Calcutta High Court
In the Circuit Bench at Jalpaiguri
Appellate Jurisdiction

Present :- Hon'ble Justice Amrita Sinha

WPA 85 of 2024

Mohammad Shamasher
Vs.
The State of West Bengal & Ors.

For the writ petitioner	:-	Mr. Dhiraj Lakhotia, Adv. Ms. Radhika Agarwal, Adv. Ms. Khushi Kundu, Adv.
For the State	:-	Mr. Momenur Rahman, Adv. Ms. Rima Sarkar, Adv.
Heard on	:-	24.01.2024 & 30.01.2024
Judgment on	:-	01.02.2024

Amrita Sinha, J.:-

The petitioner is the sole proprietor of M/s Afika Infrastructure. He is registered under the Central Goods and Services Tax Act, 2017. An escalator machine (JCB) of the petitioner returning from work was intercepted by the officers of the Bureau of Investigation, North Bengal Alipurduar Zone. The driver of the vehicle failed to produce any document in support of movement of the goods, i.e, the JCB machine. On account of the said offence order of detention under Section 129 (1) of the State Goods and Services Tax Act, 2017 was issued. The authority alleged that the provision of Section 68 (1) of

the Act was violated. The petitioner was directed to pay penalty under Section 129 (3) of the Act.

The adjudicating authority passed order against the petitioner. An appeal was carried there from before the appellate forum which too stood rejected. The petitioner has been held liable for payment of penalty of a sum of Rs. 9,93,008/- for contravention of the provision of the Act and the Rules made thereunder. The petitioner has executed a bank guarantee for the above sum subject to which the JCB machine has been released provisionally.

Specific case of the petitioner is that under the provision of Section 129 (3) of the Act, the respondent authority does not have the power to evaluate and adjudicate the quantum of tax.

The petitioner submits that the machine in question was being transported with a valid e-way bill. The details of the machine were mentioned in the said e-way bill. The invoice number and the reason for transportation was also mentioned. The petitioner contends that no tax is payable on account of the return of the machine after completion of work. The relevant details of the movement of the goods were duly submitted before the adjudicating authority but without appreciating the applicability of Section 129 (3) of the Act, the adjudicating and the appellate authority demanded penalty which is liable to be set aside.

It has been contended that the proper officer exceeded his jurisdiction in calculating the quantum of tax and specifying penalty at the rate of 200% of the tax payable on such goods. The proper officer does not have the power either to determine or to specify tax under Section 129 of the Act. Non availability of the delivery challan with the vehicle is a mere procedural impropriety and the petitioner did not have any intention to evade tax. The petitioner is the owner of the JCB machine which was being returned and the same is not a taxable supply. Assuming, but not admitting, that penalty could have been charged, the same ought not to be more than Rs. 25,000/- only as the goods in question was not eligible for payment of tax. For a minor breach of not possessing the delivery challan, such heavy amount of penalty at the rate of 200% ought not to have been imposed.

In support of the aforesaid submission the petitioner relies upon the judgment delivered by the High Court of Uttarakhand in ***Prestress Steel LLP vs. Commissioner, Uttarakhand State GST*** reported in ***(2013) 157 taxmann.com112 (Uttarakhand)***, order dated 16th June, 2023 passed by the Hon'ble Division of this Court in ***MAT 1032/2023 IA No. CAN 1 /23 and CAN 2/23; Usha Martin Limited & Anr. Vs. The Deputy Commissioner of State Tax, Durgapur Range and Ors***., judgment delivered by the High Court of Allahabad in the matter of ***Bharti Airtel Limited vs. State of Uttar Pradesh & Ors.*** reported in ***(2023) 109 GSTR 214***, judgment passed by the Hon'ble Division Bench of this Court in ***K.D.***

Gupta & Company & Anr. Vs. Assistant Commissioner of State Tax, Barrackpore Range & Ors. reported in ***(2023) 108 GSTR 395***.

Reliance has also been placed on the Circular no. 64/38/2018-GST dated 14th September, 2018 issued by the Central Board of Indirect Taxes and Customs, GST Policy Wing relating to modification of the procedure for interception of conveyances for inspection of goods in movement and detention, release and confiscation of goods and conveyances.

The petitioner prays for setting aside of the order passed by the appellate authority rejecting the appeal preferred by the petitioner and affirming the order of demand of penalty passed by the adjudicating authority.

The State respondents oppose the prayer of the petitioner. It has been submitted that no document in support of the movement of the vehicle could be produced by the driver at the time of interception. The same is in violation of Rules 138 and 138A of the CGST Rules, 2017. Rule 55 of CGST Rules requires the invoice, delivery challan with proper signature for movement of the goods.

The adjudicating authority and the appellate authority noticed that the vehicle in question was not released by the person as recorded in the e-way bill. The same was released by some other person. The delivery challan was also not signed by the consignor. Section 129 of the Act provides for imposition of 200% penalty if goods are transported without valid

documents. The adjudicating and the appellate authority were of the considered opinion that the petitioner would be liable to pay penalty at the rate of 200%.

The respondents rely on the judgment delivered by the Hon'ble Supreme Court in the matter of ***Vardan Associates Private Limited vs. Assistant commissioner of State Tax and Central Section & Ors.*** reported in ***2023 SCC Online SC 1710***.

Prayer has been made for dismissal of the writ petition.

I have heard and considered the submissions made on behalf of both the parties.

From the documents annexed to the writ petition it appears that an e-way bill was duly generated for transportation of the subject machine. As no document in support of such transportation could be produced by the driver of the vehicle at the time interception, accordingly, the vehicle along with the machine was detained. After physical verification of the goods it was detected that the document relied upon by the driver was not signed. The details mentioned in the e-way bill did not match the delivery challan. The name and address of the person who released the goods did not match with the details of the person whose name is mentioned in the e-way bill. Because of the discrepancy in the documents, the respondent authorities concluded that the petitioner transported the goods, i.e., the machine in contravention of the provisions of law.

The petitioner all along contended that he was the owner of the machine and the same was returning back after completion of work. The reason for transportation of machine is a non taxable one. No tax is liable to be paid as the movement was not a taxable supply. The respondent authorities noted that the reason for transportation of the goods was inward job work return. The adjudicating authority and the appellate authority despite noticing the fact that the supply was non-taxable, proceeded to impose penalty on the ground that the petitioner could not produce valid documents in support of the movement of the goods.

The appellate authority held that the fact that the movement of goods was in pursuance of a transaction that is not taxable is irrelevant and inconsequential because it is the mandate of law that there should be a delivery challan accompanying the goods in movement. If condition under the Act and the Rules are not complied, Section 129 will be attracted. Failure to comply a provision and the excuses taken for non compliance will not exonerate the petitioner from facing action under Section 129 of the Act.

The Hon'ble Division Bench of this Court in the matter of Usha Martin Limited (supra) held that if the conduct of the assessee is not to evade tax then relief ought to be granted. The Hon'ble Division Bench relied upon several decisions in similar matters and being convinced that the assessee did not have any intention to evade tax granted relief to the petitioner.

In K.D. Gupta and Company (supra) the Hon'ble Division Bench held that as the assessee contended that the transaction did not attract any levy

of tax, accordingly, the adjudicating and the appellate authority both ought to have examined the said contention while imposing penalty under Section 129 of the Act.

In Prestress Steel (supra) it was held that even if the assessee did not carry any delivery challan there was no additional information that could have been provided by virtue of production of delivery challan. E-way bill was generated and tax paid. Mere non compliance of Rule 55 (5) (b) of the Act was detected. In such case the offence may be punishable under Section 122 of the Act instead of Section 129. Every detention may not invariably be proceeded under Section 129 of the Act. The Revenue may also proceed under other provisions of the Act. If fraudulent intent is not found, Section 129 may not be invoked.

In Bharti Airtel (supra) the Court opined that there is no provision under Section 129 for determination of tax due, which can be done only by taking recourse to provision of Section 73 and 74 of the Act, as the case may be. In Vardan Associates (supra), decision relied upon by the respondent authorities, penalty was imposed as the assessee failed to comply with the requirement to generate fresh e-way bill while transporting the goods as the e-way bill in question expired in the midst of transportation. In such a situation the Court was of the opinion that a fresh e-way bill ought to have been generated so that the transportation of the consignment could be concluded.

In the present case there was a valid e-way bill in support of the transportation. It is only because of non production of the delivery challan that the penalty has been assessed and imposed. Though possession of all document in support of transportation is the fundamental requirement of law, but as it appears that, the petitioner did not have the intention to evade tax, accordingly, imposition of penalty at the rate of 200% of the tax payable appears to be highly disproportionate and not in accordance with the provisions of law.

In view of the above, the impugned order passed by the adjudicating authority affirmed by the appellate authority is liable to be set aside and is accordingly set aside. The adjudicating authority is directed to revisit the issue in line with the discussions made herein above and pass a reasoned order. A decision shall be taken at the earliest but positively within a period of eight weeks from the date of communication of this order.

The writ petition stands disposed of.

Urgent certified photocopy of this judgment, if applied for, be supplied to the parties or their advocates on record expeditiously on compliance of usual legal formalities.

(Amrita Sinha, J.)

Later:

It has come to the notice of the Court that in the order dated January 30, 2024 it was wrongly recorded that the matter will appear in the list on March 1, 2023.

The date should be corrected.

The correct date should be read as “February 1, 2024.”

(Amrita Sinha, J.)