

**Calcutta High Court
In the Circuit Bench at Jalpaiguri
Appellate Jurisdiction**

Present :- Hon'ble Justice Amrita Sinha

WPA 321 of 2023

**Sandip Kumar Singhal
-versus
Deputy Commissioner, Revenue, Bureau of Investigation
North Bengal Headquarter & Ors.**

For the writ petitioner	:-	Mr. Sandip Choraria, Adv. Mr. Rajeev Parik , Adv. Ms. Esha Acharya, Adv.
For the State	:-	Mr. Subir Kumar Saha, AGP Mr. Bikramaditya Ghosh, Adv.
Heard on	:-	06.03.2023
Judgment on	:-	10.03.2023

Amrita Sinha, J.:-

The petitioner is aggrieved by the adjudicating order and the order passed by the appellate authority affirming the same by holding that the petitioner acted in contravention of Section 67(2) read with Section 129 of the State Goods and Services Tax Act, 2017 ('the Act' for short).

The goods of the petitioner were seized on 22nd February, 2022 at 2 pm. from a godown upon invoking the provision of Section 67(2) of the said Act. The order of seizure issued in Form GST INS-02 dated 22nd February, 2022 mentions that, on inspection of the goods under Section 67(1) of the Act and on scrutiny of the books of accounts, registers, documents/papers and goods found during inspection/search there were reasons to believe that the goods were liable to be confiscated and the same were seized by invoking power under Section 67(2) of the Act. A report of satisfaction that the goods were liable to be confiscated was prepared on the same date at 4.30 pm. The e-way bill status of the goods mentions that the e-way bill already expired on the date of inspection and seizure.

E-way bill was generated on 9th February, 2022 for transporting fifteen thousand kilograms of cumin seeds and the same was valid upto 20th February, 2022. The goods were dispatched from Gujrat and were to reach Siliguri, West Bengal. The goods were confiscated from a godown which the petitioner claims to be three kilometres ahead of the final destination point mentioned in the e-way bill.

Notice calling information under Section 129 of the Act was issued on 25th February, 2022 in the name of the transporter and the person in charge of the goods and the addressees were directed to appear in person or through authorized representative on or before 26th February, 2022 to show cause why tax and penalty will not be imposed for contravention of Section 129 of the Act. Hearing was conducted on 25th and 26th February, 2022 and the authorized representative of the addressees allegedly failed to explain the reason behind the expiry of e-way bills in respect of the goods lying in the godown.

The adjudicating authority opined that the goods were transported and stored while they were in transit in contravention of Section 129 of the Act and calculated the applicable penalty under Section 129 (1) (a) of the Act.

The petitioner, being the owner of the goods, submitted to the jurisdiction of the adjudicating authority and upon hearing the petitioner the adjudicating authority was of the opinion that the goods were transported in contravention of Section 68 of the Act and confirmed the penalty imposed under Section 129 (1)(a) of the Act. On payment of the penalty amount the goods of the petitioner were released.

Being aggrieved by the order of the adjudicating authority, appeal was preferred and the appellate authority affirmed the order passed by the adjudicating authority. The appellate authority observed that the RTP could have averted the proceeding had the transporter's godown been registered in the registration certificate as additional godown. The appellate authority was of

the further opinion that the RTP could have easily updated his e-way bill from his mobile app which was a trivial thing.

The petitioner specifically contends that the initial seizure was made under Section 67(2) of the Act whereas the penalty has been imposed under Section 129 of the Act. The same is impermissible in law.

Section 67 can be invoked in respect of goods stored in a warehouse or a godown which has escaped payment of tax or is likely to cause tax evasion. The same implies that the goods were in a static position inside a warehouse or a godown but not in transit. Section 129 can be invoked only in respect of goods and conveyances which are in transit.

The goods could not have been kept in the godown and be held to be in transit at the same time. The authority not being sure of the provision under which the penalty may be imposed, erroneously invoked the aforesaid provision, solely with the view to impose penalty upon the petitioner.

It has been contended that if the goods were inspected and seized in transit then provision of Section 68 ought to have been invoked and not Section 67, as has been done in the present case. Since Section 67 was invoked, Form GST INS 02 has been issued. Had the goods been in transit, then corresponding Form MOV had to be issued.

It has been submitted that there has been violation of principle of natural justice by not affording an opportunity of hearing to the petitioner prior to passing the order of penalty under Section 129 of the Act. The right to trade under Article 19(1)(g) of the Constitution of India has been infringed by the illegal seizure of goods.

There is no conclusive finding of the authority that the petitioner intended to evade payment of tax or the goods which were seized, escaped payment of tax. On the contrary, the appellate authority opined that it was a trivial lapse on the part of the petitioner for which, penalty equal to two

hundred percent of the tax payable on such goods ought not to have been imposed.

It has been argued that the time mentioned in the order of seizure and the report of satisfaction clearly implies that the authority, with a biased and determined mind, decided the issue and the reason for seizure is recorded after the seizure is actually made.

It has been stressed that it is only after the officer is satisfied that there are reasons to believe that the RTP intended to evade tax, can an order of inspection, search and thereafter seizure be made. In the present case, the seizure was made even before the officer came to the finding that inspection, search and seizure was necessary. The authority failed to make out a case that there has been any connivance between the buyer and the seller to evade payment of tax.

It has been admitted that the e-way bill was generated for transporting fifteen thousand kilograms of cumin seeds but due to shortage of storage space at the godown mentioned in the e-way bill, the petitioner had to offload the goods at a godown which is located just three kilometres ahead of the final destination. The petitioner, out of the aforesaid quantity, sold a part of the goods, and as such, at the time of search and seizure only 12,840 kilograms were found in the godown.

It is not the contention of the authority that the aforesaid 12,840 kilograms of cumin seeds is not the goods transported via the e-way bill generated on 9th February, 2022.

The petitioner alleges infringement of Section 129(4) of the Act. It has been argued that no opportunity was given to the petitioner prior to imposition of penalty under Section 129.

Reliance has been placed on the judgment delivered by the Hon'ble Supreme Court on 2nd March, 2023 in Civil Appeal Nos. 9597-9599 of 2011 in

Union of India & Ors. Vs. M/s. Magnum Steel Limited etc. and on an order dated 6th August, 2022 passed by the Hon'ble Allahabad High Court in Writ Tax No. 57 of 2020 in ***Mahabir Polyplast Private Limited Vs. State of UP & two Ors.***

Prayer has been made for setting aside the impugned orders and refund of the penalty amount collected contrary to law.

The respondent authority opposes the prayer of the petitioner. It has been submitted that the authority invoked Section 67(1)(b) as it was found that the petitioner was keeping goods in the godown on the basis of an e-way bill which had expired and thereafter seized the goods from the said godown.

It has been submitted that according to Section 67(7) of the Act, the authority may issue notice to show cause within a period of six months which can be further extended to another six months. In the instant case, the authority issued the order of seizure under Section 67(2) on 22nd February, 2022 at 2 pm and immediately at 4.30 pm. on the same date, recorded its satisfaction for invoking the aforesaid provision. There has been no delay on the part of the authority.

The goods that were seized from the disputed godown did not carry a valid e-way bill. The quantity of goods mentioned in the e-way bill relied upon by the petitioner, did not match the quantity of goods mentioned in the said e-way bill. The bill produced by the petitioner was issued in respect of fifteen thousand kilograms of cumin seeds whereas at the time of seizure only 12,840 kilograms of cumin seeds were found. The petitioner failed to produce any document in respect of the 12,840 kilograms of cumin seeds.

As the aforesaid quantity of cumin seeds was found without a proper e-way bill, the authority invoked the provision of Section 129(1)(a) of the Act and the petitioner, claiming to be the owner of the goods, was imposed penalty

equal to two hundred percent of the tax payable on such goods. There has been no error on the part of the authority in imposing the said penalty.

The person in charge of the goods and the transporter, both were issued notice under Section 129(4) and opportunity of hearing was given to them prior to imposition of penalty. After the petitioner stepped in and claimed to be the owner of the goods, a further opportunity was given to him prior to the imposition of penalty and thereafter the goods were released upon payment by the petitioner.

It has been denied that there has not been compliance of the statutory provision and the constitutional mandate. The petitioner had a fair opportunity to defend himself before the adjudicating and the appellate authority. He was unsuccessful before both.

Prayer has been made for dismissal of the writ petition.

I have heard and considered the rival contentions of both the parties.

From the documents annexed to the writ petition it appears that an e-way bill was generated in respect of the vehicle no. RJ04GC1737 on 9th February, 2022 for transporting fifteen thousand kilograms of cumin seeds by road from Gujrat to Siliguri. The e-way bill was valid upto 20th February, 2022. On receiving information about illegal storage of goods, the authority inspected a godown on 22nd February, 2022 where 12,840 kilograms of cumin seeds were found. The stock of the goods was assessed. The person in charge of the godown produced the tax invoice, consignment note and the e-way bill of the said goods.

On scrutiny of the aforesaid documents it was found that the goods were in order but the corresponding e-way bill expired. The authority was of the opinion that as the goods did not reach the end point as mentioned in the e-way bill, the goods were in transit. According to the respondent authority, the

goods ought to have been covered with valid e-way bills till the time of delivery to the recipient.

For determination of the value of the seized goods for computation of tax and penalty, the transporter and the person in charge of the goods in the godown were directed to appear for hearing on 26th February, 2022 as to why penalty under Section 129 of the Act would not be imposed. A proposed order under Section 129(3) of the Act was prepared and served upon the transporter and the person in charge of the goods and penalty under Section 129(1)(a) was imposed. Thereafter, when the petitioner disclosed himself as the owner of the goods, the authority invoked the provision of Section 68 and imposed penalty under Section 129(1)(a) of the Act.

From the order under Section 129(3) of the Act dated 28th February, 2022 it appears that though initially the authority invoked the provision of Section 67 and imposed penalty under Section 129, but later the authority shifted their stand and invoked Section 68 read with Section 129 of the Act.

Section 67(2) of the Act empowers the proper officer to confiscate goods, if secreted in any place, for evading payment of tax. The place may be searched and goods seized and the same shall be released on payment of applicable taxes. The proper officer, if has reasons to believe that the goods are stored in a warehouse or godown or any other place without paying tax or not paying requisite tax, may cause inspection, search and seizure. The provision relates to a particular 'place' where inspection, search and seizure can be made.

Section 129 deals with detention, seizure and release of goods and conveyances, 'in transit'. The said provision is to be invoked when the goods are in movement on a conveyance.

Here, the goods in question were not seized while in transit. They were seized from a godown, two days after the expiry of the e-way bill. The godown in question from where the goods were seized is approximately three kilometres

ahead, as claimed by the petitioner, from the final destination mentioned in the e-way bill. As the goods were seized from a godown, the authority issued the order of seizure in form GST INS 02.

The goods which were initially booked for shipment weighed fifteen thousand kilograms, whereas, at the time of seizure only 12,840 kilograms were found. The petitioner asserts that due to shortage of space for storage of such huge quantity of goods, the petitioner stored the goods in a separate godown which, inadvertently, was not mentioned in the e-way bill. Rest of the goods were sold. Receipt evidencing taking the godown on rent for storage of the goods upon payment of charges has been produced in Court.

When the goods were held to be in transit, then notice under Form GST MOV ought to have been issued. The authority, as an afterthought, held the goods to be in transit but, for reasons best known, did not issue either order or notice in Form GST MOV. There is no mention of any vehicle or conveyance for transporting the goods. Under the Act a specific form has to be applied in case of a particular offence. The nomenclature of the form is an indication of the offence committed by the RTP. Not issuing any order/notice in Form GST MOV makes it clear that the authority was satisfied that the goods were not in transit.

Admittedly, the goods were seized two days after expiry of the e-way bill on being offloaded and stored in a godown not mentioned in the e-way bill. The e-way bill is for the purpose of moving/transporting the goods from one place to the other. Law does not require a way bill to remain valid for such period the goods remain in the godown. The petitioner submits, with conviction, that the godown from where the goods were seized is the final destination and the goods were duly delivered to the recipient. The authority has not come up with a case that the goods ought not to have been offloaded and stored at the said godown but should have been transported to the place mentioned in the e-way bill.

The appellate forum took note of the entire issue and recorded in the impugned order that, the RTP could have averted the proceedings had the transporter's godown been mentioned in the registration certificate as additional godown and the same was a trivial thing to be done on the part of the RTP.

Despite the above finding, the authority erroneously opined that as the goods were yet to reach the final destination mentioned in the e-way bill, accordingly, the same may be treated as 'on transit'; for which the e-way bill ought to have been extended. The authority ought not to have imposed penalty without resorting to the proper provision.

From the facts of the present case and the documents on record it appears that, though the authority found the goods stored in the godown to be of a lesser quantity but the authority never questioned the identity and quantum of the goods apropos the expired e-way bill.

It is not the case of the respondent that the goods which were seized from the godown were not the goods which were transported by the expired e-way bill. On the contrary, the e-way bill number is recorded in the report filed by the concerned officer. The petitioner admits that the rest of the goods were sold out by him. It does not appear that the petitioner had the intention to evade tax as the petitioner already paid the taxable amount at the time of generation of the e-way bill. The authority has also failed to make out a case that there was any connivance between the buyer and seller in dealing with the goods without payment of necessary taxes.

It appears that though initially the authority invoked the provision of Section 67 but thereafter shifted stand and relied upon Section 68 read with Section 129 for imposition of penalty. The authority was in a fix as to which provision to invoke for imposition of penalty. At one point of time the goods were held to be stored in the godown without the proper documents and

without a valid e-way bill and immediately thereafter, the goods were held to be in transit. A single consignment of goods cannot be held to be stored in the godown and to be in transit, simultaneously, at the same time.

The rate of penalty depends upon the place or the conveyance from where the goods are seized, i.e, whether the goods are in transit or in the godown. The amount of penalty varies depending upon the offences committed.

The petitioner was certainly at fault in not recording the additional godown at the time of generation of the e-way bill, but at the same time, the petitioner ought not to be penalized with two hundred percent penalty for such trivial offence. As the goods were not confiscated while on the move, imposition of penalty under Section 129 of the Act is erroneous and bad in law. The aforesaid section cannot be relied upon to penalize the RTP when the goods are seized from a godown.

In *Magnum Steel* (supra) the Hon'ble Supreme Court held that the person authorizing the search must express his satisfaction that the material is sufficient for conducting a search and a reasonable belief that some objective material exists on the official record to trigger searches. The report of the proper officer is an unsatisfactory one, not enough to initiate search in the godown.

In *Mahabir Polyplast* (supra) the Court was of the opinion that provision of Section 129(3) of the Act would not be invoked to subject a godown premises to search and seizure operation. For invoking Section 67 of the Act existence of "reasons to believe" to subject the premises to search and seize goods is mandated. Here, the authority is vacillating between Section 67 and 68; whether the goods are in transit or in the godown.

In the case at hand it does not appear that the authority acted in accordance with the appropriate legal provisions and instead penalised the petitioner in a mechanical manner without proper application of mind.

In view of the above, the impugned order of the adjudicating authority and the appellate forum are liable to be set aside and, are accordingly, set aside. The respondent authority is directed to refund the amount collected from the petitioner as penalty positively within four weeks from the date of communication of this order.

It will, however, be open for the authority to assess the penalty, if any, payable by the petitioner for offloading goods and storing the same at a place not mentioned in the e-way bill.

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.)