:-
Md. T. M. Siddique,
Mr. Soumitra Mukherjee,
Mr. Debasish Ghosh **.....for the appellant.**

Mr. Ankit Kanodia,
Mr. Himangshu Kumar Ray,
Ms. Megha Agarwal **.. for the respondent.**

JUDGMENT

(Judgment of the Court was delivered by* T.S. SIVAGNANAM, *J.)

1. This intra Court appeal at the instance of the department is directed against the order dated 1st March, 2022 in W.P.A. No.11085 of 2021. In the said writ petition, the respondent herein challeged the order passed by the Joint Commissioner (Appeal), CGST and CX, Kolkata Appeal – I Commissionerate dated 18th March, 2021. The said appeal filed before the Joint Commissioner was directed against the order of demand of tax and penalty in Memo dated 11th September, 2019 issued by the Assistant Commissioner of State Tax, Durgapur Range and summary of order under reference dated 11th September, 2019 passed by the Assistant Commissioner of State Tax, Kolkata South.

2. The learned single Bench while noting the fact found that the detention of the vehicle along with the goods and the demand of tax and penalty not to be justified on the ground that the e-way bill, which was being carried in the vehicle transporting the goods had expired on the midnight of 8th September, 2019 and the goods were being transported on 9th September, 2019 and the vehicle was intercepted at 1.30 p.m.(noon) and according to the writ petitioner the vehicle transporting goods had broken down and on account of which, there was delay and there was no

willful intention to evade payment of tax. The learned single Bench was convinced with the factual position and has disposed of the writ petition by setting aside the order dated 11th September, 2019 as well as the order of the appellate authority dated 18th March, 2021 and consequently held that the respondent /writ petitioner will be entitled to get refund of penalty and tax paid on protest subject to compliance of all legal formalities. The department is aggrieved by such order. Hence, this appeal.

3. The learned counsel appearing for the appellant would submit that neither before the appellate authority nor in the pleadings in the writ petition, the respondent had stated anything about the vehicle being broken down or that non-extension of the validity of the e-way bill was not deliberate and willful but due to the circumstances as stated. When such was the factual position, the learned single Bench ought not to have allowed the writ petition by accepting the said argument, which was placed for the first time when the writ petition was moved before the Court.

4. Further, on fact, the learned counsel appearing for the appellant had elaborately referred to the findings recorded by the appellate authority and argued that the learned writ Court ought not to have interfered with the order of demand of tax and penalty.

5. The learned counsel appearing for the respondent / writ petitioner submitted that the bona fides of the writ petitioner has to be considered and this was taken note of by the learned writ Court and relief was granted. In order to show the bona fides of the writ petitioner, the learned counsel had referred to the documents, which formed part of the records of the writ Court, more particularly, the tax invoice raised by M/s. Bhaskar Steel and Ferro Alloy Private Limited dated 7th September, 2019, e-way bill dated 7th September, 2019, which was valid upto midnight of 9th September, 2019 giving the details of the despatch from SRMB Srijan Private Limited to Shubham Steels, the writ petitioner having its registered office in Kolkata. It is further submitted that he writ petitioner had raised a tax invoice in favour of Om Dayal Educational and Research Society, which had its registered office at Kolkata but the goods had to be delivered as per the instruction of the purchaser at Delhi

Public School, Sector – 2D, Bidhannagar, Durgapur and in this regard, the writ petitioner had raised a second e-way bill dated 7th September, 2019 since the distance between SRMB Srijan Pvt. Ltd. and the place of delivery was 9 kilometers, the e-way bill was valid upto 8th September, 2019. Furthermore, it is submitted that the vehicle number in both the e-way bills will clearly show that it is the same vehicle.

6. We have elaborately heard Md. T. M. Siddique, learned advocate for the appellant and Mr. Ankit Kanodia, learned advocate appearing for the respondent.

7. After hearing the learned Advocates for the parties, we are of the view that in the instant case, the bona fides of the writ petitioner has to be tested on the documents, which were available on record. Firstly, we find that the tax invoice has been raised by Bhaskar Steel and Ferro Alloy Pvt. Ltd. dated 7th September, 2019. There is no dispute as regards the quantity and description of the goods. The said vendor had raised the e-way bill dated 7th September, 2019 as the goods were to be despatched from SRMB Srijan Pvt. Ltd. to the writ petitioner, who had its registered office at Kolkata. The said e-way bill

was valid upto 9th September, 2019 since the approximate distance was about 168 kilometers. The writ petitioner's case was that they are traders and they had a supply order from Om Dayal Educational and Research Society, which also has its registered office at Kolkata but, however the goods had to be shifted to a place in Durgapur. Therefore, the writ petitioner raised a second e-way bill on 7th September, 2019 and since the distance from SRMB Srijan Pvt. Ltd., Durgapur to the Delhi Public School, Durgapur was only 9 kilometers, the e-way bill was valid only for one day, i.e. 7th September, 2019 to 8th September, 2019 (midnight).

8. We need not go into the controversy as to whether there was a break down of the vehicle, etc. The case has to be approached by considering the bona fides of the transaction as to whether the case warrants detention of the goods and collection of tax and penalty. Admittedly, the first e-way bill dated 7th September, 2019 was valid upto 9th September, 2019. Therefore, in the absence of second e-way bill, the tax authorities at Durgapur could not have intercepted or detained the vehicle. Therefore, the explanation offered by the respondent / writ petitioner was an acceptable explanation and a case cannot be

made out that there was a deliberate and willful attempt on the part of the respondent / writ petitioner to evade payment of tax so as to justify invocation of the power under Section 129 of the Act.

9. Thus, we are of the view that the relief granted by the learned writ Court is fully justified. However, we substantiate the said conclusion by the reasons which we have assigned to the preceding paragraphs.

10. In the result, the appeal and the application filed by the department are dismissed and the appellant is directed to process the application for refund filed by the respondent on 7th March, 2022 and orders be passed thereon in terms of the direction issued by the learned writ Court within a period of two weeks from the date of receipt of the server copy of this judgment and order.

11. We make it clear that we have examined the facts of the case on hand, the bona fides of the respondent / writ petitioner and then arrived at a conclusion that it is not a case of willful attempt to evade payment of tax and therefore, the

decision having been rendered on the peculiar facts cannot be treated as a precedent.

12. Urgent photostat certified copy of this order, if applied for, be furnished to the parties expeditiously upon compliance of all legal formalities.

(T.S. SIVAGNANAM, J)

I agree,

(HIRANMAY BHATTACHARYYA, J.)

NAREN/PALLAB(AR.C)