

IN THE HIGH COURT OF KARNATAKA
KALABURAGI BENCH

DATED THIS THE 5TH DAY OF AUGUST, 2020

PRESENT

THE HON'BLE MR.JUSTICE B. A. PATIL

AND

THE HON'BLE MR.JUSTICE HANCHATE SANJEEVKUMAR

WRIT APPEAL Nos.200011-13/2020 (T-RES)

Between:

1. The Secretary to Govt.
Department of Finance
M.S. Building
Bengaluru-560 001
2. The Commissioner of
Commercial Taxes
Vanijya Therige Karyalaya
Gandhinagar
Bengaluru-560 009
3. The Commercial Tax Officer
(Enforcement-02, Government Building
Afzalpur Tekke
Vijayapur-586102
4. The Assistant Commissioner of
Commercial Taxes (Enforcement)
Vijayapur,
Government Building
Afzalpur Tekke
Vijayapur-586102

5. The Joint Commissioner
Of Commercial Taxes (Enforcement)
North Zone
Sumoulya Soudha
Club Road
Belagavi-590 001

... Appellants

(By Sri Vikram Huilgol, AGA)

And:

1. M/s. K.S. Arcanut Stores
Represented by its Proprietor
Mr. Sainulbid K.H.
S/o Mr. Hamsa
Aged about 21 years
R/o Door No.XI/229
Chalissery Road
Perumannur-679536
Kerala State
2. M/s. T.K.K.Traders
Represented by its Proprietor
Mr. T.K.Koya
S/o Mr. Kunjahammed Haji
Aged about 61 years
R/o Havanoor
Thrikannalpuram
Maliapuram-679571
Kerala State
3. Mr. V.N. Nirmalan
S/o Mr. Narayanan Nair
Aged about 51 years
Residing at Payyazhi
Chengattil House, Vattendas Post
Koottanand, Palakkad District-679533

... Respondents

(By Sri Arvind Kamath, Senior Advocate for
Smt. Veena J. Kamath, Advocate for C/Respondents)

These Writ Appeals are filed under Section 4 of the High Court Act, 1961, praying to call for records, allow the writ appeal and set aside the order dated 25.10.2019 passed by the learned Single Judge of this Court in Writ Petition Nos.19098/2019 and 19722-19723/2019 (T-RES).

These appeals having been heard and reserved for judgment on **28.07.2020**, coming on for pronouncement of judgment this day, **B.A.Patil J.**, delivered the following:-

JUDGMENT

This intra Court appeal has been preferred by the State challenging the order passed by learned Single Judge in Writ Petition Nos.19098/2019 and 19722-19723/2019 (T-RES).

2. We have heard Sri Vikram Huilgol, learned Additional Government Advocate appearing for the appellants and Sri Aravind Kamath, learned Senior Counsel appearing on behalf of Smt. Veena J. Kamath for the respondents.

3. The factual matrix of the case are that Vigilance Cell of Commercial Tax intercepted the goods conveyance bearing No.KL-48/H-3892 which was

carrying arecanut on 30.01.2019 at about 5.35 p.m. at Bagalkot road. The driver in charge of the goods conveyance tendered the invoice for verification and as per the invoice No.A189 dated 23.01.2019 the consignor was M/s. T.K.K.Traders, Kerala, GSTIN-32AFOPK 7597P1ZF and consignee has been shown as A.V. Traders, Maharashtra with GSTIN-27BRYP A0538F1ZQ and arecanut of Rs.5,38,000/- with waybill bearing No.521081341498 another invoice bearing No.A42 dated 23.01.2019 consignor has been shown as K.S. Arecanut Stores, Kerala with GSTIN-32AXFPH1073 C1Z6 and consignee as Akkino Traders, Maharashtra GSTIN-27ACVPT6266E1ZV arecanut of Rs.30,87,000/- with waybill bearing No.531081339649. It is further alleged that on verification of the said document it is noticed that the driver of the goods vehicle has taken 5 days to reach from Tumkur to Vijayapura and the statement of the driver was recorded which reveals that the vehicle has been loaded with 300 bags (each bag

containing 70 kg of arecanut) from M/s. K.S. Arecanut stores, Chalissery Road, Perumannur, Palakkad, Kerala and he has further stated that another 40 bags of arecanut, each bag containing 75 kg belonging to M/s. T.K.K. Traders, Kerala has been received through LMV and same has been loaded in the goods container but the said statement was not substantiated with any document of evidence and he has started the journey on 24.01.2019 at about 10.49 p.m.

4 It is further alleged that the arecanut is most evasion prone commodity and the driver taking deviation route of more than 145 kms than the usual route, clandestine approach of the driver indicated is suspicion. Subsequently, the said goods have been taken possession and both the consignors have been summoned to appear before the Officer. By providing opportunity and after recording the statement and perusal of the documents, a finding was given that the

goods were not loaded at Kerala but the same has been taken somewhere in Karnataka as there is no processing units present at Kerala and there was absence of inward supply details in the business premises at Kerala and the goods under transit did not originate from Kerala. The goods under transit are nowhere related to documents tendered nor belongs to both the respondents shown in the consignment. Subsequently, the owner of the conveyance came forward and discharged the fine of Rs.3,20,000/- under Section 130 (2) of the Central Goods and Services Tax Act, 2017 (hereinafter for brevity referred to as 'Act') and in pursuant to the payment of fine the conveyance was released on 16.05.2019, however, the owner of the goods did not come forward to discharge the tax penalty and as such the goods were confiscated and stored in the warehouse on 16.05.2019. Subsequently, after following the procedure, auction was conducted on 19.07.2019 and the successful bidder bid it for

Rs.75,44,799/-. Challenging the order dated 01.02.2019 as per Annexure-A and another order dated 25.02.2019 as per Annexure-A1 and 11.04.2019 as per AnnexureA2, the respondents filed the writ petitions.

5. The learned Single Judge after hearing both the sides, permitted the petitioners to pay the applicable tax and penalty equal to 100% of the tax payable on such goods as per Section 129 of the Act. He further ordered that on such payment sale proceeds of Rs.75,33,620/- shall be returned to the petitioners and the respondents can collect the applicable tax from the petitioners as determined under Section 129 (1) (a) of the Act and to return the balance amount out of Rs.75,33,620/- to the petitioner. Challenging the same the Government is before this Court.

6. It is the submission of learned Additional Government Advocate that the learned Single Judge ought not have exercised the extra ordinary jurisdiction

under Article 226 of the Constitution of India when the respondents had efficacious and alternative remedy by way of an appeal under Section 107 of the Act. It is his further submission that the impugned order is erroneous. As far as merits of the case is concerned, the only order that could have been passed is to pay the applicable tax and penalty equal to 100% of the tax payable on such goods as per Section 129 of the act. But the refund of the amount excess after deducting the tax itself is not correct.

7. He further submitted that even though there is no prayer for payment of the penalty and refund of the amount, the learned Single Judge has exceeded his jurisdiction and passed the impugned order. It is his further submission that when the ownership of the goods itself is questioned and the same has to be determined before the payment of the tax and the return of the amount, until and unless the validity and

genuineness of the transaction is heard and decided the learned Single Judge ought not have passed the impugned order. It is his further submission that the circular referred does not determine the ownership of the goods. Until and unless the valuation and ownership is determined along with the tax which has to be paid, under such circumstances if any excess amount is there, the balance amount has to be returned. It is his further submission that the respondents have involved in an evasion of tax. The learned Single Judge by misconceiving Section 129 of the Act has passed the impugned order. It is his further submission that as per Section 129 of the Act it has got two legs, one is under Section 129 (1) (a) of the Act. The owner of the goods has to take shelter under Section 129(1) (a) of the Act and the other persons who were in possession have to take shelter under Section 129 (1) (b) of the Act. When the appellants have rejected the documents tendered by the person in charge and has

passed the order under Section 129 (1) (b) of the Act, the learned Single Judge had no occasion to take shelter under Section 129 (1) (a) of the Act. It is his further submission that the auction proceedings have not been challenged by the respondents. Under such circumstances, the order which has been passed is not sustainable in law and the same is liable to be set aside. On these grounds he prayed to allow the appeals.

8. *Per contra*, it is the submission of the learned Senior Counsel for the respondents that the goods which were under transit was accompanying the consignments receipts of the said goods along with necessary waybills and even a notice has been also issued to the consignee and they are entitled to get the goods released under Section 129 of the Act on payment of applicable tax and penalty equal to 100% of the tax payable on such goods. Even the learned counsel for the respondents filed a memo to the effect that he will

accept the order passed by the appellants but he is ready to pay the penalty as per Section 129 (1) (a) of the Act and the learned Single Judge order with regard to the refund of the excess amount out of the auctioned amount has to be refunded to the petitioner/respondent. It is his further submission that respondents being the rightful owners of the goods would get back the balance amount. The learned Single Judge after taking into consideration the said aspect has passed the impugned order. There is no illegality or irregularity in passing the impugned order. On these grounds he prayed to dismiss the appeals.

9. We have carefully and cautiously gone through the submissions made by the learned counsels appearing for both the parties.

10. On perusal of the copy of the writ petitions, the respondents have challenged the order of detention passed under Section 129(1) dated 01.02.2019 as per

Annexure-A and also order dated 25.02.2019 passed by respondent No.3 under Section 129 (3) of the Act as per Annexure-A1 and they have also challenged the order dated 11.04.2019 passed under Section 130 (1) of the Act which has been produced at Annexure-A2. On perusal of the order of the learned Single Judge, he has not determined whether the impugned orders which were under challenge were sustainable in law or not. Until and unless the validity of the order is either upheld or quashed, no other ancillary relief can be given to the petitioners. When it is the specific contention of the Government that the goods which have been carried in conveyance is not belonging to the respondents and they are not the owners, then under such circumstances, the learned Single Judge ought not to have passed the order under Section 129 (1) (a) of the Act. For the purpose of brevity we quote Sections 129 and 130 of the Act, which reads as under:

“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.”

130. Confiscation of goods or conveyances and levy of penalty –

(1) Notwithstanding anything contained in this Act, if any person—

(i) supplies or receives any goods in contravention of any of the provisions of this Act or the rules made thereunder with intent to evade payment of tax; or

(ii) does not account for any goods on which he is liable to pay tax under this Act; or

(iii) supplies any goods liable to tax under this Act without having applied for registration; or

(iv) contravenes any of the provisions of this Act or the rules made thereunder with intent to evade payment of tax; or

(v) uses any conveyance as a means of transport for carriage of goods in contravention of the provisions of this Act or the rules made thereunder unless the owner of the conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance,

then, all such goods or conveyances shall be liable to confiscation and the person shall be liable to penalty under section 122.

(2) Whenever confiscation of any goods or conveyance is authorised by this Act, the officer adjudging it shall give to the owner of the goods an option to pay in lieu of confiscation, such fine as the said officer thinks fit:

Provided that such fine leviable shall not exceed the market value of the goods confiscated, less the tax chargeable thereon:

Provided further that the aggregate of such fine and penalty leviable shall not be less than the amount of penalty leviable under sub-section (1) of section 129:

Provided also that where any such conveyance is used for the carriage of the goods or passengers for hire, the owner of the conveyance shall be given an option to pay in lieu of the confiscation of the conveyance a fine equal to the tax payable on the goods being transported thereon.

(3) Where any fine in lieu of confiscation of goods or conveyance is imposed under sub-section (2), the owner of such goods or conveyance or the person referred to in sub-section (1), shall, in addition, be liable to any tax, penalty and charges payable in respect of such goods or conveyance.

(4) No order for confiscation of goods or conveyance or for imposition of penalty shall be issued without giving the person an opportunity of being heard.

(5) Where any goods or conveyance are confiscated under this Act, the title of such goods or conveyance shall thereupon vest in the Government.

(6) The proper officer adjudging confiscation shall take and hold possession of the things confiscated and every officer of Police, on the requisition of such proper officer, shall assist him in taking and holding such possession.

(7) The proper officer may, after satisfying himself that the confiscated goods or conveyance are not required in any other proceedings under this Act and after giving reasonable time not exceeding three months to pay fine in lieu of confiscation, dispose of such goods or conveyance and deposit the sale proceeds thereof with the Government.

11. A close scrutiny of Section 129 (1)(a) of the Act indicates that if the owner come forward to pay the

tax payable on such goods equal to 100% of the tax payable, then Section 129 (1)(a) of the Act is attracted. But when already the appellants have passed an order under Section 129 (1)(b) of the Act, by rejecting the documents tendered by the person in charge, until and unless that order is set aside, no order can be passed under Section 129 (1)(a) of the Act. Even for the order under challenge under Section 130 (1) of the Act some order ought to have been passed. The learned Single Judge without looking into the said provisions, by taking shelter under Section 168 of the Act gone into the circular issued on 31.12.2018 and passed the impugned order.

12. Taking into consideration the above aspects of the matter, without expressing anything on the merits of the case, the impugned order is not in consonance with the provisions of law. Firstly he has to say whether the orders passed by respondent –

Government are in accordance with law or not. Then, if it is not in accordance with law, he has to set aside the same, then pass the suitable order. By keeping pending those orders, whatever order has been passed is not sustainable in law. It appears to be contrary to each other. The orders passed by the Government remain intact and learned Single Judge passes order under Section 129(1)(a) of the Act. In that light, it requires interference at the hands of this Court. If the matter is remitted to consider afresh all the issues which have been raised by both the parties, then thereafter to pass suitable order, it would meet the ends of justice. In that light, we pass the following:

ORDER

The appeals are ***allowed***, the impugned order passed in W.P.Nos.19098/2019 and 19722-19723/2019 dated 25.08.2019 is set aside and the matter is remitted to the learned Single Judge for

considering afresh all the points and to pass an order in
accordance with law.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

swk