THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

THE HON'BLE SMT JUSTICE KONGARA VIJAYA LAKSHMI

WRIT PETITION NO.31563 OF 2018

ORDER: {Per the Hon'ble Sri Justice Ramesh Ranganathan}

The relief sought for in this Writ Petition is for a mandamus to declare the action of the first respondent, in intercepting vehicle bearing No.AP-03-TE-9508 on 24.08.2018 at 10.30 pm at Madanapalle while it was in transit carrying "fresh tamarind" from the petitioner to its purchasing dealer in Tamilnadu, though it was covered by an invoice and both the parties were registered GST dealers, in detaining the same, and in issuing a confiscation notice, as arbitrary and illegal.

While the goods were in movement, in vehicle bearing No.AP-03-TE-9508, the Deputy Assistant Commissioner (ST), Madanapalle intercepted the vehicle and caused inspection, of the goods in movement, under Section 68(3) of the Central Goods and Services Tax Act, 2017 ("the CGST Act" for brevity). In the impugned confiscation notice dated 24.08.2018, it is recorded that the driver of the vehicle had produced unnumbered invoices dated 24.08.2018 to the inspecting authority at the time of inspection; on examination, it was observed that the goods under movement were mentioned as fresh tamarind with HSN Code No.810; suspecting the genuineness of the transaction, the goods were physically verified in the presence of the driver and other witnesses; and the inspection revealed that the goods under transportation was not fresh tamarind but was deshelled dried tamarind.

In the impugned notice, the first respondent further observed that there were four stages of tamarind; the goods under transportation were the fourth stage goods; the goods were moving from Angallu to Kapukadu in Tamilnadu State; the vehicle was intercepted at Madanapalle by-pass road, 25 km away from Punganur, that too on the opposite direction to Punganur and Chennai Highway; the driver had informed that the goods were loaded from KNM Cold Storage, Angallu which was 10 km away from Madanapalle, and 35 km away from Punganur; it would not be possible to store fresh tamarind in cold storage without drying it, as it would become wet and get spoilt; it was only possible to keep dry tamarind in cold storage, and the goods under transportation were dried seeded tamarind only; it was impractical to keep fresh tamarind in cold storage without the shell; the goods in transit fell under Entry No.813, taxable at 5% under the IGST Act; and the person, transporting taxable goods in the guise of exempted goods to avoid legitimate tax that too without serial number in the invoices, was required to be proceeded against.

Both the goods, and the conveyance used for movement of goods, were detained under Section 129(1) of the CGST Act read with Section 68(3) of the State/Union Territory Goods and Services Tax Act, or under Section 20 of the Integrated Goods and Services Tax Act read with Section 68(3) of the CGST Act, by issuing an order of detention in FORM GST MOV 06; and the same was served on the person in-charge of the conveyance on 27.08.2018. On the ground that the goods were transported without valid documents, the first respondent presumed that the goods were being transported for the purpose of evading taxes and, in view thereof, he proposed to confiscate the said goods under Section 130 of the CGST Act read with the relevant provisions of the State Goods and Services Tax Act. In addition, the petitioner was informed that they were liable to pay tax, penalty and other charges payable in respect of such goods and the conveyance. It is this show cause notice which is under challenge in this Writ Petition as suffering from inherent lack of jurisdiction.

Sri G.Narendra Chetty, learned counsel for the petitioner, would draw our attention to the Circular issued by the Chief Commissioner of State Tax dated 12.07.2018; and to Section 129(1), (3), (4), (5) and (6) of the CGST Act, to submit that, without calling upon the petitioner to pay tax and penalty under Section 129(1) of the CGST Act, it was not open to the respondents to proceed directly to confiscate the goods under Section 130(1) of the CGST Act; and yet another error in the impugned notice was that, besides asking the petitioner to show cause as to why the goods should not be confiscated, the first respondent had also called upon the petitioner to pay tax and penalty and fine, besides confiscation, and he lacked jurisdiction to do so.

In his circular dated 12.07.2008, the Commissioner stated that no vehicle should be detained in vehicular check for the purpose of dispute of the rate of tax, provided the vehicle was covered by all required statutory documents; and the description of the goods, mentioned in the documents, tallied with the goods under transport.

On a bare reading of the show cause notice it does appear that, while the petitioner claimed that the goods were fresh tamarind, the first respondent was of the view that it was dried tamarind. It does also appear that the description of the goods mentioned in the invoice, did not tally with the goods under transport; and, consequently, the instructions in Circular dated 12.07.2018, that vehicles not be detained under certain circumstances, has no application to the case on hand.

Section 129(1) of the CGST Act contains a non-obstante clause and stipulates that, notwithstanding anything contained in the Act, where any person transports any goods, or stores any goods while they are in transit in contravention of the provisions of the Act or the Rules made thereunder, all such goods and conveyance used as a means of transport for carrying the said goods, and documents relating to such goods and conveyance, shall be liable for detention or seizure; and after detention or seizure, they shall be released (a) on payment of the applicable tax and penalty equal to one hundred per cent of the tax payable on such goods and, in case of exempted goods, on payment of an amount equal to two per cent of the value of the goods or twenty five thousand rupees, whichever is less, where the owner of the goods comes forward for payment of such tax and penalty. Section 129(3) of the CGST Act requires the officer, detaining or seizing the goods or conveyance, to issue a notice specifying the tax and penalty payable and, thereafter, to pass an order for payment of tax and penalty under clause (a) or clause (b) or clause (c) of Section 129(1).

Section 129(4) of the CGST Act stipulates that no tax, interest or penalty shall be determined, under sub-section (3), without giving the person concerned an opportunity of being heard. Section 129(5) provides that, on payment of the amount referred to in sub-section (1), all proceedings, in respect of the notice specified in sub-section (3), shall be deemed to be concluded. Section 129(6) of the CGST Act stipulates that, where the person transporting any goods or the owner of the goods fails to pay the amount of tax and penalty as provided in sub-section (1) within seven days of such detention or seizure, further proceedings shall be initiated in accordance with the provisions of Section 130 of the CGST Act.

Section 130 of the CGST Act relates to confiscation of goods or conveyances and levy of penalty. Section 130(1) of the CGST Act reads thus:

> (1) Notwithstanding anything contained in this Act, if any person -
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> (i) supplies or receives any goods in contravention of any of the provisions of the Act or the rules made thereunder with intent to evade payment of tax; or
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> (ii) does not account for any goods on which he is liable to pay tax under this Act; or
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> (iii) supplies any goods liable to tax under this Act without having applied for registration; or
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> (iv) contravenes any of the provisions of this Act or the rules made thereunder with intent to evade payment of tax; or
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> (v) uses any conveyance as a means of transport for carriage of goods in contravention of the provisions of this Act or the rules made thereunder unless the owner of the conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance,
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> then, all such goods or conveyance shall be liable to confiscation and the person shall be liable to penalty under Section 122.

While failure to pay tax and penalty, as referred to under Section 129(1) of the CGST Act within seven days of detention or seizure, would enable confiscation proceedings to be initiated, as stipulated under Section 129(6) of the CGST Act, the fact remains that it is also open to the authorities concerned to initiate proceedings for confiscation, under Section 130 of the CGST Act, in cases where the contingencies, referred to in clauses (i) to (v) of Section 130(1) of the Act, are attracted.

Sri Shaik Jeelani Basha, learned Special Standing Counsel for Commercial Taxes, would draw our attention to the Circular issued by the Central Board of Indirect Taxes and Customs in Circular No.41/15/2018-GST dated 13.04.2018 whereby the Board, in the exercise of the powers conferred on it under Section 168(1) of the

CGST Act, issued several instructions including in clause (L) which reads as under:-

> "Where the proper officer is of the opinion that such movement of goods is being effected to evade payment of tax, he may directly invoke Section 130 of the CGST Act by issuing a notice proposing to confiscate the goods and conveyance in FORM GST MOV-10. In the said notice, the quantum of tax and penalty leviable under Section 130 of the CGST Act read with Section 122 of the CGST Act, and the fine in lieu of confiscation leviable under sub-Section (2) of Section 130 of the CGST Act shall be specified. Where the conveyance is used for the carriage of goods or passengers for hire, the owner of the conveyance shall also be issued a notice under the third proviso to sub-section (2) of Section 130 of the CTGST Act, proposing to impose a fine equal to the tax payable on the goods being transported in lieu of confiscation of the conveyance."

Sri Shaik Jeelani Basha, Learned Special Standing Counsel, would submit that, in terms of para-2(l) of the said Circular, if the officer is satisfied that the movement of the goods is effected to evade payment of tax, it is open to him to directly invoke Section 130(1) of the CGST Act. While Sri G. Narendra Chetty, learned counsel for the petitioner, would contend that the petitioner's case would fall within the ambit of Section 129 of the CGST Act, Sri Shaik Jeelani Basha, learned Special Standing Counsel for Commercial Taxes, would submit that, since the petitioner's endeavour was to evade payment of tax, it is open to the authorities to directly proceed under Section 130(1) of the CGST Act.

We must bear in mind that the proceeding, under challenge in this Writ Petition, is merely a show cause notice. It is only if it is *ex-facie* evident, from a bare reading of the show cause notice, that it suffers from inherent lack of jurisdiction, would this Court be justified, in exercising jurisdiction under Article 226 of the Constitution of India to interfere. We are unable to hold that the contents of the show-cause notice, if accepted as true, *ex facie* reflect inherent lack of jurisdiction for the 1st respondent to issue the said notice.

Questions as to whether the matter falls within the ambit of Section 129(1) or Section 130(1) of the CGST Act, whether or not the Circular issued by the Board on 13.04.2018 is applicable, whether tax and penalty can be levied besides confiscation of the goods and the vehicle etc should be examined, in the first instance, by the first respondent on the petitioner submitting his reply to the confiscation show-cause notice, and the order passed by the first respondent can, thereafter, be subjected to challenge in appropriate legal proceedings.

We consider it appropriate, therefore, to permit the petitioner to submit their reply to the show cause notice within one week from today; and to direct the first respondent to pass orders thereupon at the earliest and, in any event, not later than one week from the date of receipt of the petitioner's reply to the show cause notice. Needless to state that the first respondent shall examine the petitioner's contentions, as urged in the reply to the show-cause notice, on its merits uninfluenced by any observations made by us in this order.

The Writ Petition stands disposed of accordingly. There shall be no order as to costs. Miscellaneous petitions, if any, pending shall stand closed.

(RAMESH RANGANATHAN, J)

(KONGARA VIJAYA LAKSHMI, J)

6th September 2018
Note:
Issue C.C. tomorrow.
B/O
RRB