Form No. J.(2)
Item No.12

IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

HEARD ON: 25.06.2024

DELIVERED ON: 25.06.2024

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

M.A.T. 1285 of 2023
With
I.A. No. CAN 1 of 2023
ATR Malleable Casting Private Limited & Ors.
Versus
Inspector of Central Taxes,
Headquarters, Anti-Evasion Unit,
Haldia CGST & CX Commissionerate
& Ors.

Appearance:-
Mr. Pranit Bag
Ms. Rita Mukherjee
Mr. Ghanshyam Jha
Mr. Rowsan Kumar Jha
...for the appellants

Mr. Ranjan Kumar Sinha
Mr. Shaunak Ghosh
......for the Union of India

Mr. K. K. Maiti
Mr. Tapan Bhanja
Mr. Saurov Mallick
.....for the CGST Authority

JUDGMENT

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

1. This intra-Court appeal by the unsuccessful writ petitioners is directed against the order dated 14th June, 2023 in W.P.A. 11167 of 2023. The main relief sought for in the writ petition was to refund a sum of Rs.30,00,000/-, which the appellants would allege was forced to be paid by them under the threat of arrest, coercion and undue influence on 22nd March, 2023. The writ petition was dismissed on the ground that the allegation made by the appellants that there was no proper authorization in INS-01 was a false statement since the revenue, during the course of argument, had produced a copy of the INS-01 dated 12th June, 2023. Therefore, the Court was not inclined to entertain the writ petition.
2. Aggrieved by such order, the appellants have filed the present appeal.
3. We have heard Mr. Pranit Bag, learned advocate appearing for the appellants, Mr. Ranjan Kumar Sinha, learned counsel appearing for the Union of India and Mr. K. K. Maiti, learned Senior Standing counsel for the CGST authority.
4. As indicated above, the main prayer in the writ petition is for directing the authorities to return a sum of Rs.30,00,000/-, which according to the appellants were compelled to be paid by them during the course of search.
5. The other aspect, which has been alleged is the validity of such search itself, which has been questioned by the appellants by filing an affidavit-in-reply to the affidavit-in-opposition filed by the respondent nos.1 to 5.
6. The appellants in the affidavit-in-reply have enclosed two affidavits shown by one, Tarun Bera and Ashim Kumar Modi, wherein they have alleged that the signatures found in the INS-01 in respect of the premises at Howrah Amta

Road, Madhya Santoshpur, Howrah, West Bengal is not the signature of Mr. Bera. In our view, this issue cannot be adjudicated in a writ petition based on affidavits, more particularly, when the affidavit, which has been filed on behalf of the appellants has been placed before this Court, for the first time, alongwith the affidavit-in-reply filed by the appellants.

7. The explanation offered by the appellants is that they were unaware of the facts and they came to know of it only upon perusal of the annexure to the affidavit-in-opposition filed by the department. In any event, this being a question of fact, cannot be adjudicated in a writ petition.

8. Mr. Maiti, learned Senior Standing counsel for the department submitted that the investigation is complete and the department is in the final stages of issuance of a show-cause notice. Therefore, this issue as to the validity of the search as to whether there was proper authorization etc. can be agitated by the appellants in the reply to the show-cause notice, which is to be issued by the department.

9. The main prayer sought for in the writ petition was to refund a sum of Rs.30,00,000/-, which according to the department, has been voluntarily paid by the appellants. The issue would be as to how the Court will test as to whether the payment made by the appellants could be treated to be a voluntary payment. In this regard, first we take note of the instructions issued by the Commissioner (GST-Inv.), CBIC dated 25th May, 2022, wherein it was clarified that there may not be any circumstances necessitating recovery of tax dues during the course of search or inspection or investigation proceedings. However, there is also no bar on the taxpayers for voluntarily making the payments on the basis of ascertainment of their liability on non-

payment/short payment of tax before or at any stage of such proceedings. The tax officer should however, inform the taxpayers regarding the provisions of voluntary tax payments through GST DRC –O3.

10.Further, the instruction states that Principal Chief Commissioners/Chief Commissioners, CGST Zones and Principal Director General, DGGI are advised that in case, any complaint is received from a taxpayer regarding use of force or coercion by any of their officers for getting the amount deposited during search or inspection or investigation, the same may be inquired at the earliest and in case of any wrongdoing on the part of any tax officer, strict disciplinary action as per law may be taken against the defaulting officers.

11.Thus, it is evidently clear from the above circular that there may not be any circumstance necessitating recovery of tax during the course of search or inspection and the investigation proceedings. So far as the voluntary payment by the taxpayer is concerned, it should be against an ascertainment of their liability on non-payment/short payment. Admittedly, in the instant case, such ascertainment has not taken place and there was no intimation given to the appellants regarding non-payment or short payment of taxes.

12. The issue as to how the matter has to be dealt with when there is an allegation that the assessee was coerced to effect payment of tax during the course of search or inspection was subject-matter of consideration in several decisions and we may refer to the decision in the case of ***Vallabh Textiles Vs. Senior Intelligence Officer*** reported in ***[2022] 145 taxmann.com 596 (Delhi)***, wherein it has been held that where payment made during such proceeding for which acknowledged was not issued in Form GST DRC – 04 were not voluntary and the department was directed to refund the same

alongwith interest. Admittedly, in the instant case, no GST DRC-04 was issued. Thus, it is clear that the mandate under Rule 142(2) of the CGST Rule, 2017 was not complied with.

13. The learned senior Standing Counsel for the department would contend that since it is a voluntary payment made by the appellants/assessees, the necessity of issuing Form GST DRC-04 would not arise.

14. This submission is contrary to the statutory rule, which was considered in the case of ***Shree Ganesh Molasses Trading Co. Vs. Superintendent, Office of the Commissioner*** reported in ***[2023] 148 taxmann.com 36 (Gujarat)***, wherein the Hon'ble Court referred to Rule 142(2) of the CGST Rules, 2017, which stipulates that where any person makes any payment of tax, interest, penalty, whether on his own ascertainment or as communicated by the proper officer under sub-rule (1A), he shall inform the proper officer of such payment in Form GST DRC-03 and the proper officer shall issue an acknowledgement, accepting the payment made by the said person in Form GST DRC-04. Admittedly, in the instant case, Form GST DRC-04 was not issued.

15. As pointed out earlier, there was no ascertainment of the tax liability nor there was any ascertainment of any alleged non-payment or short payment of taxes. In the absence of any acknowledgement given in GST DRC-04, it goes without saying that there was no acceptance of such payment alleged to have been made by the appellants/assessees voluntarily.

16. The next aspect is whether the circumstances would indicate as to whether the payment was voluntary or otherwise. The Form GST INS-02 is dated 22nd March, 2023 in the preamble it has been stated that the search under sub-

section (2) of Section 67 was conducted by the concerned officer viz. the Inspector (Anti Evasion), Anti Evasion Unit, Haldia CGST & CX Commissionerate alongwith their officer on 22nd March, 2023, which ended at 18:30 Hrs. The Panchanama, which was recorded by the very same officer on 22nd March, 2023 records that the entire search proceedings concluded at about 22:45 hours and the officers left the premises at about 22:50 hours.

17. Thus, it is shown that there is a discrepancy in the time at which the search was concluded and as to when the officers left the premises of the appellants/assessees.

18. It is not in dispute that the appellants had paid the amount through bank transfer by raising a challan and from the receipt it is seen that deposit time is 18:31:33.

19. Thus, it is evident that during the course of search, this payment of Rs.30,00,000/- is said to have been made. The circumstances definitely shows that the payment could not have been voluntary. In fact, the fact situation in the case of *Shree Ganesh Molasses Trading Co. (supra)* as well as in the case of *Vallabh Textiles (supra)* are more or less identical wherein the Courts noted dates and events and came to the conclusion that the payment of tax by a taxpayer during the course of search could not be have been stated to be voluntarily made. Furthermore, as pointed out earlier, there was no receipt issued in GST DRC – 04 by the authority. The appellants on their part at the earliest point of time have submitted a representation on 29th March, 2023 to the Inspector of Central Taxes, Anti Evasion Wing, wherein they have stated that they were forced to make payment of Rs.30,00,000/-. This representation appears to have not been disposed of or considered.

Nonetheless, the appellants had been approached the higher authorities and being done so, the higher authorities could have investigated the matter in terms of the instructions given by the (GST-Inv.), CBIC dated 25th May, 2022.

20. Be that as it may, the facts clearly show that the payment of Rs.30,00,000/- could not have been said to be voluntary as it was done during the course of search and the search as per the recording in the Panchanama is stated to have completed after about two hours after the appellants had effected the payment.

21. Therefore, we are of the view that the amount of Rs.30,00,000/- has to be returned to the appellants and cannot be retained by the department any longer, more particularly, when there was no acknowledgement given in GST DRC – 04.

22. As pointed out earlier, the aspect as to the validity of the search, whether the authorization in GST INS-01 was validly issued, whether it was signed by the concerned person of the assessee company etc. are all issues, which the appellants should contest after the issuance of the show-cause notice.

23. The learned Senior Standing Counsel appearing for the respondents placed reliance on the decision in the case of ***Innovators Façade Systems Ltd. Vs. Assistant Additional Director General of GST Investigation, Zonal Unit, Mumbai*** reported in ***2024 (84) G.S.T.L. 233.*** We have gone through the facts of the said case, where the Court noted that the petitioner therein was a legal person as it is described to be a company registered under the Companies Act, 1956 and that the legal person cannot be physically coerced. Apart from that, the Court also noted in paragraph 7 of the said judgment that the petitioner therein did not even whisper anything of such kind in the

several letters addressed to the authorities including in answering the summons to say that such amount was recovered by the department under coercion, much less to raise the same before the appropriate police authorities. Further, the Court held that whether the amount, which was deposited under threat or coercion or whether it was a voluntary deposit, was held to be a disputed question of fact, which cannot be gone into and appreciated in a proceeding under Article 226 of the Constitution of India. Firstly, the facts of the case in *Innovators Façade Systems Ltd. (supra)* are entirely differently and, therefore, the decision is factually distinguishable. It is no doubt true that disputed question of fact as to whether the payment was made under coercion or voluntarily made may be a disputed question of fact. Nonetheless, the surrounding circumstances has to be taken note of with particular reference to the facts and circumstances of each case.

24. In the preceding paragraphs, we have recorded our opinion that the payment of tax during the course of search i.e. even before the search could be completed cannot be at any stage of imagination to be treated to be a voluntary payment. Furthermore, it is an admitted case that the department has not issued any receipt under GST DRC-04.

25. For the above reasons, the appeal along with the connected application (I.A. No. CAN 1 of 2023) are allowed. The order passed in the writ petition is set aside and there will be a direction to the respondents/GST authorities to return the sum of Rs.30,00,000/- to the appellants within a period of six weeks from the date of receipt of server copy of this order. With regard to the claim for interest is concerned, the appellants are at liberty to raise such a

plea during the adjudication of the show-cause notice for which, we propose to issue the following directions.

26. The appropriate respondent viz. CGST authorities are directed to issue show-cause notice to the appellants within a period of twelve weeks from the date of receipt of server copy of this order and the appellants should be granted sufficient time to submit their reply and after conducting a personal hearing, the show-cause notice shall be adjudicated. The appellants are at liberty to test the show-cause notice on all factual and legal grounds including the validity of the search.

27. No costs.

28. 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)
CHIEF JUSTICE

I agree.

(HIRANMAY BHATTACHARYYA, J.)

Pallab/Krishnendu AR(Ct.)