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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.04.2022

CORAM

THE HONOURABLE MR.JUSTICE R. MAHADEVAN
AND
THE HONOURABLE MR.JUSTICE J.SATHYA NARAYANA PRASAD

W.A.No.1032 of 2022
and
C.M.P.No.6553 of 2022

1. The Managing Director,
The Tamil Nadu State Marketing
Corporation Limited (TASMAC),
4th Floor, CMDA Towers,
Gandhi Irwin Bridge Road,
Egmore, Chennai.
2. The Senior Regional Manager,
The Tamil Nadu State Marketing
Corporation Limited (TASMAC),
Salem Region,
Salem - 16.
3. The District Manager/Deputy Collector,
The Tamil Nadu State Marketing
Corporation Limited, (TASMAC),
Salem District. ... Appellants/Petitioners

Versus

1. K.Selvamani
S/o.L.Kuppusamy,
(Supervisor in Shop No.7215),
No.5/120J, B.T.R. Nagar,
Masinaickenpatty Post,
Salem District - 636 103.
2. C.Palanisamy,
S/o.Chinnannan,
(Salesman in Shop No.7215)
No.18/3-59 E, Erakundapatti,
Mecheri, Mettur Dam,
Salem District - 636 451.



3. S.Lakshmanasami,
S/o.R.Sivalingam,
(Salesman in Shop No.7215),
No.1-4, Chinnaiya Reddy Theru,
T.M.P.Nagar, P.N.Patti,
R.S.Post, Mettur Dam,
Salem District - 636 402.

4. D.Srinivasan,
S/o.Duraisamy,
(Assistant Salesman in Shop No.7215),
No.251A, Mariyapillai Kadu,
Shevappet, Salem - 636 002.

... Respondents

PRAYER:-

Writ Appeal filed under Clause 15 of Letters Patent against the order dated 05.01.2021 passed by this Court in W.P.No.9432 of 2020.

PRAYER IN W.P.NO.9432 OF 2020:-

Writ Petition filed under Article 226 of the Constitution of India praying to Writ of Certiorarified Mandamus to call for the records pertaining to the impugned order passed by the 3rd Respondent in Na.Ka.No.196/2020/A-4/C.V. dated 22.05.2020 and quash the same and consequently direct the 3rd Respondent to consider the Petitioners representation dated 24.06.2020.

For Appellant : Mr.K.Sathish Kumar

JUDGMENT

[Judgment of the Court was made by R.MAHADEVAN,J.]

Assailing the order dated 05.01.2021 passed by the learned Judge in W.P. No.9432 of 2020, the appellants/TASMAC has come up with this intra-court appeal.

2. By the order impugned herein, the learned Judge, following the earlier orders of this court in WP.(MD)No.10355 of 2020 dated 18.12.2020 and WP.No.12657 of 2020 etc batch dated 22.02.2021, allowed the writ petition filed by the respondents herein as against the order imposing penalty for the alleged shortage of stocks amounting to Rs.7,95,770/- found in shop



no.7215 at Semmanatham, Yercaud, Salem District, maintained by them. The relevant passage of the same is usefully extracted below:

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"4. The impugned order is thus set aside. The respondent is at liberty to initiate proceedings afresh and finalise the same after hearing the petitioner by issuing a fresh show cause notice.

5. On the question of levy of GST, learned counsel for the petitioner relies on the decision of the Madurai Bench of this Court in W.P.No.10355 of 2020 order dated 18.12.2020 and R.Sivashanmugam Vs. the Managing Director and Others in W.P.No.12657 of 2020 and batch, order dated 22.02.2021 wherein the levy of GST in identical circumstances has been set aside. The reasoning appears to be that the provisions of Section 7(1) (d) of the GST Act, 2017 which imposes GST on activities to be treated as supply of goods or supply of services as referred to in Schedule II, stands omitted with effect from 01.07.2017. Thus, post 01.07.2017, there can be no levy of GST on the amount of penalty."

3. It is the main contention of the learned counsel for the appellants that the order dated 18.12.2020 made in WP(MD) No.10355 of 2020, based on which, the learned Judge passed the order impugned herein, was subsequently challenged by the appellants/TASMAC by filing WA(MD)No.679 of 2021 and this court, by order dated 24.03.2021, granted an order of interim stay in respect of the findings of the learned Judge on the calculation of GST on the penalty, alone; and hence, the order of the learned Judge is covered by the said interim order of this court dated 24.03.2021 passed in WA(MD)No.679 of 2021. Adding further, the learned counsel submitted that the omitted section 7(1)(d) was brought into the same amendment as section 7(1)(A) and the same was not taken into consideration by the learned Judge; and that, the findings of the learned Judge that GST cannot be imposed in respect of the penalty levied in the disciplinary proceedings, are against clause 5(e) of the schedule II of the Central Goods Sales Tax Act, 2017. It is also submitted that the respondents had already paid the amount of shortage as well as penalty with GST, without any protest and thereafter, filed the writ petition and asked for refund of GST, which is a clear case of estoppel. The learned counsel further submitted that the stock shortage was admitted and the shortage amount was also paid; in such an event, no domestic enquiry is necessary; and therefore, the order of the authority imposing a lenient and



minor punishment of levying penalty, without affecting the service condition, is perfectly justified. However, the learned Judge erred in setting aside the same, on the ground of violation of principles of natural justice. With these submissions, the learned counsel sought to allow this appeal by quashing the order impugned herein.

4. Heard Mr.K.Sathish Kumar, learned counsel appearing for the appellants and also perused the materials available on record.

5. At the outset, it is to be pointed out that we are not inclined to go into the correctness of the order passed by the learned Judge, in respect of setting aside the order impugned in the writ petition and granting liberty to initiate the proceedings afresh and finalise the same, after hearing the respondents by issuing a fresh show cause notice, on the ground of violation of principles of natural justice, having regard to the admitted position that no enquiry was conducted before passing the order imposing penalty on the respondents herein. Therefore, the short question that arises for consideration herein is with respect to the findings of the learned Judge, on the levy of GST.

6. It could be seen from the order impugned in this appeal that the learned Judge decided the question of levy of GST, in the light of the earlier orders in WP(MD)No.10355 of 2020 dated 18.12.2020 and WP.No.12657 of 2020 etc. batch dated 22.02.2021 and ultimately, held that 'post 01.07.2017, there can be no levy of GST on the amount of penalty'. For better appreciation, the relevant portion of the order dated 18.12.2020 passed in WP(MD) No.10355 of 2020 is extracted below:

"32. The next question that arises for consideration is whether the penalty imposed in a disciplinary proceedings in a service matter is liable for GST, in terms of Section 7(1) (d) or 7(1-A) of the GST Act, 2017. Admittedly the said Section 7(1) (d) was not in force as on the date of passing the impugned order in the month of September 2020. The said Section was omitted with effect from 01.02.2019. The respondent, in his counter clearly stated that the notice of collection of GST was issued under Section 7(1) (d) alone. Therefore, without any provision/authority, the third respondent has issued the show cause notice to collect the GST, which is totally illegal.



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33. Secondly, even assuming that Section 7(1A) of the Act r/w Rule 5(e) of the Rules will be applicable and the show cause notice was issued in accordance with the said provision, as contended by the learned counsel for the respondents, nowhere either in the show cause notice or in the impugned order or in the counter affidavit, the respondents never ever stated about the applicability of Section 7(1A) r/w Rule 5(e). It would be apposite to mention Section 7(1A), which reads as follows:-

'Agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act'.

34. By referring the above said Section, the respondents submitted that the petitioner refrained from performing to prevent the shortage of supply, so that they have imposed the penalty and as such it would attract the GST. This Court is not in a position to accept the present approach of the respondents due to the reason that the imposition of any GST will arise only when the penalty imposed in the course of trade or commerce. During the course of business, if any agreement was entered, where there is a delay in supply or in payment, if any, penalty imposed as per the agreement, such penalty comes under the purview of Section 7 (1A) for the imposition of GST. However, in the present case, the penalty imposed was in a disciplinary proceedings to an employee which would not attract GST.

35. In any angle, the imposition of the GST by the respondents, to the penalty imposed, under Rule 7(b) (xiv) of the Code, in a disciplinary proceedings initiated against the employees would not attract the GST and the penalty referred therein would only refer the penalty imposed in the course of trade or commerce.

36. As such in the present case the penalty was imposed in a disciplinary proceedings which cannot be construed that the penalty imposed in the course of trade or commerce for the imposition of GST.

37. This Court finds substance in the arguments made by Mr.R.V.Rajkumar, learned counsel appearing for the petitioners in some of the writ petitions in the batch and this Court recorded its



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appreciation for his assistance in the present writ petition.

38. Therefore, I am of the opinion that the GST imposed by the respondents is illegal on the face of it and the same is liable to be set aside."

7. According to the learned counsel for the appellants, the aforesaid order dated 18.12.2020 made in WP(MD) No.10355 of 2020 was put to challenge by the appellants/TASMAC by filing W.A.(MD) No.679 of 2021, and this court by order dated 24.03.2021 granted an order of interim stay, insofar as the order relating to calculation of GST on the penalty alone. The operative portion of the same is quoted below for ready reference:

"3.Considering the same, there shall be an order of interim stay insofar as the order of the learned Judge pertaining to the finding on the calculation of GST on the penalty alone is concerned. Thus, it is made clear that the other portion of the order of the learned Judge, in which, liberty was given to the appellant to proceed to conduct an enquiry has not been dealt with and therefore, it is open to the appellant/petitioner to proceed further. Notice."

Thus, according to the learned counsel, the order impugned herein is covered by the above stated interim order dated 24.03.2021 in WA (MD) No.679 of 2021.

8. In the opinion of this court, the contention so made on the side of the appellants, cannot be accepted. The learned Judge rendered her finding that 'post 01.07.2017, there can be no levy of GST on the amount of penalty', on 05.01.2021, whereas, the appellants obtained the order of interim stay with respect of GST on penalty, only on 24.03.2021 i.e., much later than the order of the learned Judge. Therefore, the said interim order subsequently obtained, cannot be applicable to the facts of the present case and the order of the learned Judge holds good as on 05.01.2021, which warrants no interference. However, it is made clear that there is no bar for the appellants in proceeding with the enquiry as against the respondents, after issuing show cause notices afresh and providing opportunity of hearing. At the same time, the imposition of GST on the penalty amount alone, is subject to the result of WA(MD)No.679 of 2021.



9. With the aforesaid observations, this writ appeal stands disposed of. No costs. Consequently, connected miscellaneous petition is closed.

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Sd/-
Assistant Registrar(CCC)

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Sub Assistant Registrar

msr

To

1. The Managing Director,
The Tamil Nadu State Marketing
Corporation Limited (TASMAC),
4th Floor, CMDA Towers,
Gandhi Irwin Bridge Road,
Egmore, Chennai.
2. The Senior Regional Manager,
The Tamil Nadu State Marketing
Corporation Limited (TASMAC),
Salem Region, Salem - 16.
3. The District Manager/Deputy Collector,
The Tamil Nadu State Marketing
Corporation Limited, (TASMAC),
Salem District.

W.A.NO.1032 OF 2022 &
C.M.P.NO.6553 OF 2022

AK-II(CO)
PBS/20/05/2022