

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM

&

THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN

MONDAY, THE 11TH DAY OF NOVEMBER 2019 / 20TH KARTHIKA, 1941

WA.No.2291 OF 2019

AGAINST JUDGMENT DATED 29.10.2019 IN WP(C) 28884/2019(I) OF HIGH COURT OF KERALA

APPELLANT/PETITIONER:

SMEARA ENTERPRISES
SHOP NO.4, BAY PRIDE MALL, SHANMUGHAM ROAD, KOCHI-
682 031, REPRESENTED BY SMT. MINI ASHRAFF, MANAGING
PARTNER.

BY ADVS.
SRI.K.N.SREEKUMARAN
SRI.P.J.ANILKUMAR (A-1768)
SRI.N.SANTHOSHKUMAR

RESPONDENTS/RESPONDENTS:

- 1 STATE TAX OFFICER
SQUAD NO. 5, STATE GOODS AND SERVICES TAX
DEPARTMENT, PERUMANOOR, THEVARA, ERNAKULAM-682 015
- 2 DEPUTY COMMISSIONER (APPEALS),
STATE GOODS AND SERVICES TAX DEPARTMENT,
PERUMANOOR, THEVARA, ERNAKULAM-682 015.

OTHER PRESENT:

SR.GP.SRI.MOHAMMED RAFIQ

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON
11.11.2019, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**C.K. ABDUL REHIM, J.
&
ANU SIVARAMAN, J.**

W.A. No. 2291 OF 2019

Dated this the 11th day of November, 2019

J U D G M E N T

Abdul Rehim, J.

Petitioner in W.P.(C) 28884/2019 is the appellant challenging the judgment of the Single Judge, dated 29th October, 2019. The respondents herein are the respondents in the writ petition.

2. Challenge raised in the writ petition was against Ext.P3 order passed by the Assistant State Tax Officer, Squad No. V, State Goods and Service Tax Department, Ernakulam under Section 129(3) of the Central Goods and Services Tax Act, 2017(for short, 'the Act') imposing tax and penalty to the tune of ₹1,15,333/- each. It was contended that the goods detained under Section 129(1) was only 'promotional materials'

W.A. No.2291/2019

-:3:-

consigned by the supplier, not intended for sale, and it will not attract any tax liability as contemplated under Section 7 of the GST Act. It is complained that the impugned order was passed by the above said authority without properly appreciating the explanations offered in this regard.

3. It is pointed out that, against Ext.P3, the appellant had already filed a statutory appeal, as provided under Section 107 of the Act, after paying 10% of the disputed tax and penalty, to satisfy the prerequisite condition contemplated under Section 107(6)(b) of the Act. It was the contention in the writ petition that, since he had resorted to the statutory remedy of appeal by remitting 10% of the disputed tax and penalty, as required under Section 107, the entire balance amount is deemed to be under stay as provided in sub-section (7) to Section 107. Therefore the appellant pleaded for release of the goods, without proceeding with any further steps for confiscation of the same.

4. When the writ petition was considered, on behalf of

W.A. No.2291/2019

-:4:-

the respondents it was contended that, since the amount of tax and penalty imposed under sub-section 3 of Section 129 was not paid, the goods are liable to be proceeded for confiscation, as contemplated under Section 130, because it will attract a situation as provided under sub-section (6) of Section 129, with respect to the failure to make payment of the amount of tax and penalty imposed. The respondents further contended that the goods could be released pending disposal of the appeal only on the appellant furnishing Bank Guarantee for the entire tax and penalty determined.

5. The learned Single Judge found that, the mere pendency of an appeal cannot be taken as a basis for directing release of the goods, without any security, because non payment of the amount of security would attract proceedings for confiscation of the goods under Section 130 of the Act. However, direction was issued to the appellate authority to consider and dispose of Ext.P5 appeal, within a period of three

W.A. No.2291/2019

-:5:-

months. Liberty was given to the appellant to seek release of the goods by furnishing necessary Bank Guarantee for the amount of tax and penalty imposed, pending disposal of the appeal. In the alternative, it was observed that, he has to wait for the outcome of the confiscation proceedings under the Act.

6. Contention of the appellant is two-folded. Firstly, he is impugning the judgment on the basis that the confiscation proceedings cannot go on in view of the provisions contained under sub-section (7) of Section 107. When the appellant had preferred the appeal after complying with the prerequisite condition stipulated thereunder, it is contended that, by virtue of provisions contained in sub-section (7) of Section 107 there is a deemed stay with respect to the collection and recovery of the tax and penalty imposed. Under such circumstances, provisions of sub-section (6) of Section 129 will not be attracted and the goods are not liable to be proceeded for confiscation under Section 130 of the Act.

W.A. No.2291/2019

-:6:-

7. We find force in the above said contention. Sub-section (7) of S.107 provides that where the appellant had paid the amount stipulated under sub-section (6), which in the case at hand is 10% of the remaining amount of tax in dispute, the recovery proceedings for the balance amount shall be deemed to be stayed.

8. As long as there exists a deemed stay against the recovery and collection of the amount of tax and penalty imposed by virtue of Ext.P3, the situation contemplated under Section 6 of Section 129 would not arise. Consequently, no proceedings for confiscation of the goods as contemplated under Section 130 can be proceeded until disposal of the statutory appeal. Therefore, merely because the appellant had failed to furnish security, or to get the goods released, by paying the amount of tax and penalty imposed, the confiscation proceedings cannot be proceeded, because he had instituted a statutory appeal after compliance of pre-requisite condition. To

W.A. No.2291/2019

-:7:-

the above said extent we are inclined to clarify the impugned judgment.

9. Second question argued by learned counsel for the appellant is with respect to release of the goods. His contention is that, since there exists stay against recovery of the balance amount of tax and penalty in force and since the respondents are restrained by virtue of statutory provisions from proceeding against goods for confiscation, the goods are liable to be released pending finalization of the appeal, is the contention. We cannot accept such a proposition, because the provision under Section 129 is clear and unambiguous that the goods under detention can be released only on compliance with the provisions of sub-section (6) of Section 67 of the Act, which is made applicable with respect to the condition under Section 129, by virtue of Section 129(2) of the Act. The procedure for compliance of the conditions stipulated under Section 67(6) is literally provided under Section 140 of the Central Goods and

W.A. No.2291/2019

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Services Tax Rules 2017. Therefore, unless the security as contemplated under Section 129(2), read with Section 67(6), is furnished with; or payment of the entire amount of tax and penalty imposed under Section 3 is made, the goods are not liable to be released. Therefore the relief sought for the release of the goods, pending disposal of the appeal, cannot be entertained.

10. Consequently, the above writ appeal is disposed of by reserving liberty to the appellant to seek any of the methods mentioned as above for release of the goods.

C.K. ABDUL REHIM, JUDGE.

ANU SIVARAMAN, JUDGE.

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P.S. to Judge.