(2012) 12 KL CK 0084

In the High Court Of Kerala

Case No : W.A. No. 2098 of 2012

M/s. Siemens Limited — APPELLANT

Vs

Commercial Tax Inspector and Others — RESPONDENT

Date of Decision : 07-12-2012

Acts Referred:

Kerala Value Added Tax Act, 2003 — Section 47, 47(2), 47(8)

Citation : (2013) 1 ILR (Ker) 399 : (2013) 2 KLJ 313

Hon'ble Judges : K.M. Joseph, J;K. Harilal, J

Bench : Division Bench

Advocate : Jose Joseph, for the Appellant; Bobby John (Government Pleader), for the Respondent

Judgement

K.M. Joseph, J.—Appellant is the Writ Petitioner. It is a manufacturer-cum-dealer of medical equipments, electronic and electrical equipments etc. Proceedings were initiated u/s 47 of Kerala Value Added Tax Act (hereinafter referred to as ''the Act''). A consignment of medical equipment was detained. The appellant furnished Bank Guarantee for the security amount demanded and the consignment was released. Thereafter notice was issued that adjudication was going on. The Writ Petition was filed seeking the following relief:

Issue a writ of mandamus or any other appropriate writ or order restraining the 1st and 2nd respondents from encashing/enforcing Ext. P-22 Bank Guarantee furnished by the petitioner before expiry of 30 days from the date of service of any order imposing penalty on conclusion of the enquiry/adjudication in O.R. No. 1546/3/11-12, CTCP Walayar pursuant to Ext. P-24 & P-25 notices or any subsequent notices.

The learned Single Judge found that prayer is untenable. It is further found that it is premature to assume that an order be passed against the petitioner and that the departmental authority will act illegally and invoke the bank guarantee. It is further found that on the other hand, if the order is adverse to the appellant, it is for them to file and seek stay from the appellate authority. It is also possible for them to approach this court at that stage and seek appropriate protective orders. On these reasons, the writ petition as filed, was found to be unsustainable and it was dismissed.

2. We heard learned counsel for the appellant and also the learned Government Pleader.

3. According to the appellant, from the past experience, the appellant apprehends that the second respondent will pass order of penalty and proceed to encash/enforce the bank guarantee without serving the order and without granting time which is provided under law. Annexure 1 purports to be an order by the officer imposing penalty on the appellant on an earlier occasion. The order is dated 29-4-2006. The order reveals that the officer has apart from imposing the penalty, ordered that the security which was collected from the appellant be converted into penalty. The Bank was to make immediate arrangement to forward the DD within three days of the receipt of the order. Annexure 2 dated 7-6-2007 is a letter from the Sales Tax Officer to the appellant company with a copy to the manager referring to Annexure 1 order inter alia and noting that the appellant has not remitted the penalty amount till date and to make the arrangements to forward the DD for Rs. 21 Lakhs within three days from the receipt of the letter inter alia.

4. Learned counsel for the appellant drew our attention to Section 47(8) of the Act, which reads as follows:

47. Procedure for inspection of goods in transit.--(8) If the owner of the goods or his representative or the driver or other person in charge of the vehicle or vessel does not furnish security or execute the bond as required under sub-section (2) within fourteen days from the date of stopping the vehicle or vessel under sub-section (1), the officer referred to in that sub-section may, by order, seize the goods, and in the event of the owner of the goods not paying the penalty imposed under sub-section (6) within thirty days from the date of the order imposing the penalty, the goods seized shall be liable to be sold for the realisation of the penalty in the manner provided in sub-section (11).

He further brought our attention to provision contained in Rule 67 (9) of the Rules made in the Act, which reads as follows:

67. Procedure for inspection of goods in transit.--(9) Where the penalty is not paid within the time specified in sub-section (8) of Section 47--

(a) if cash security has been furnished or when the goods seized have been sold under sub-section (12) of Section 47 and the amount deposited in Government Treasury, the officer authorised under sub-section (5) of Section 47 shall adjust the amount towards the penalty imposed and the expenses and incidental charges to be recovered and refund the excess if any;

(b) if any other security or a bond has been furnished, the officer shall take steps to realize the amount of penalty imposed from the security and adjust the same towards the penalty and expenses and incidental charges.

5. Therefore, according to him, the law is clear that when security is furnished and if the penalty is imposed, then there must be a waiting period of 30 days and if penalty is not paid then alone can the security be enforced.

6. Per contra the learned Government Pleader would submit that the provisions of sub-section 8 of Section 47 deal with a case where the goods are seized and there after a penalty is imposed. In other words, only in a case where when goods had been seized and penalty is imposed the law contemplates the waiting period of 30 days before further steps are taken by way of sale of seized goods for the realisation of penalty in the manner provided in sub-section 11. In this case, it is contended by learned Government Pleader that goods have admittedly not been seized. Learned Government Pleader would submit that the Rules must be interpreted in a harmonious fashion with the provisions of parent Act and on the basis of the said interpretation, the appellant may not be entitled to the benefit of waiting period mentioned in sub-section 8 of Section 47. He would also point out the difficulty which is likely to be encountered by the department, namely that if there is a waiting period of 30 days, even in a case where security is furnished, the party will immediately file appeal and orders of stay will be obtained and the matter will be kept pending and orders of penalty will not be implemented. He also contended that in case cash security is given, it is to be converted as penalty and there is no waiting period as provided under the Act.

7. Next, he would draw our attention to sub-rule 8 of Rule 67. Rule 67(8) reads as follows:

67. Procedure for inspection of goods in transit.--(8) Where an order imposing penalty has been passed and the owner of the goods or his representative or the driver or other person in charge of the vehicle or vessel has paid the amount of penalty together with the expenses and other incidental charges for keeping the goods seized in custody and for the service and publication of the notice under sub-section (6) and (10) of Section 47 and the order under clause (d) of sub-rule (7) of this rule to the Officer imposing the penalty, such officer shall pass an order directing the release of the goods seized or of the security or bond furnished, as the case may be.

8. We are of the view that there is no merit in the contention raised by learned Government Pleader. Section 47 comes under the heading ''Procedure for inspection of goods in transit''. It inter alia provides that the driver or the person is to stop the vehicle when so required by the officer so that documents may be verified. We consider sub-section (2) as interconnected with sub-rule 8 of the Rule and hence we refer to the same:

47. Procedure for inspection of goods in transit.--(2) If such officer has reason to suspect that the goods under transport are not covered by proper and genuine documents (in cases where such documents are necessary) or that any person transporting the goods is attempting to evade payment of the tax due under this

Act, he may, for reasons to be recorded in writing, detain the goods and shall allow the same to be transported only on, the owner of the goods or his representative or the driver or other person in charge of the vehicle or vessel on behalf of the owner of the goods, furnishing security for double the amount of tax likely to be evaded, as may be estimated by such officer:

Provided that such officer may, if he deems fit, having regard to the nature of the carrier or the goods and other relevant matters, allow such goods to be transported on the owner of the goods or his representative or the driver or other person in charge of the vehicle or vessel executing a bond with or without sureties for securing the amount due as security:

Provided further that where the documents produced in support of the transport of goods evidence defects of a minor or technical nature and the goods are owned by a dealer registered under this Act, such officer may allow the goods to be transported after realising the tax on the turnover of the goods under transport.

9. In our view Section 47(2) contemplates power with the officer to detain the goods and goods so detained can be transported only on the owner of the goods or his representative or the driver or other person in charge of the vehicle on behalf of the owner of the goods, furnishing security for double the amount of tax likely to be evaded. No doubt, the provisos contemplates transport being permitted on executing a bond with or without sureties for securing the amount due as security and also goods being permitted to be transported after realising the tax on the turnover of the goods under transport. Thereafter sub-rule (8) contemplates the situation where the owner of the goods or his representative or the driver or other person in charge of the vehicle does not furnish security or execute bond as required under sub-section (2), to which we have already referred, within 14 days from the date of stopping the vehicle. In such an event, the Officer may, by order, seize the goods and if the penalty is imposed, he must wait for a period of 30 days and see whether the person is paying the penalty or not. If the penalty is not paid, then alone he can proceed to get the penalty realised by way of sale of seized goods. Thus Section 47 contemplates initially detaining the goods. The goods which are detained may be released u/s 47(2) on furnishing security or bond or on realisation of tax as the case may be. It is in respect of goods which are detained, and which have not been got released on furnishing security, that the Officer can seize the goods. Therefore, obviously detaining and seizing goods are two different concepts. But the question which we are concerned with is whether the waiting period of 30 days mentioned in Section 47(8) is confined only to cases where the goods are seized. Goods are seized, as we have already noted for the reason that party concerned has not furnished the security. In a case where the party furnishes security, the goods which have been detained will be released and therefore they will not be available for the Government Officer to seize. But the pertinent question is whether having regard to Rule 67(9) it could be argued that the Government

Officer need wait for a period of 30 days from the order of penalty only in a case where goods have been seized. Rule 67(9) which we have extracted, is unambiguous in its opening words that it contemplates a case where penalty has not been paid within the time-limit under sub-section 8 of Section 47. In other words, sub-rule 9 contemplates action under clause (a) and (b) only in a case where penalty is not paid within the time specified under sub-section 8 of Section 47. Learned Government Pleader does not have a case that any other time-limit is mentioned in Section 47(8) other than the period of 30 days. Therefore, the time-limit of 30 days mentioned in Section 47(8) is imported into sub-rule 9 of Rule 67 and the Rule maker contemplates that only if penalty is not paid within the time specified in sub-rule (8) can cash security which has been furnished be adjusted against penalty under sub-rule (a). Likewise under clause (b), if any other security or bond has been furnished, the Officer is to take steps for realising the amount from the security and adjust the same towards penalty, and expenses and incidental charges after the waiting period is over. In other words, without waiting for the expiry of the period mentioned in Section 47(8), even if the goods have not been seized, and on the other hand the goods have been released u/s 47(2) on furnishing either cash security or any other security, the security can be enforced only after the expiry of 30 days. This is the unambiguous declaration of law, contained in the Rules.

10. We consider that the conclusion we have so arrived at is in no way unwarranted, having regard to sub-rule (9) of Rule 67. Sub-rule (8) of Rule 67 which we have already extracted deals with a case where on the basis of order of penalty. However, we are contemplating a situation where the penalty is not paid. As to what will happen if the penalty u/s 47 is not paid and the goods are not seized, is a matter which is squarely covered by Rule 67(9).

11. We are not also impressed by the contention raised by the learned Government Pleader that by virtue of such interpretation the assessee or persons concerned can delay the realisation of penalty. We are dealing with a case of penalty. The law permits the party concerned to avail of the statutory remedy. That is the right given to the parties which they are free to avail. The Appellate Authority or other authority is always armed with ample powers to pass interim orders. Such interim orders can always be conditioned by appropriate conditions to safeguard the interest of party and the Revenue.

12. Therefore we are of the view that having regard to the stand taken by the learned Government Pleader also it becomes necessary to grant relief to appellant in this case. We feel that we should direct that the security furnished in this case namely the bank guarantee can be realised or enforced and adjusted towards the penalty and expenses and incidental charges only if penalty is not paid within the time specified in sub-section 8 of Section 47 as provided in Rule 67(9) of the Rules. Needless to say, we make it clear that it will always open to the Officer to take note of the legal position and to impose appropriate condition in regard to the conditions about security, so that interest of the Revenue is also

not jeopardised. It is submitted before us that bank guarantee has been furnished and it is valid till 20-3-2013. In such circumstances, we feel it is necessary that we should interfere in the matter and particularly having regard to the previous experience of the appellant. The judgment of learned Single Judge is set aside and we direct that first and second respondent shall not enforce Ext. P-22 bank guarantee unless and until if the penalty is not paid within the time-limit specified in sub-section 8 of Section 47 (30 days). In case the proceedings of penalty are not completed and also taking into consideration the period mentioned in Section 47(8) read with Rule 67(9) as interpreted by us, it will be open to the Officer to demand that the security (bank guarantee) will be kept alive for such period as he considers necessary.

