IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE JUSTICE ARINDAM MUKHEREJEE.

WPA 835 of 2024

Mohammad Shamasher

versus

State of West Bengal & Anr.

For the petitioner : Mr. Dhiraj Lakhotia,
Mr. Radhika Agarwal,
Ms. Meghana Joshi,
Ms. Kushi Kundu
.....Advocates

For the State : Mr. Subir Kr. Saha, AGP.,
Mr. Dilip Kumar Agarwal
.....Advocates

Last Heard on 13.05.2024 and 15.05.2024

Judgment on : 24th May, 2024.

Arindam Mukherjee, J.:

The present writ petition has been filed inter alia praying for recalling and/or cancelling and/or rescinding the penalty imposed by an order dated 27th March, 2024 passed by the Adjudicating Authority under Section 129(3) of the West Bengal Goods and Services Tax Act, 2017 (hereinafter referred to as the WBGST Act) pursuant to a direction given by this Court vide an order dated 1st February, 2024 passed in WPA 85 of 2024.

I. Facts of the case:

a) One unregistered person (in short URP) namely Pisi Suriya Singhpo of Arunachal Pradesh was returning a Hyundai make Excavator machine (hereinafter referred to as JCB) to the petitioner at its place of business at Gaya, Bihar. The petitioner holds a GSTN number being 10BMYPS0695E1ZP. The said JCB had been taken on hire from the petitioner for road excavation work.

b) On 18th April, 2023 an E-way bill was generated by the petitioner for transportation of the said JCB as "inward job work returns". A consignment note was generated by Pisi Suriya Singhpo (hereinafter referred to as the Consignor) wherein the consignee was the petitioner. The place of dispatch was indicated to be Changlang Miao, Arunachal Pradesh and the place of delivery was Gaya, Bihar.

c) The value of the goods was stated to be zero and the said E-way bill was valid up to 26th April, 2023.

d) The JCB loaded in a vehicle bearing no.NL01NB8041 which was also said to be mentioned in the E-way bill and the challan.

e) The said vehicle was intercepted by the Officers of the Bureau of Investigation, North Bengal Alipurduar Zone. Finding discrepancies during inspection as envisaged under Section 68(1) of the Central Goods and Services Act, 2017 (hereinafter referred to as the CGST

Act) a case was registered with case no. APD/R/W/37/23-24 dated 21st April, 2023.

f) An order of physical verification in FORM GST MOV 02 was issued which was followed by vehicle verification of the conveyance in connection wherewith a physical verification report in FORM GST MOV 04 was also issued.

g) On 23rd April, 2023 an order of detention under Section 129(1) of the WBGST Act was passed by issuance of FORM GST MOV 06 stating that the goods were not covered by valid documents.

h) On 26th April, 2023, the Deputy Commissioner of Revenue, State Tax, Bureau of Investigation (North Bengal) Alipurduar Zone being the respondent no. 2 herein issued a show-cause (SCN) under Section 129(3) in FORM GST MOV 07 reiterating the observations made under the detention order.

i) The petitioner was directed to appear before the said Officer on 1st May, 2023. The petitioner challenged the order of detention by filing a writ petition being WPA 10607 of 2023 on 28th April, 2023.

j) By a judgment and order dated 19th May, 2023 the said writ petition was disposed of granting the petitioner liberty to make an application for provisional release of the seized goods in question along with the conveyance under the relevant provision of Section 129 of the WBGST Act within 7 (seven) days from the date of the said order.

k) The petitioner in compliance of the said order furnished a bond for provisional release of the goods in FORM GST MOV 08 along with bank guarantee on 25th May, 2023 the goods were thereafter released.

l) The respondent no. 2 on 3rd May, 2023 passed an order of penalty under Section 129(3) of the WBGST Act and issued a demand for the same.

m) Being aggrieved by and dissatisfied with the order of demand, the petitioner preferred a statutory appeal under Section 107 of the WBGST Act, 2017 on 5th June, 2023. The said appeal was registered as AD1906230017529.

n) The appeal was rejected by an order dated 27th September, 2023 issued in FORM GST APL 04.

o) The said appellate order dated 27th September, 2023 was challenged by the petitioner by filing WPA 85 of 2024. The said writ petition was allowed by a judgment and dated 1st February, 2024 by setting aside the order of the Adjudicating Authority affirmed by the Appellate Authority and directing the Adjudicating Authority to revisit the issue in the line of the discussion made in the said judgment and order and to pass a reasoned order.

p) Pursuant thereto, the Adjudicating Authority passed an order on 27th March, 2024 which is at page 89 of the writ petition holding that the petitioner is liable to pay a sum of Rs.9,93,008/- on account of penalty under Section 29(1)(a) of the WBGST Act.

q) Assailing the said order dated 27th March, 2024 the petitioner has filed this writ petition inter alia on the ground that the said order was passed in gross violation of the direction given by this Court vide its judgment and order dated 1st February, 2024 and the order impugned is therefor, illegal and not sustainable. The order impugned is according to the petitioner also erroneous and arbitrary.

II. Submission of the Petitioner:

1. The submissions of the petitioner can be summarized as follows:

i) The order impugned is without jurisdiction in as much as the same has been passed without following the directions given by this Court in the order dated 1st February, 2024 passed in WPA 85 of 2024.

ii) The Adjudicating Authority without deciding the matter afresh only reiterated its previous order in a mechanical manner which is against the spirit of the order dated 1st February, 2024.

iii) The Adjudicating Authority has no authority to assess the tax allegedly evaded in course of transit of the JCB from Arunachal Pradesh to Bihar and to impose penalty on that basis.

iv) The said JCB was being transported under a valid E-way bill. All details of the JCB and the relevant facts on the basis whereof the same was carried back to Bihar from Arunachal Pradesh was available in the portal on being entered at the time of generating the E-way bill. The Adjudicating Authority on having decoded the E-way bill by using the software application was in possession of all details. However, ignoring the same and in a colourable exercise of power has passed the order impugned demanding a huge sum on account of penalty.

v) The delivery challan which could not be produced at the time when the vehicle carrying the said JCB was intercepted had been produced subsequently. It cannot therefor be said that the documents as envisaged under Rule 138A of the WBGST Rules were not available thereby giving rise to the detention of the vehicle and adjudication of the penalty. There is no mismatch in the E-way bill and the delivery challan which can be construed as documents not in accordance with Rule 55 of the WBGST Rules for which the petitioner is liable to pay penalty.

2. The judgments reported in ***2023 157 Taxmann.com 112 (Prestress Steel LLP v. Commissioner, Uttarakhand State GST)*** passed by the High Court of Uttarakhand, the judgment reported in ***(2023) 109 GSTR 214 (Bharti Airtel Ltd. Vs. State of Uttar Pradesh and Others)*** passed by the High Court of Allahabad, the judgment reported in ***2022 SCC Online Cal 4529 (K.D. Gupta and Company and another vs. Assistant Commissioner of State Tax, Barrackpore Range and others)***. The order dated 16th June, 2023 passed in ***MAT 1032 of 2023 (Usha Martin Limited and Anr. Vs. The Deputy Commissioner of State Tax, Durgapur Range and Ors.)*** and the judgment and order dated 2nd May, 2024 passed in ***WPA 842 of 2024 (M/s. Maa Amba Builders & Anr. Vs. The Assistant Commissioner of Revenue, State Tax, Bureau of Investigation North Bengal HQ & Ors.)*** will clearly demonstrate that the order of the adjudicating authority is void, passed in erroneous appreciation of law and fact and is arbitrary. The order impugned therefor is required to be set aside.

III. Submission of the Respondents:

On behalf of Revenue, it is submitted that the vehicle on having been intercepted was not carrying the required documents as envisaged under Rule 138A of the WBGST Rules. As a result whereof the same was detained and a case was registered. The petitioner was issued a show-cause directing him to produce necessary documents. The petitioner apart from producing the E-way bill and an unsigned delivery challan prepared in the letterhead of B.G. Enterprise, Arunachal Pradesh did not produce any other documents. Even after being provided with an opportunity pursuant to the direction given by the order dated 1st February, 2024.

The written submission filed by the writ petitioner as the writ petitioner did not appear was duly considered and a reasoned order was passed dealing with all the contentions raised by the writ petitioner. The order impugned cannot therefore be said to be one without jurisdiction. The writ petition is also not maintainable in view of the alternative remedy available in form of an appeal under Section 107 of the WBGST Act.

The order impugned according to the Revenue is also in compliance with the statutory provisions. As the writ petitioner did not produce any document neither to show the acquisition price of the JCB nor its depreciated value or the alleged rental income, the Revenue has assessed the reasonable value of the JCB and computed the penalty.

This has also been done following the provisions of WBGST Act/CGST Act and the rules framed thereunder.

The Revenue had no other option but to compute the tax amount as envisaged under Section 129 of the WBGST Act treating the transaction attracting tax in terms of Section 7 read with second Schedule of the said Act.

The writ petition, therefor, is liable to be dismissed.

Decision with Reasons:

Rule 138 of the West Bengal Goods and Services Tax Rules, 2017 (hereinafter referred to as the WBGST Rules) provide for the information to be furnished prior to commencement of movement of goods and generation of E-way bill. Admittedly the JCB is a capital goods as under Section 2 (19) of the WBGST Act. The value of the JCB is required to be capitalised in the books of account of the petitioner if he intends to claim Input Tax Credit (in short ITC) as defined under Section 2 (63) and 2 (63) of the CGST Act on the ground that the same is being used or intended to be used in course of furtherance of business.

Section 143 of the WBGST Act enumerates how the accounts is required to be maintained in respect of job work procedure which the writ petitioner claims in the instant case to have been performed by it with the use of the said JCB. Relying upon the provisions of Section 143(1)(a) of the WBGST Act, the petitioner has contended that it is entitled to bring back inputs like the JCB after completion of job work to any of his place of business without payment of tax on completion of the job at the site where it had been sent.

The petitioner has also contended that the entire transaction of bringing the JCB from Arunachal Pradesh where it was sent for job work to its place of business at Bihar is a transaction which falls under the provisions of Section 143 (1) (a) of the WBGST Act.

The Revenue has not disputed this provision. The Revenue says that the said JCB was being transported without the documents as envisaged under Rule 138A of the WBGST Rules. This amounted to a violation of the procedure laid down under the WBGST Act or the CGST Act which attracts the provision of Section 129 of the WBGST Act. The writ petitioner is therefor, liable to pay applicable tax and penalty equal to 100 per cent of the tax payable on such goods.

Countering this argument of Revenue, the writ petitioner says that there was a valid E-way bill generated for the purpose of the transit of the said JCB. The delivery challan was also with the driver of the vehicle but could not be produced at the time when the vehicle was intercepted as he had misplaced the same. The delivery challan has been subsequently produced. There is as such no question of evasion of tax and the whole action of the Revenue is without jurisdiction. The order impugned is also passed in violation of the direction given by this Court in its judgment and order dated 1st February, 2024 passed in WPA 85 of 2024 and as such is without jurisdiction so the same can be challenged directly filling this writ petition instead of preferring an appeal under the provisions of Section 107 of the WBGST Act. The Appellate Authority failed to appreciate this fact and as such the order impugned dated 27th March, 2024 is liable to and should be set aside.

The alterative argument of the petitioner is that assuming without admitting that all the documents required under Rule 138A of the WBGST Rules were not there when the vehicle was intercepted but the same did not amount to violation of the provisions of Rule 138 as the requisite documents were produced before the authority concerned subsequently. In any event the E-way bill contained all requisite information. The incident can, therefore, be at the highest a bona fide mistake for which the petitioner can only be saddled with payment of an amount of Rs.25,000/- under the provisions of Section 129 (1)(b) of the WBGST Act.

Countering this, it has been submitted by the Revenue that in the E-way bill generated on 18th April, 2023 which was valid till 26th April, 2023 the GSTIN of the supplier was mentioned as Pisi Suriya Singhpo who is an unregistered person (in short URP). The delivery challan which was produced by the writ petitioner shows that the said JCB was released by DAMIK gameh, proprietor of M/s. B.G. Enterprise, Ghandhi Market, Daporijo, Arunachal Pradesh. The delivery challan is a letter written in the writing pad of M/s. B.G. Enterprise, Arunachal Pradesh and is not signed by the consignor or his authorised representative. The delivery challan so issued by M/s. B.G. Enterprise, Ghandhi Market, Daporijo, Arunachal Pradesh having GSTN no. 12BORPG6791N1Z8 even if is considered to be a valid document, the information given therein does not match with that of the E-way bill where the consignor is Pisi Suriya Singhpo.

The E-way bill therefor, did not contain the particulars as prescribed under Rule 55 of the CGST Rules and the WBGST Rules. The delivery challan is also not in conformity with such Rules. This gave rise to a doubt in the mind of the Revenue that the E-way bill was issued by an URP without mentioning the name of M/s. B.G. Enterprise from whom such JCB was released to conceal the actual transaction of the facts. It is, therefor, apparent according to the Revenue that the JCB was used by M/s. B.G. Enterprise to supply some services to some concealed person and was released by him for taking possession of such goods directly by the writ petitioner. Thereby a registered person has suppressed his inward supply of service availed from Akifa Infrastructure, Gaya, Bihar with its connivance. This doubt was therefor, required to be cleared and/or clarified by the writ petitioner. If the writ petitioner was the owner of the JCB and had sent the same to Arunachal Pradesh for job work then the writ petitioner will have the tax invoice of such JCB in its name, there will be an E-way bill by which the said JCB was taken to Arunachal Pradesh for job work as claimed by the petitioner. The income generated from such job work must be reflected in the books of the writ petitioner which would demonstrate that there has been no evasion of tax as doubted by the Revenue. The writ petitioner could have also produced the documents on the basis whereof the writ petitioner had performed the job work at Arunachal Pradesh with the said JCB and that it was being taken back on completion of such job work to its place of business.

The writ petitioner has not produced any of these documents and/or the relevant documents to show that the said JCB is owned by the writ petitioner and due tax for acquiring the same has been paid in order to use the said JCB in furtherance of its business. Assuming without admitting that the JCB was sent to Arunachal Pradesh on rental basis, then also the relevant documents relating to letting out of the JCB, the E-way bill by which the same was taken to Arunachal Pradesh and the rental income ought to have been reflected in the books of the writ petitioner. The petitioner in such a case would have documents either from Pisi Suriya Singhpo, Arunachal Pradesh or from M/s. B.G. Enterprise, Arunachal Pradesh for having let out the JCB for job work. The writ petitioner did not produce any such documents to clarify that there was no evasion of tax either from its end or from the end of B.G. Enterprise, a registered person by using the JCB belonging to the petitioner as suspected by the Revenue. On the contrary after having the goods released, the writ petitioner did not appear before the Adjudicating Authority in terms of the order dated 1st February, 2024 but had only sent a written notes of submission which did not disclose any new material despite getting an opportunity in terms of the order dated 1st February, 2024. The written submission filed by the writ petitioner has been duly considered by the Adjudicating Authority while passing the order impugned.

In Revenue jurisprudence, it is well-settled that the assessee/registered person is required to provide documents in case of any issue raised by the Revenue for necessary clarification. It was therefor, incumbent upon the petitioner to produce documents as discussed hereinabove to clarify the situation. Having not done so, the petitioner cannot fall back and say that the order impugned is bad in law or without jurisdiction. On the contrary, the bona fide of the petitioner is in doubt and the presumption of withholding relevant documents by the petitioner is also substantiated.

So far as the petitioner's contention that the order impugned is without jurisdiction as the Revenue under Section 129 of the WBGST Act does not possess the jurisdiction to assess tax is also unfounded as the said Section in itself has been clearly provides for the same in details. In absence of the transaction being showed as an exempted one, the Revenue has no other option to compute the penalty. In order to compute the applicable penalty, the Revenue has taken the value of the JCB to be Rs.27,000,00/-. The petitioner has also produced no documents to dispute such figure but only says that tax cannot be assessed which is an incorrect interception of the provisions of Section 129 of the WBGST Act. I, therefore, do not find any infirmity in such computation. I also do not find that the order impugned has been passed without following any direction given in the order dated 1st

February, 2024. The impugned order is a reasoned one passed after affording the writ petitioner a fresh hearing.

So far as the point of maintainability of the writ petition is concerned as raised by the Revenue on the ground of alternative remedy being available, I am inclined to give the petitioner the benefit as it has contended that the order impugned is without jurisdiction.

It is well-settled principle of law that alternative remedy is not an absolute bar for filing a writ petition particularly when the order is assailed as one without jurisdiction.

The judgment in **Vardan Associates** (supra), has clarified the position when a consignment is intercepted in course of inter-State movement and it is claimed that such consignment is exempted from payment of GST and in absence of proper documents imposition of GST and attendant penalty is justified both in law as well as in facts.

It is also not in doubt that stricto sensu an assessee/registered person cannot shirk from his responsibility of complying with the requirement of law to produce valid documents required under the Act and the rules framed thereunder on the consignment being intercepted.

The Hon'ble Supreme Court in the facts of the said case on considering that the act of the appellant in the said case was bona fide and did not amount to evasion of tax since the same was paid while the goods were transported from Uttar Pradesh to Durgapur had reduced the imposition of penalty.

The same treatment is not available to the writ petitioner in the facts of the instant case.

The judgments relied upon by the writ petitioner in **Prestress Steel** (supra), **K.D. Gupta** (supra), **Bharti Airtel** (supra) and **M/s. Maa Amba Builders** (supra) in view of the facts considered therein, has no manner of application to the petitioner's case although, there is no quarrel as to the ratio laid down therein. Each one of such judgments was passed considering the case which was before the Court and does not lay down any general principle to be followed in respect of a case considered herein.

The writ petition is accordingly dismissed.

Urgent photostat certified copy of this judgment and order, if applied for, be supplied to the parties on priority basis after compliance with all necessary formalities.

(ARINDAM MUKHERJEE, J.)