

**IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
Civil Appellate Jurisdiction
Appellate Side**

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

M.A.T. No. 32 of 2023

With

IA No: CAN 1 of 2023

Asian Switchgear Private Limited

Vs.

**State Tax Officer, Bureau of Investigation, North Bengal,
Headquarters & Ors.**

For the Appellant : Mr. Boudhayan Bhattacharyya, Adv.
Mr. Anup Kumar Bhattacharjee, Adv.
Ms. Stuti Bansal, Adv.

For the State : Mr. Subir Kumar Saha, Ld. A.G.P.
Mr. Dilip Kumar Agarwal, Adv.
Ms. Rima Sarkar, Adv.

For the Respondent : Mr. Ratan Banik, Adv.
Nos. 4 & 6 Mr. Bishwa Raj Agarwal, Adv.

Hearing Concluded on : November 28, 2023
Judgement on : December 01, 2023

DEBANGSU BASAK, J.:-

1. Appellant has assailed the judgement and order dated March 3, 2023 passed by the learned Single Judge in WPA 340 of 2023. By the impugned judgement and order the learned Judge has dismissed the writ petition filed by the appellant challenging an order passed by the adjudicating

Authority and affirmed by the Appellate Authority imposing penalty under Section 129 (3) of the West Bengal Goods and Services Tax Act, 2017.

2. Learned advocate appearing for the appellant has submitted that, the appellant generated a valid e-way bill for transportation of electrical switches manufactured as per the requirement of Arunachal Pradesh Government. The appellant was transporting the electrical switches for delivery at Arunachal Pradesh through a vehicle which had suffered mechanical failure. On such vehicle suffering mechanical failure, the goods have been transported to a new vehicle. He has contended that, the mechanical snag of the first vehicle was unforeseen and beyond the control of the appellant. The subsequent vehicle had been intercepted and detained. He has contended that, the appellant did not have any intention to evade tax.

3. Learned advocate appearing for the appellant has contended that, the Adjudicating Authority overlooked the grounds put forth in the reply to the show cause notice. He has pointed out that, the Adjudicating Authority did not allude to the grounds of defence raised by the appellant in

reply to the show-cause notice. The Appellate Authority also did not allude to the same or to the grounds of appeal.

4. Learned advocate appearing for the appellant has submitted that, on the day when, the new vehicle had been intercepted, the registered e-way bill was still valid. Accordingly, penalty under Section 129 (3) of the Act of 2017 ought not to have been imposed.

5. In support of his contentions, learned advocate for the appellant has relied upon **2000 Volume 35 STA 41 (Cal) (DB) (Pannalal Mahabir Prasad & Another vs. State of West Bengal and Others)**, **2022 Volume 100 GSTR 160 (Cal) SB (Ashok Kumar Sureka vs. Assistant Commissioner, State Tax Durgapur Range, West Bengal)**, **2023 Volume 110 GSTR 179 (Cal) (SB) (Hanuman Ganga Hydroproject Private Limited vs. Joint Commissioner, State Tax, Authority Siliguri Circle and Another)**, **2023 Volume 113 GSTR 191 (Cal) (Sunil Yadav vs. Assistant Commissioner, Bureau of Investigation (North Bengal Headquarters and Ors.)**, **2023 Volume 108 GSTR 366 (Cal) (Ramji Jaiswal and Anr. Vs. State Tax Officer, Bureau of Investigation (South Bengal), Kharagpur Zone and Ors.)**, unreported decision of the Single Bench passed in **WPA 178 of 2023**

(Pushpa Devi Jain vs. Assistant Commissioner of Revenue, Bureau of Investigation North Bengal Headquarter and Others), 2023 Volume 113 GSTR 189 (Cal) (DB) (Pushpa Devi Jain vs. Assistant Commissioner of Revenue, Bureau of Investigation, North Bengal Headquarter and Others).

6. Learned advocate appearing for the appellant has relied upon ***2022 Volume 97 GSTR 218 (SC) (Assistant Commissioner (ST) and Others vs. M/s. Satyam Shivam Papers Pvt. Limited & Anr.)*** and ***2021 Volume 92 GSTR 154 (Satyam Shivam Papers Pvt. Ltd. Vs. Asst. Commissioner (ST) and Others)*** and contended that, provisions of Section 129 of the Act of 2017 had been construed therein and it was held that, explanation for non-compliance put forward should be considered and that in a given case, no penalty should imposed. According to him, in the facts and circumstances of the present case, the appellant was prevented by sufficient cause from non-compliance and therefore, no penalty should have been imposed.

7. Learned advocate appearing for the respondent has contended that, the appellant cannot set up the defence of non-compliance as done in the present case. He has referred to the Rules framed under the Act of 2017 and in particular to

Rule 138 (5) thereof. He has contended that, three persons were authorised to revalidate the existing e-way bill in the event of an unforeseen eventuality namely, the consignor, consignee and the transporter. None of them had revalidated the e-way bill in respect of the goods concerned. He has contended that, revenue authorities are not required to establish mens rea or motive so far as Section 129 of the Act of 2017 is concerned.

8. In support of his contentions, learned advocate for the State has relied upon **2006 Volume 5 SCC 361 (Chairman SEBI vs. Shriram Mutual Fund and Another)**, **2007 Volume 7 Supreme Court Cases 269 (Guljag Industries vs. Commercial Tax Officer)**, **2011 Volume 7 Supreme Court Reports 934 (Commissioner of Central Excise, Chandigarh vs. M/s. Doba Steel Rolling Mills)** and **2023 SCC OnLine SC 428 (State of Gujrat and Another vs. Saw Pipes Ltd.)**.

9. Appellant has claimed itself to be a manufacturer of electrical goods and to be registered under relevant statute in the State of Uttar Pradesh and under the provisions of the Central Goods and Services Tax Act, 2017.

10. Appellant has claimed that it entered into a contract with Flomore Limited of Uttar Pradesh for supply of specifically designed and customized electrical panel and ship them to the Department of Power, Government of Arunachal Pradesh through Power Grid Corporation of India Limited. Appellant has claimed that the goods in question was specifically designed suited and customized for the power grid maintained by the Government of Arunachal Pradesh and that such goods were of no other use except in such particular power grid.

11. Appellant has claimed that the goods had been moved from Kanpur, Uttar Pradesh to Itanagar, Arunachal Pradesh. The appellant had issued GST notice for the movement of the goods by road through states falling between Uttar Pradesh and Arunachal Pradesh. Appellant had appointed a transporter and handed over the consignment along with relevant documents and e-way bill to the transporter for delivery.

12. In e-way bill, as is required, the registration number of the vehicle transporting the goods had been registered.

13. The appellant has claimed that when the vehicle carrying the goods reached Jatiakali on National Highway 27

District, Jalpaiguri on June 19, 2022, it encountered a technical and mechanical failure preventing it from further movement. Consequently, the driver of the vehicle had in his wisdom decided to load the goods on another truck obviously bearing a different registration number. The appellant has claimed that, the driver of the first vehicle was ignorant of the legal requirements and therefore, did not initiate the process of generating a further e-way bill.

14. The Respondent No. 1 had detained the new vehicle with the goods of the appellant. The Respondent No. 1 had issued a pre-printed recorded statement of the driver in Form GST Mov – 01, dated June 19, 2022. The Respondent No. 1 had ordered for vehicle verification of the goods and documents in Form GST MOV- 02. The Respondent No. 1 had carried out physical verification in Form GST Mov - 04 dated June 20, 2022. In such report, the Respondent No. 1 did not find any description in the genuineness for the discrimination of the goods in conveyance with that of the e-way bill in the original vehicle.

15. The Respondent No. 1 had issued an order of detention in Form GST Mov – 06 on June 25, 2022. The Respondent No. 2 had issued a show cause notice dated June 23, 2022 as to

why tax and penalty will not be imposed under Section 129 (3) by Form GST Mov – 7. The appellant has claimed that the show cause notice was served electronically prior to June 26, 2022 on the appellant and that the date June 26, 2022 thereon has been endorsed when such notice was served physically on the driver on such date.

16. The appellant had submitted claim of ownership of the goods before the Respondent No. 1 by a letter dated June 22, 2022. The appellant had explained the chain of events leading up to the goods being found on the new vehicle. It had claimed that the e-way bill containing the registration number of the first vehicle was valid on the date of detention. The appellant has claimed that the letter dated June 22, 2022 is essentially a reply to the show cause notice.

17. The Respondent No. 2 had passed an order dated June 27, 2022 imposing penalty under Section 129 (3) against the appellant to the tune of 200 per cent amounting to Rs. 4,31,380.

18. The appellant had paid the amount of penalty being Rs. 4,31,280 without prejudice to its rights and contentions with regard to the demand. On payment of the penalty the goods and the vehicle had been released.

19. The appellant had thereafter preferred an appeal against the Adjudicating order dated June 27, 2022. Such appeal had been filed on June 13, 2022. A written submission had been filed on August 8, 2022. The appeal had been disposed of by an order dated December 12, 2022. Appellate Authority had concurred with the view of the Adjudicating Authority.

20. Appellant had assailed the order of the Adjudicating Authority and of the Appellate Authority by way of a writ petition which has resulted in the impugned judgement and order.

21. A learned Single Judge of this Hon'ble Court, has, in ***Ashok Kumar Sureka (supra)*** considered the provisions of Section 129 of the Act of 2017. There, the learned Single Judge has held that, since, the authorities could not make out a case that the violation was wilful and deliberate and since no specific material with regard to the intention of the delinquent for evading tax was placed, proceeded to grant relief to the delinquent. The judgement of the single Judge had been assailed in appeal and the Division Bench in ***Assistant Commissioner, State Tax Durgapur Range, West Bengal (supra)*** although did not interfere with the relief granted by

the learned Single Judge in **Ashok Kumar Sureka (supra)** proceeded to observe that, such decision have been rendered on the peculiar facts of the case and cannot be treated as a precedent.

22. Therefore, in our view, the appellant before us cannot take the assistance of the ratio of **Ashok Kumar Sureka (supra)** as upheld in appeal, as the Appeal Court therein has directed that the same should not be treated as a precedent.

23. In **Pushpa Devi Jain (supra)** the Single Bench has dismissed the writ petition, where, a challenge was thrown to the order passed by the Adjudicating Authority under Section 129 (3) of the Act of 2017 affirmed by the Appellate Authority. In appeal, the Division Bench has set aside the order of the Adjudicating Authority and the Appellate Authority including the order of the single Bench finding that, the vehicle was intercepted just beyond the expiry of the 8 hours time and there was no other allegation as against the defaulter. In such circumstances, the Division Bench has held that there was no lack of bonafide and that there was no wilful mis-conduct committed by the defaulter while transporting the goods.

24. **Sunil Yadav (supra)** has noticed the Division Bench of **Pushpa Devi Jain (supra)** and granted relief to the defaulter.

Both ***Pushpa Devi Jain (supra)*** and ***Sunil Yadav (supra)*** has proceeded on the basis that, the revalidation period of 8 hours fell on a Saturday and therefore, even if the application for revalidation of e-way bill was made the same in all likelihood could not have been revalidated on the same day.

25. The Supreme Court in ***M/s. Doba Steel Rolling Mills (supra)*** has observed that a taxing statute should be strictly construed. It has also observed that the intention of the legislature is primarily to be gathered from the words used in the statute and once it is shown that the assessee falls within the letter of the law he must be taxed howsoever great the hardship may appear to the judicial mind to be.

26. In ***Pannalal Mahabir Prasad & Another (supra)***, the Division Bench has considered the provisions of the West Bengal Sales Tax Act, 1994. In the facts of that case, it has been held that, there must be a motive established on facts or otherwise that a dealer had a motive to evade the payment of Sales Tax and that such motive gave rise to cause of action for the purpose of initiating penal proceedings.

27. Relevancy of motive in respect of imposition of tax liability to the extent that it results in civil liability has been examined by the Supreme Court in ***Shriram Mutual Fund***

and Another (supra), Guljag Industries (supra) and in **Saw Pipes Limited (supra)**. The Supreme Court has held in such authorities that, mens rea is not an essential ingredient for contravention of the provisions of a civil act. It has also held that, penalty is directed since the contravention of the statutory provisions as contemplated by a statute is established and therefore, the intention of the parties committing such violation becomes immaterial. The breach of civil obligations which attracts penalty under the provision of a statute would immediately attract levy of the penalty irrespective of the fact whether the contravention has been made by the defaulter with any guilty intention or not. In none of these three authorities the Supreme Court had the occasion to consider the provisions of the Act of 2017.

28. The Supreme Court, has considered the provisions of Section 129 of the Act of 2017 in **Assistant Commissioner (ST) & Ors. (supra)**. It has approved the view of the Telengana High Court rendered in **M/s Satyam Shivam Papers Pvt. Limited & Anr. (supra)**.

29. The Telengana High Court in **M/s Satyam Shivam Papers Pvt. Limited & Anr. (supra)** has construed provisions of Section 129 of the Act of 2017 and held that, it

was duty of the Adjudication Authority to consider the explanation offered by the defaulter. The High Court had found that there was no material before the Adjudication Authority to come to the conclusion that there was evasion of tax by the defaulter merely on account of the lapse of time mentioned in the e-way bill since, the Adjudicating Authority had no evidence of attempt to sell the goods to somebody else. It has held that, on account of non-extension of the validity of the e-way bill by the defaulter, no presumption can be drawn that there was an intention to evade the tax. Moreover, it was the duty of the Adjudicating Authority to consider the explanation as to why the goods could not have been delivered within time.

30. Parties have referred to Section 129 of the Act of 2017 which is as follows :-

“129. Detention, seizure and release of goods and conveyances in transit.- (1)Notwithstanding anything contained in this Act, where any person transports any goods or stores any goods while they are in transit in contravention of the provisions of this 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 to detention or seizure and after detention or seizure, 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 goods or twenty five thousand rupees, whichever is less, where the owner of the goods comes forward for payment of such tax and penalty;

(b) on payment of the applicable tax and penalty equal to the fifty per cent. of the value of the goods reduced by the tax amount paid thereon and, in case of exempted goods, on payment of an amount equal to five per cent. of the value of goods or twenty five thousand rupees, whichever is less, where the owner of the goods does not come forward for payment of such tax and penalty;

(c) upon furnishing a security equivalent to the amount payable under clause (a) or clause (b) in such form and manner as may be prescribed:

Provided that no such goods or conveyance shall be detained or seized without serving an order of detention or seizure on the person transporting the goods.

(2) The provisions of sub-section (6) of section 67 shall, mutatis mutandis, apply for detention and seizure of goods and conveyances.

(3) The proper officer detaining or seizing goods or conveyances shall issue a notice specifying the tax and penalty payable and thereafter, pass an order for payment of tax and penalty under clause (a) or clause (b) or clause (c).

(4) No tax, interest or penalty shall be determined under sub-section (3) without giving the person concerned an opportunity of being heard.

(5) On payment of amount referred in sub-section (1), all proceedings in respect of the notice specified in sub-section (3) shall be deemed to be concluded.

(6) 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:

Provided that where the detained or seized goods are perishable or hazardous in nature or are likely to depreciate in value with passage of time, the said period of seven days may be reduced by the proper officer."

31. Sub-Section (1) of Section 129 of the Act of 2017 has specified that goods and conveyance shall be liable to detention and seizure if the goods were in transit in contravention of the provisions of the Act of 2017 or the Rules made there under. It has also prescribed that, goods once detained or seized shall be released on payment of penalty for the amount specified in respect of the eventualities laid down therein.

32. Sub-Section (3) of Section 129 has laid down that, the proper officer detaining or seizing the goods or conveyance shall issue a notice of detention or seizure specifying the penalty payable and thereafter pass an order for payment of

penalty. Sub-Section (4) has specified that no penalty shall be determined under sub-Section (3) without giving the person concerned an opportunity of being heard. Sub-Section (5) has specified that on payment of the amount referred in sub-Section (1), all proceeding in respect of the notice specified under sub-Section (3) shall be deemed to be concluded. Sub-Section (6) has provided for the eventualities of evading to pay the amount of penalty specified under sub-Section (1) within the time period specified.

33. In the facts of the present case, the appellant had suffered a notice under Section 129 (1) of the Act of 2017 to which, there was a response dated June 22, 2022. The notice in Form GST Mov - 07 being a notice under Section 129 (3) of the Act of 2017, was undated. The response dated June 22, 2022, thereto, has referred to a subject of GST Mov - 2 dated June 19, 2022. However, GST Mov – 2 dated June 19, 2022 is not an order of detention. The order of detention is Form GST Mov -07 which has been undated in its soft version and a date of June 26, 2022 written on the left hand top corner on the hard copy thereof served on the driver of the vehicle.

34. It is trite law that, quoting of a wrong section or a wrong provision of law does not militate against the substance

of the response. The response of the appellant is dated June 22, 2022 and is a response to the notice of show cause. The Adjudicating Authority has failed to allude to the response dated June 22, 2022 or the contents therein. The Adjudicating Authority did not apply its mind to the response. The Adjudicating Authority has proceeded mechanically to find that, there has been a violation of the Act of 2017 and therefore, the appellant was liable to penalty.

35. The Telengana High Court in ***M/s. Satyam Shivam Papers Pvt. Limited & Anr. (supra)*** has held that, such a course of action is not available to an Adjudicating Authority under Section 129 of the Act of 2017 and such view was affirmed by the Supreme Court in ***Assistant Commissioner (ST) and Others (supra)***.

36. Sub-Section (3) of Section 129 of the Act of 2017 has a requirement of issuance of notice with sub-Section (4) thereof, mandating the Adjudicating Authority not to pass an order of penalty without affording an opportunity of hearing to the defaulter. Compliance of principles of natural justice is inherent in any adjudicating proceedings unless specifically ousted by a statute. In the present case, Section 129 (3) and (4) of the Act of 2017 require compliance with the provisions of

principles of natural justice prior to pronouncement of an order of penalty. Requirement of compliance with the principles of natural justice before passing an order of penalty ipso facto means that, the Adjudicating Authority has the jurisdiction to evaluate the merits of the defence taken and speak thereon. The mechanism provided under Section 129 of the Act of 2017 allows the Adjudicating Authority to accept the explanation given by a defaulter in given facts and circumstances and not to impose a penalty. The Adjudicating Authority has to consider the mitigating and aggravating circumstances, after affording the defaulter an opportunity of hearing and arrive at the finding whether there was a violation requiring imposition of penalty or not. Imposition of penalty cannot be said to be automatic given the mechanism provided for by the legislature in Section 129 (3) and (4) by affording an opportunity of hearing to the defaulter before imposition of the penalty.

37. By virtue of the authoritative pronouncement of the Supreme Court in ***Shriram Mutual Fund and Another (supra)***, ***Guljag Industries (supra)*** and ***Saw Pipes Limited (supra)*** the department has been relieved of the burden of proof of mens rea or motive in respect of a statute imposing

penalty as a civil obligation for violating a tax regime. However, absence of requirement to establish mens rea by the department cannot be equated with an automatic imposition of penalty under the scheme of Section 129 of the Act of 2017 in view of the provisions of Section 129 (3) and (4) thereof. A delinquent alleged to have violated a tax regime inviting imposition of penalty, nonetheless may have potential defences which would require consideration by the Adjudicating Authority. The delinquent may have a defence of reasonable cause in non-compliance. He may have set up a defence of impossibility of performance and adherence to the tax regime leading up to the default. He may have suffered a supervening event unforeseen and unavoidable making the compliance with the tax regime impossible or burdensome. Such defences set up have to be considered by the Adjudicating Authority. In short, the regime of imposition of penalty as envisaged under Section 129 of the Act of 2017 does not automatically result in the penalty of a violation of the tax regime stipulated without the Adjudicating Authority alluding to and deciding on the defences, if any, set up, by passing a reasoned order thereon.

38. In the facts of the present case, e-way bill in respect of the goods transported was yet to expire when, the new vehicle had been detained. The explanation given by the appellant that, the driver of the old vehicle did not know the law and therefore did not comply with the same and did not inform the appellant about the same, should have been evaluated, in the facts and circumstances of the present case, by the Adjudicating Authority in light of the e-way bill being valid till then in respect of the first vehicle. He has to deal with the defence raised by the defaulter by a reasoned order. That is the mandate of Section 129 (3) and (4) of the Act of 2017 read together. The Adjudicating Authority has not done so. The Appellate Authority has also overlooked such fact. In the appeal preferred, the appellant has reiterated its defence taken in the reply to the show cause notice dated June 22, 2022. Appellate Authority had the jurisdiction and in fact was obliged to deal with the grounds of appeal pressed at the hearing of the appeal. Respondent has not contended that, the defence canvassed in the show cause notice and the grounds pressed in the appeal were not canvassed or pressed by the appellant at the time of hearing before the Adjudicating or the Appellate Authority.

39. In such circumstances, we find that the impugned order of the Adjudicating Authority as upheld by the Appellate Authority to have violated the principles of natural justice, inasmuch as it has not spoken on the defence taken. Consequently, both the orders passed by them are set aside. The Adjudicating Authority under the Act of 2017 is directed to decide on the show cause notice, in light of the reply to the show cause notice dated June 22, 2022, afresh after giving an opportunity of hearing to the appellant through its authorized representative. Let such exercise be completed within a period of fortnight from the date of communication of this order.

40. In view of the discussions above, the impugned judgement and order of the learned Single Judge is set aside.

41. M.A.T. No. 32 of 2023 along with IA No: CAN 1 of 2023 are disposed of without any order as to cost.

[DEBANGSU BASAK, J.]

42. I agree.

[MD. SHABBAR RASHIDI, J.]