

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

HEARD ON: 21.07.2023

DELIVERED ON: 21.07.2023

CORAM:

**THE HON'BLE CHIEF JUSTICE T.S. SIVAGNANAM
AND**

THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

M.A.T. 1048 of 2023

With

I.A. No. CAN 1 of 2023

With

I.A. No. CAN 2 of 2023

Khadim India Limited

Vs.

**Assistant Commissioner, State Tax, Bureau of Investigation
South Bengal & Ors.**

Appearance:-

Mr. Anil Kumar Dugar

Mr. Rajarshi Chatterjee

.....for the appellant

Mr. Anirban Ray, Ld. GP

Mr. T.M. Siddique

Mr. S. Sanyal

.....for the State

JUDGMENT

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

In Re: I.A. No. CAN 2 of 2023

1. We have heard Mr. Dugar, learned advocate appearing for the appellant and Mr. T.M. Siddique, learned Government counsel appearing for the respondents.

2. There is delay of 75 days in filing the appeal. We have perused the affidavit filed in support of the petition and we find that sufficient cause has been shown for not being able to prefer the appeal within the period of limitation.
3. I.A. No.CAN 2 of 2023 is allowed and the delay in filing the appeal is condoned.

In Re: M.A.T. 1048 of 2023

4. This intra-Court appeal by the writ petitioner is directed against the order dated 2nd March, 2023 in W.P.A. 3798 of 2023. The appellant had challenged the order passed by the Deputy Chief Commissioner of Revenue, Howrah Zone, BI- South Bengal dated 22nd November, 2022 imposing penalty on the goods, which were imported by the appellant from Nepal.
5. The learned writ Court had admitted the writ petition on the ground of applicability of certain decisions of the Hon'ble Supreme Court and this Court, which are to be considered in the matter. However, it declined to pass any interim order and aggrieved by the same, the appellant has filed the present appeal.
6. With the consent of the learned advocates for the parties, the writ petition as well as the appeals are taken up for hearing and are disposed of by this common judgment and order.
7. The appellant had earlier approached this Court and filed a writ petition in W.P.A. 18655 of 2022 challenging the order passed by the respondent authorities detaining the vehicle, which was transporting the goods meant for the appellant on the ground that e-way bill had expired and also imposing penalty. The writ petition was entertained by order dated 23rd

August, 2022 but no interim orders were granted but the Court observed that it will be open to the respondent authorities to release the vehicle in question in accordance with law subject to statutory formalities to be complied with by the appellant.

8. Aggrieved by such order, the appellant preferred an intra-Court appeal in M.A.T. 1417 of 2022 and the appeal as well as the writ petition was disposed of by judgment and order dated 6th September, 2022 by directing the appellant to furnish a bond to the satisfaction of the respondent authorities in the appropriate forum to secure imposition of penalty, which was proposed in the show-cause notice. The goods along with the vehicle was directed to be released within 24 hours from the date of production of such bond.
9. The appellant was granted 15 days time to submit its reply to the show-cause notice and thereafter the concerned authority was directed to take up the show-cause notice for adjudication after affording an opportunity of personal hearing to the authorised representative of the appellant and pass a reasoned order on merits and in accordance with law.
10. Pursuant to such direction, the goods have been released upon execution of the requisite bond. The appellant had also submitted its explanation to the show-cause notice on 20th September, 2022. Thereafter the show-cause notice was adjudicated by the authority viz., the Deputy Commissioner of Revenue, Howrah Zone and an order has been passed on 22nd November, 2022 confirming the proposal in the show-cause notice, imposing penalty. Aggrieved by the same, the appellant had filed the writ petition.

11. As noted above, the writ petition was entertained. However, no interim order was granted. The learned Single Judge was fully justified in not granting any interim order since there was no scope for granting any interim order as the goods have already been released and if any interim order had been granted, it would amount to allowing the writ petition. Therefore, on that ground, the order impugned in the writ petition cannot be interfered.
12. However, since we have taken up the writ petition also for consideration, we took note of the submission of Mr. Duggar, learned advocate appearing for the appellant, who had submitted that the authority has failed to take note of the factual position in the instant case that when the vehicle was transporting the goods, it was hardly 30 kilometres away to reach the destination and there was no intention on the part of the appellant to evade the payment of tax and there was no reason for the authority to initiate proceedings under section 129 of the CGST Act.
13. The further submission of the learned advocate for the appellant is that though the appellant had placed reliance on the decision of the Hon'ble Supreme Court in the case of **Assistant Commissioner (ST) vs. Satyam Shivam Papers (P.) Ltd.** reported in [2022] 134 taxmann.com 241(SC) and in the case of **Assistant Commissioner, State Tax, Durgapore Range, Government of West Bengal** passed in **M.A.T. 470 of 2022** dated 12th May, 2022, the authority, which adjudicated the show-cause notice has not even adverted to those decisions nor rendered any finding as to the effect of those decisions on the facts and circumstances of the appellant's case.

14. Further, the learned advocate for the appellant placed reliance on the decision of this Court in the case of **Progressive Metals Pvt. Ltd. vs. The Deputy Commissioner, State Tax, Bureau of Investigation, South Bengal, Durgapur Zone & Ors** passed in **M.A.T. 562 of 2023 dated 28th April, 2023**. Therefore, it is submitted that the impugned order in the writ petition is liable to be set aside.
15. Mr. T.M. Siddique, learned Government counsel appearing for the respondent authorities submitted that the orders and directions issued by this Court in the earlier round of litigation were scrupulously complied with by the authority. Sufficient opportunity was granted to the appellant and thereafter an order of adjudication has been passed and against the said order, the appellant has an efficacious alternate remedy of filing an appeal before the appellate authority and without exhausting the same, writ petition was not maintainable.
16. We have elaborately heard the learned advocates for the parties. We are of the view that in order to take a decision in the matter, facts have to be gone into. The adjudicating authority has considered the facts and given his own reasoning as to how he is not agreeable to the submissions made by the appellant. The correctness of the decision taken by the original authority based on the facts and circumstances has to be adjudicated and when disputed questions of fact are involved, it is but appropriate for the appellant to invoke the appellate authority since the appellate authority will be able to re-appreciate the factual position and come to a conclusion.
17. Needless to state that if a decision is relied on by the assessee in support of his contention, there is a duty cast upon the original authority as well as

the appellate authority to deal with such decision and thereafter, render a finding. If the original authority has not even adverted to the effect of the decisions relied on by the appellant, it has to be deprecated as the adjudicating authority is bound to consider both the factual and legal submissions made by the assessee.

18. The judgment in the case of *Progressive Metals Pvt. Ltd. (supra)* is relied on by the appellant to show that the factual position in the said case was also more or less identical to the facts of the case on hand and the Court took note of the *bona fides* of the concerned appellant and thereafter granted relief.
19. In view of the language of section 129 of the WBGST Act, what is required to be considered is whether there was a contravention of the provisions of the Act. Apart from that, the conduct of the property can also be taken note of. This is precisely what was taken note of in the case of *Progressive Metals Pvt. Ltd. (supra)* and the Court came to the following conclusions:

“8. The revenue would rely upon rule 138 of the rules to state that the appellant ought to possess a valid e-way bill and admittedly when the vehicle was intercepted, time stipulated in the e-way bill had expired. Sub-rule (10) of rule 138 lays down the validity period for a e-way bill. The 2nd proviso in sub-rule (10) provides that in circumstances of an exceptional nature including trans-shipment, the goods cannot be transported within the validity period of the e-way bill. The transporter may extend the validity period after updating the details in Part B of FORM GST EWB-01.

9. The third proviso states that the validity of e-way bill may be extended within 8 hours from the time of its expiry. Thus, the rules give certain latitude and therefore, the conduct of the transporter is required to be examined bearing in mind that the rule itself provides for extension of the validity period of the e-way bill and the transporter has been given a latitude of 8 hours to seek for such extension.

10. If that benefit is granted to the appellant, then the delay would be about 1 hour and 35 minutes. Further, consignee Larsen & Toubro Construction had sent an e-mail on 15th May, 2022

stating that initially the goods were consigned to Kankora, Near Shantiniketan Road, Trilokchandrapur, Bud Bud, Panagarh, Durgapur, Barddhaman, West Bengal-713148. However, subsequently the consignee thought it to bring to another yard located at Degaule Avenue, Durgapur and the officer of consignee accordingly, communicated the same. The consignee also expressed regret for the inconvenience caused and requested them to deliver the material at initial address only i.e. Panagarh, Durgapur. Admittedly the vehicle was within the area of Durgapur and even as per the revenue department, the distance between the place where the vehicle was intercepted and Durgapur was about 20 kilometres. There is no other allegation against the appellant.”

20. In the light of the above, we are of the view that the appellant should file a statutory appeal and the appellate authority should consider the appeal petition both on facts as well as on law and after affording an opportunity of personal hearing to the authorised representative of the appellant, a reasoned decision shall be rendered on merits and in accordance with law.
21. In the result, the appeal and the connected application being IA. No. CAN 1 of 2023 are disposed of by directing the appellant to file a statutory appeal before the concerned appellate authority against the order dated 22nd November, 2022 and if the appeal is filed within a period of 30 days from the date of receipt of server copy of this judgment and order, the appeal shall be entertained and decided on merits without rejecting the same on the ground of limitation.
22. Since the appellant has already paid the entire penalty and has also furnished a bond for release of the goods, no pre-deposit shall be demanded from the appellant by the appellate authority for entertaining and hearing the appeal.

23. The appellate authority shall endeavour to decide the matter at the earliest, preferably within a period of 6 weeks from the date on which personal hearing is concluded.
24. Needless to state that the Court has not gone into the merits of the case and it will be open to the appellant to canvass all factual and legal points before the appellate authority.
25. In the light of the above order, no coercive action shall be initiated against the appellant for recovering the penalty, which has been levied on the appellant by the original authority till the appeal is filed and the appellant is granted liberty to pray for appropriate interim orders before the appellate authority.
26. No costs.
27. 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.)