



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

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**WRIT PETITION NO.2611 OF 2021
WITH
WRIT PETITION NO.5900 OF 2021
WITH
WRIT PETITION NO.5899 OF 2021**

Fabricship Pvt. Ltd.)
A private limited company)
formed under the laws)
of India having its registered)
office at Plot-26/I, -13,)
Lucrative Industrial Complex,)
Near Atodra Chokdi,)
Olpad Sayan Road, Village: Atodra,)
Tal: Olpad, Surat - 394130)Petitioner

V/s.

1.The Union of India)
Through the Secretary,)
Ministry of Law & Justice,)
4th Floor, A Wing, Rajendra)
Prasad Rd,)
Shastri Bhavan,)
New Delhi – 110 001)
2.The State of Maharashtra,)
Through the Ministry of)
Finance, 3rd Floor,)

- Mantralaya,)
Mumbai – 400 032.)
- 3.The Commissioner of State Tax,)
8th Floor, Room No.831,)
GST Bhavan, Mazgaon,)
Mumbai – 400 010)
4. Secretary, Ministry of Finance,)
Union of India, Dept. of Revenue,)
New Delhi – 4110001) ...Respondents

Mr. Ishaan Patkar i/b Alaksha Legal for Petitioner.

Mr. Anjani Kumar Singh a/w Mr. D.P. Singh for Respondent Nos.1 & 4.

Ms. S.D. Vyas, Addl. G.P. a/w Mr. M.M. Pable AGP for Respondent Nos.2 and 3.

**CORAM : K.R. SHRIRAM &
JITENDRA JAIN, JJ.**

DATE : 21st JUNE 2024

JUDGMENT (PER JITENDRA JAIN, J.)

1 Rule. By consent of the parties taken up for final hearing at the admission stage. Mr. Anjani Singh appearing for Respondent Nos.1 and 4 and Ms. S. D. Vyas appearing for Respondent Nos.2 and 3 waives service of notice.

2 These three petitions are disposed of by common order since the issues raised in all the three petitions are identical. By this petition under Article 226 of the Constitution of India, the Petitioner challenges an Order dated 15 December 2020 along with the corrigendum dated 22 December 2020 passed by State GST Authority under Section 129(1) of the Maharashtra Goods and Services Tax Act, 2017 (hereinafter “MGST Act”) levying penalty with regard to three consignments not being accompanied with e-way bill. During the course of hearing, the Petitioner has pressed only prayer clause (b).

BRIEF UNDISPUTED FACTS :

3 Petitioner imported, at JNPT Port, certain machinery from China which were fully exempted under the Customs Act as well as Integrated Goods and Services Tax Act, 2017 (“IGST Act”) since they were covered by the EPCG scheme. Petitioner, thereafter, arranged a transporter to transport the said machinery from the port to its factory at Surat. The vehicle in which the machinery was being transported from port to Surat was intercepted at Palghar in Maharashtra. On interception, it was found that the e-way bill did not accompany the vehicle in which the machinery was transported as mandated by Rule 138 A of the MGST Rules, 2017. However, Bill of Entry accompanying the vehicle contained all the details.

4 The State GST authority issued a notice under the MGST Act for imposition of penalty. Petitioner replied to the said show cause notice on 19th December 2020. On 22nd December 2020, the State GST authority passed the impugned order imposing penalty under Section 129 (1) of the MGST Act equivalent to tax applicable on the value of the machinery.

The penalty imposed is as under :-

Writ Petition No.	Penalty u/s. 129(1)(a) (Rs.)	Penalty u/s. 129(1)(b) (Rs.)
2611 of 2021	14,44,200/-	40,11,665/-
5900 of 2021	15,55,152/-	43,19,875/-
5899 of 2021	15,97,760/-	44,38,228/-

It is on this backdrop that Petitioner has challenged the order passed levying penalty by filing the present petition.

SUBMISSIONS OF PETITIONER:-

5 Mr. Patkar for Petitioner submits that at the time of import of machinery there is no Customs duty or IGST liability since goods are exempt under notification no.16 of 2015 read with notification no.18 of 2020. After the goods were cleared by Customs, they were being transported to the Petitioner's factory at Surat. Petitioner admits that the e-way bill did not accompany the vehicle when it was intercepted. However, Petitioner submits that there cannot be any GST liability when goods are

transported by an importer to his own factory and therefore State GST authority was not justified in imposing penalty by applying rate of tax on value of machinery and arriving at tax amount to determine penalty. Petitioner submits that penalty of only Rs.25,000/- should have been imposed under Section 129 (1) of the MGST Act since same was less than two percent of value of exempt goods. Petitioner also submitted that while passing the impugned order, the State GST authority has not considered any of its submissions made in response to the show cause notice. Petitioner, therefore, prayed for reducing the penalty to Rs.25,000/- only.

SUBMISSIONS OF RESPONDENTS:-

6 Counsel for State GST authority, Ms. Vyas, submitted that admittedly at the time when the vehicle was intercepted there was no e-way bill and therefore, there has been a contravention of Rule 138 A of the MGST Rules. Consequently, the counsel, therefore, submitted that as per Section 129(1) of the MGST Act, Petitioner is liable for penalty equivalent to the tax applicable. The counsel, therefore, supported the order passed by the authority and prayed for dismissal of the Writ Petition.

7 The counsel for Union of India, Mr. Singh adopted the submissions made by Respondent Nos.2 and 3.

ANALYSIS AND CONCLUSION:-

8 The issue which arises in the present Petition, is whether Petitioner is at all liable for penalty and if so, under which limb of Section 129(1) of the MGST Act, Petitioner is liable for penalty.

9 The relevant provisions of the MGST Act, as existing on the date of interception, i.e., 15th December 2020, reads thus:

Section 129 (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;

Section 9:-

Levy and collection.

9.(1) Subject to the provisions of sub-section (2), there shall be levied a tax called the Maharashtra Goods and Services Tax on all intra-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under section 15 and at such rates, not exceeding twenty per cent, as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person.

Section 7:-

Scope of supply.

7.(1) For the purposes of this Act, the expression “supply” includes-

- (a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;*
- (b) import of services for a consideration whether or not in the course or furtherance of business and*

(c) *the activities specified in Schedule I, made or agreed to be made without a consideration;*

Section 2 (47):-

“exempt supply” means supply of any goods or services or both which attracts nil rate of tax or which may be wholly exempt from tax under section 11, or under section 6 of the Integrated Goods and Services Tax Act, and includes non-taxable supply.

Section 2 (78):-

“non-taxable supply” means a supply of goods or services or both which is not leviable to tax under this Act or under the Integrated Goods and Services Tax Act;

10 Admittedly, there is no dispute that machinery imported is exempted from Customs duty and IGST by virtue of Notifications Nos.16 of 2015 and 18 of 2020. The State GST Authority in the impugned order has admitted that there is no evidence indicating the movement of machinery to the outside buyer out of State of Maharashtra, thereby accepting that there is no material to show transfer of title in goods to any other person. The authority has also not disputed that the machinery was being transported from JNPT to petitioner’s own factory at Surat post clearance by the Customs Authorities. There is also no dispute that at the time of

interception the machinery and the vehicle were not accompanied by e-way bill as required under Rule 138A of the MGST Rules. It is in the light of these admitted and undisputed facts that we are called upon to adjudicate upon the correct limb of Section 129 (1) of the MGST Act under which penalty is required to be imposed.

11 Section 129 (1)(a) of the MGST Act provides for penalty equal to one hundred per cent of the tax payable on goods detained or seized. The phrase “tax payable” would contemplate that the transaction is liable for tax and on which the tax becomes payable. In the instant case, when the machinery is being transported from JNPT to petitioner’s factory after Customs clearance, there is no tax payable under the GST Act. Section 9 of the MGST Act levies tax on all intra-State supplies of goods or services or both and such a tax shall be paid by the taxable person. Section 7(1)(a) of the MGST Act defines “supply” to include all forms of supply of good or services or both such as sale, transfer, barter, exchange, license, etc made or agreed to be made for a consideration by a person in the course or furtherance or business. Admittedly Sections 7(1)(b) and 7(1)(c) are not applicable and the transaction under consideration also does not fall within Schedule I, II and III to the Act. In the instant case, when petitioner imports machinery and after Customs clearance transports the said machinery to its

own factory, it cannot be said that such a transportation would fall within the definition of the term “supply” as defined by Section 7. This is so because for a “supply” to fall under Section 7 there has to be more than one person or entity between whom the transaction of supply should take place. The illustrations given in Section 7 (1)(a) namely sale, transfer, barter, exchange, etc fortifies the requirement of existence of more than one person to fall within the expression “supply”, which is not satisfied in the present case since machinery is being transported by petitioner to its own factory. Secondly, the supply has to be for a “consideration”. Section 2(31) of the MGST Act defines “consideration” to include any payment made or to be made or the monetary value of any act or forbearance. In the instant case, when petitioner transports his machinery to its own factory there cannot be any consideration as defined in section 2(31).

12 Therefore, in our view, the activity of transport of machinery from JNPT to petitioner’s own factory would not fall within Section 7 which deals with scope of supply and consequently in the absence of any supply, and absence of consideration the charging Section 9 also would not get attracted so as to make petitioner liable to pay any tax.

13 Therefore, the first limb of Section 129(1)(a) which provides for

penalty equal to one hundred per cent of the tax payable cannot be invoked in the present case. The State GST Authority in the impugned Order has erroneously applied the rate of GST without first satisfying itself whether the transportation to one's own factory can at all fall within the charging section. The applicability of the rate of tax would get triggered only if a transaction falls within the meaning of the term "supply" as per Section 7 of the MGST Act. Therefore, in our view, the first limb of Section 129(1)(a) is not applicable.

14 The second limb of section 129(1)(a) provides penalty equal to two per cent of the value of goods or 25,000/- whichever is less in case of exempted goods. Admittedly, in the instant case, in so far as Customs duty and IGST is concerned, there is no tax liability at the time of import of machinery by virtue of exemption under Notifications Nos.16 of 2015 and 18 of 2020. In so far as, post the Customs clearance is concerned, transportation of machinery from the port to its own factory cannot be treated as a "supply" as observed us by above. The phrase "exempt supply" is defined under Section 2(47) of the MGST Act to mean supply of any goods or services or both which attracts nil rate of tax or is exempted from tax under Section 11 or under Section 6 of IGST Act and includes non taxable supply. Section 2(78) of the MGST Act defines "non-taxable"

supply to mean a supply of goods or services or both which is not leviable to tax under the said Act or under IGST Act. In our view, when a person transports the goods imported, after Customs clearance to his own factory premises then it is a non-taxable supply and would fall within the category of “exempted goods” since no tax as opined earlier is leviable under the Act. In such a scenario, the penalty under the second limb of Section 129 (1) (a) would be levied which is two per cent of value of goods or 25,000/- whichever is less. In all the three petitions before us, two per cent of the value of goods is more than Rs.25,000/- and therefore, as per Section 129(1)(a) the penalty which could be levied is Rs.25,000/- because it is the lesser of the two amounts.

15 If the interpretation sought by the State GST Authority is accepted then second limb of Section 129(1)(a) would become redundant which deals with penalty in case of exempted goods and therefore such an interpretation is to be rejected. Also second limb is special provision dealing with exempted goods and therefore in the case of petitioner second limb of Section 129(1) (a) should be made applicable.

16 Section 129(1)(b) is identical to Section 129(1)(a) except that clause (a) would apply where the owner of the goods comes forward for payment

of tax and penalty and clause (b) would apply where the owner does not come forward for payment of tax and penalty. In the instant case, before us the said distinction would be inconsequential because in neither case, since as observed above the maximum penalty which could be levied would be Rs.25,000/- only, which is lesser than two percent of value of goods as per second limb of Section 129(1)(b) of the Act.

17 By the impugned order penalty is levied under Section 129(1)(a) as well as under Section 129(1)(b) of the MGST Act. In our view, both these provisions are mutually exclusive as analysed above. Therefore, the impugned order is passed without application of mind.

18 These Petitions were heard on 21st June 2024 and while dictating the judgment in the Chamber, the Court came across an order dated 18th January 2022 wherein it is recorded that Petitioner has furnished a Bank Guarantee in all three Petitions for release of goods. Therefore, to ascertain the status of these Bank Guarantees, these Petitions were listed for direction on 26th June 2024. To a query raised by the Court about the status of the Bank Guarantees as recorded in the order dated 18th January 2022 given to the State GST Authority – Respondent Nos.2 and 3, Mr. Patkar informed the Court that the Bank Guarantees had already expired and they did not

renew the same, nor the State GST Authority informed Petitioner about renewal. Mr. Patkar stated that the Bank that issued the Bank Guarantees has also returned the fixed deposit receipts that Petitioner had given as security for the issuance of the Bank Guarantees. We are shocked to hear the same. It was the obligation of Petitioner to have continued to renew the Bank Guarantees till the disposal of these Petitions, since based on these Bank Guarantees, the goods were released. Further, we are shocked that Respondent Nos.2 and 3 also did not insist upon renewal of these Bank Guarantees which would have resulted into a huge loss to the State GST Authority in case the stand of Revenue was upheld and if Revenue had to recover the penalty from Petitioner. It was not only the obligation of Petitioner but also duty of Respondent Nos.2 and 3 to have assured that the Bank Guarantees were kept alive till disposal of these Petitions. We therefore direct Respondent No.3 to conduct enquiry, fix the responsibility and take the action against the officers / staffs who were responsible for allowing the Bank Guarantees to have lapsed. At the same time, Petitioner was also not justified in not renewing the Bank Guarantees, and therefore taking a firm view of such an inaction, this Court deems it fit to impose cost of Rs.15 Lakhs (Rs.5,00,000/- X 3) on Petitioner to be paid to the PM Cares Fund, within a period of four weeks from the date of uploading of this order and file affidavit of compliance. The account details are as under :

Name of the Account : PM CARES
Account Number : 60355358964, IFSC : MAHB0001160
Branch : UPSC – New Delhi

Respondent Nos. 2 and 3 would take proper measures to ensure that such a course of action is not repeated that could result in a huge loss of revenue to the State if the relief on basis of which the Bank Guarantees were given is ultimately found not entitled to Petitioner.

19 In view of above, following order is passed ;

- (a) The Petitioner is not liable to pay GST on movement of machinery from JNPT to its factory since same would not fall within the charging section.
- (b) The impugned order being Exhibit-A dated 15th December and corrigendum dated 22nd December 2020 is modified by holding that the Petitioner is liable for penalty of Rs.25,000/- only under Section 129 (1) of the Act.
- (c) The Petitioner is directed to deposit Rs.75,000/- (Rs.25,000/- x 3) with the State GST authority within a period of four weeks from the date of uploading of the present order. The Bank Guarantee furnished as recorded in order dated 18th January 2022 would be returned by

Respondents to Petitioner only on payment of Rs.75,000/- as directed herein.

- (d) Petitioner is directed to donate Rs.15 Lakhs (Rs.5,00,000/- X 3) to PM Cares Fund within a period of four weeks from the date of uploading of present order and file affidavit of compliance.
- (e) Rule is made absolute in above terms.
- (f) Writ Petitions are disposed.
- (g) Petition be listed for compliance on 26 July 2024.

(JITENDRA JAIN, J.)

(K.R. SHRIRAM, J.)