C.R.

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE GOPINATH P.

TUESDAY, THE 30TH DAY OF JULY 2024 / 8TH SRAVANA, 1946

WP(C) NO. 26645 OF 2021

PETITIONER/S:

M/S.T.P.METALS & ROOFINGS,
PARAPPANPOYIL, THAMARASSERY
CALICUT-673 573
REPRESENTED BY ITS MANAGING PARTNER
C.ABDUL GAFOOR
BY ADVS.
P.N.DAMODARAN NAMBOODIRI
HRITHWIK D. NAMBOOTHIRI

RESPONDENT/S:

1 ASSISTANT TAX OFFICER (INT),
MOBILE SQUAD NO.1, STATE GST DEPARTMENT,
MINI CIVIL STATION, MALAPPURAM-676 505.

2 THE ASSISTANT COMMISSIONER (INT),
SQUAD NO.1, STATE GST DEPARTMENT,
MALAPPURAM-676 505.

3 THE COMMISSIONER OF STATE GST,
TAX TOWER, KILLIPALAM, KARAMANA,
THIRUVANANTHAPURAM-695 002.

4 THE BRANCH MANAGER,
HDFC BANK, VK SHOPPING COMPLEX,
THAMARASSERY , OPP KSRTC DEPOT,
KERALA-673 573.
BY ADV. JASMINE M.M, GP

THIS WRIT PETITION (CIVIL) HAVING BEEN HEARD ON 30.07.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.R.

JUDGMENT

The petitioner is a registered dealer under the CGST/SGST Acts and is engaged in the sale of roofing sheets, pipes etc. According to the petitioner, it sold 12,080 Kg of roofing pipes to M/s. Koyasons Building Materials Pvt. Ltd, Palakkad vide Sale Invoice No.TWS/2022/232 dated 23.10.2021 for a total value of Rs.10,46,732/- (Ten lakhs forty-six thousand seven hundred thirty-two only). The goods were then despatched to the purchaser along with the Tax Invoice bearing No.TWS/2022/232 and e-way bill bearing No.5613 0699 2337 dated 23.10.2021. The vehicle in which the goods were being transported was intercepted by the 1st respondent on 25.10.2021 at 09:59 A.M. at Melmuri, Malappuram, and on the finding that the e-way bill referred to above had expired on 24.10.2021 proceedings were initiated against the petitioner under Section 129 of the CGST/SGST Acts. The proceedings culminated in Ext.P10 order imposing upon the petitioner the liability to pay tax and penalty totalling Rs.3,76,824/- (Three lakhs seventy-six thousand eight hundred twenty-four only).

2. Sri. Hrithwik D. Namboodiri, the learned counsel appearing for the petitioner would submit that there is no finding in Ext.P10 that there was any attempt to evade tax. It is submitted that the only finding in Ext.P10 is that the e-way bill referred to above (which was generated on 23.10.2021 at 10:00 P.M), had expired at the time of detention. Learned counsel referred to the provisions of Sub-rule (10) of Rule 138 of the CGST/SGST Rules and to the third *proviso* to that Rule to contend that since the e-way bill was generated at 10:00 P.M on 23.10.2021, it expired by 10:00 P.M on 24.10.2021 (considering the distance involved in the transport of goods) and the petitioner had time till 06:00 A.M on 25.10.2021 to extend the e-way bill. It is submitted that since the distance from the premises of the petitioner to the place of supply was only 107 km, the e-way bill was generated only for one day as contemplated by the provisions of Rule 138(10) of the CGST/SGST Rules. Learned counsel also referred to the provisions of Section 126 of the CGST/SGST Acts to contend that penalties should not be imposed for technical violations and the officers were

required to follow the general disciplines related to penalty set out in Section 126 of the CGST/SGST Acts. Learned counsel further submitted, with reference to the provisions of Section 122(xiv) of the CGST/SGST Acts that, even if it were to be held that the transport of goods, in the facts of the present case, without extending the validity of the e-way bill, was illegal, the only penalty that could be imposed was Rs.10,000/- (Ten thousand only). Learned counsel also placed reliance on the judgment of this Court in ***Sanskruthi Motors v. The Joint Commissioner (Appeals) II; 2022 (4) KLT OnLine 1294*** to contend that this Court, after relying on the judgment of a Division Bench of the Telangana High Court in ***Satyam Shivam Papers Pvt. Ltd v. Assistant. Commissioner, S.T and Ors; 2021 SCC OnLine TS 698*** and on finding that the Special Leave Petition against the said judgment had been dismissed by a speaking order and also taking note of the observations of this Court in ***Podaran Foods India Pvt. Ltd. (M/s.) and Others v. State of Kerala and Others, 2021 (1) KHC 471***, came to the conclusion that merely because there was a failure to revalidate an e-way bill and in the absence of any

finding that there was an attempt to evade tax, the maximum penalty, as contemplated by the provisions of Section 129 of the CGST/SGST Acts should not be imposed. It is submitted that the judgment of this Court in ***Sanskruthi Motors (supra)*** was also upheld by a Division Bench through judgment dated 19.12.2022 in W.A. No.1932 of 2022 ***(2022:KER:77429)***. Learned counsel, therefore, prays that Ext.P10 order may be quashed as being illegal and without jurisdiction.

3. Smt. Jasmine M. M, the Learned Government Pleader vehemently opposes the grant of any relief to the petitioner. Firstly, it is pointed out that, admittedly, the e-way bill which had been generated by the petitioner had expired at the time of interception. It is submitted that the authorities are insisting on revalidation/extension of the e-way bill only to ensure that multiple transports are not undertaken on the basis of the same e-way bill. It is submitted that, in the facts of the present case, the time for extending the e-way bill had expired by 06:00 A.M on 25.10.2021 and the interception was at 09:59 A.M on 25.10.2021. It is submitted that the petitioner was therefore

clearly engaging in the illegal transport of goods, warranting the invocation of proceedings under Section 129 of the CGST/SGST Acts. It is submitted that the provisions of Section 126 of the CGST/SGST Acts may not apply in the light of the provisions contained in Sub-section (6) of Section 126 of the CGST/SGST Acts which indicates that the provisions of the section shall not apply where a penalty is specifically provided in any other provision either as a fixed sum or expressed as a fixed percentage. The provisions of Section 129 of the CGST/SGST Acts are also referred to, to point out that once the proceedings under Section 129 of the CGST/SGST Acts are initiated and it is found that there was a violation of the law in the transport of goods warranting detention of the goods, then the penalty specified in Section 129 of the CGST/SGST Acts has to be levied and the Officer has no discretion to impose any lesser amount as penalty. Pertinently it is pointed out that Section 129 before and after its amendment (the provision was amended w.e.f. 1.1.2022 vide S. 117(i) of The Finance Act, 2021 (No. 13 of 2021) dated 28.3.2021 (see Notification No. 39/2021-C.T., dated 21.12.2021)) begins with a *non-obstante* clause and therefore

its provisions must be given effect to even if there are other contradictory or overlapping provisions in the statute. It is submitted that, for the same reason, the provisions of Section 122(1)(xiv) of the CGST/SGST Acts may not apply to the facts of the present case.

4. After the judgment was dictated in open court, I circulated the draft of the judgment to the respective counsel. Sri. Mohammed Rafiq, the learned Special Government Pleader (Taxes) has filed a written submission raising some additional contentions. Since this was done with the permission of the Court, these submissions are also being considered. It is stated that *mens rea* is not a necessary ingredient for the initiation and culmination of proceedings under Section 129 of the CGST/SGST Acts. He has referred to the decisions in ***Chairman, SEBI v. Shriram Mutual Fund and Anr; (2006) 5 SCC 361, Union of India and Ors v. Dharamendra Textile Processors and Ors; (2008) 13 SCC 369, Guljag Industries v. Commercial Taxes Officer; (2007) 7 SCC 269, Assistant Commercial Taxes Officer v. Bajaj Electricals Ltd; (2009) 1 SCC 308*** and ***Horticulture Experiment Station Gonikoppal, Coorg v.***

Provident Fund Organization; (2022) 4 SCC 516 in support of this contention. It is submitted that a Division Bench of this Court in ***Assistant State Tax Officer v. Indus Towers Ltd; (2018) 55 GSTR 404*** followed the law laid down by the Supreme Court in ***Guljag Industries (supra)*** and held that if there is a violation of the provisions of the CGST/SGST Acts, the penalty under Section 129 is automatic. It is submitted that a learned single Judge of this Court in ***Podaran Foods India Pvt. Ltd (supra)*** also held that where the proper officer finds that the goods have been transported in contravention of the rules, he does not have the discretion to condone the procedural lapse or relax its rigour in particular cases and he must interpret the rule strictly keeping in mind the statutory scheme that aims to curb tax evasion. It is submitted that the decision in ***Podaran Foods India Pvt. Ltd (supra)*** is also an authority for the proposition that a person aggrieved by an order under Section 129 must necessarily approach the Appellate Authority in case he is aggrieved by the order. The learned Special Government Pleader seeks to distinguish the judgment of the Telangana High Court in ***Satyam Shivam***

Papers (supra) by stating that the decision turned on its own facts and the fact that the Special Leave Petition against the judgment was dismissed by a speaking order does not mean that the judgment is a binding precedent so far as this Court is concerned. It is submitted that the judgment in ***Satyam Shivam Papers (supra)*** is not authority for the proposition that intentional evasion of tax is *sine qua non* for imposing the penalty under Section 129 of the Act. It is submitted that ***Vardan Associates Pvt. Ltd. v. Assistant Commissioner of State Tax Central Section and Others; (2024) 3 SCC 187*** is authority for the proposition that there could be no escape from the requirement of the law to generate a fresh e-way bill after its expiry. It is submitted that the judgments of this Court in ***Indus Towers Ltd (supra)*** and ***Ranjilal Damodaran v. Asst. State Tax Officer and another***; ***2020 SCC OnLine Ker 23975*** cannot be doubted and the deduction of the quantum of penalty to 50% in ***Vardan Associates (P) Ltd (supra)*** was an express exercise of the jurisdiction of the Supreme Court under Art.142 of the Constitution of India. It is submitted that the judgment of this Court in ***Sanskruthi Motors***

(supra) has merged with the judgment of the Division Bench in W.A. No.1932 of 2022 and therefore, the findings in ***Sanskruthi Motors (supra)*** is no longer good law. It is reiterated that the general disciplines relating to a penalty set out in Section 126(1) of the CGST/SGST Acts will not apply when the penalty is expressed as a specific sum or as a specific percentage. It is also reiterated that the provisions of Section 122(1)(xiv) cannot in any manner control the provisions of Section 129 of the CGST/SGST Acts as the provisions of Section 129 begin with a *non-obstante* clause. It is submitted that a Division Bench of this Court in ***Daily Express v. Assistant State Tax Officer; 2019 SCC OnLine Ker 7461*** had considered the *non-obstante* clause in Section 129 and had taken the view that neither Section 126 nor the general provision of penalty under Section 125 or Section 122 would apply in cases where Section 129 is attracted. It is submitted that thus the question as to whether Section 129 overrides the provisions contained in Sections 122, 125 and 128 of the CGST/SGST Acts is no longer *res integra*. It is submitted that in the absence of any challenge to the provisions of Section 129 of the CGST/SGST

Acts, the legality of the proceedings can be tested only with reference to the provisions contained in Section 129 of the CGST/SGST Acts.

5. On consideration of the rival submissions across the bar, I am of the view that the petitioner is entitled to succeed. In the facts of the present case, the e-way bill was generated at 10:00 P.M on 23.10.2021 for transporting goods over a distance of about 107 km and the e-way bill was therefore valid for a period of 24 hours, i.e., till 10:00 P.M on 24.10.2021. The third *proviso* to Sub-rule (10) of Rule 138 of the CGST/SGST Rules indicates that the petitioner had time till 06:00 AM on 25.10.2021 to extend the validity of the e-way bill. However, the petitioner had not done so and the vehicle was intercepted at 09:59 A.M on 25.10.2021. Technically, there is a violation of the law by the petitioner and the reason stated for transporting goods without revalidating the e-way bill (see paragraph 4 of the writ petition) may not be supported by any material. However, the question remains as to whether this should automatically lead to the initiation and conclusion of the proceedings under Section 129 of the CGST/SGST Acts resulting in the

imposition of a huge amount as tax and penalty. The learned Government Pleader may be right in contending that there is justification for the initiation of proceedings under Section 129 of the CGST/SGST Acts in the facts of this case. However, once a plausible explanation is provided by the transporter/assessee, **and it is found that there is no attempt to evade any tax**, the question remains as to whether the proceedings must thereafter culminate in an order under Section 129 of the CGST/SGST Acts imposing the maximum penalty in terms of the provisions contained in Section 129 of the CGST/SGST Acts. While the initiation of the proceedings under Section 129 of the CGST/SGST Acts, in the facts of this case, cannot be found to be without jurisdiction, the fact remains that once the transporter/assessee had offered an explanation and had demonstrated that there was no attempt to evade tax and **in the absence of any finding of an attempt to evade tax,** the officer should have imposed a penalty as contemplated by the provisions of Section 122(1)(xiv) of the CGST/SGST Acts only, without imposing penalty as contemplated by the provisions of Section 129 of the CGST/SGST Acts.

Relevant statutory provisions:-

6. Section 122 of the CGST/SGST Acts reads as follows:-

> ***"Section 122 – Penalty for certain offences:-*** *(1) where a taxable person who -*
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> *(i) supplies any goods or services or both without issue of any invoice or issues an incorrect or false invoice with regard to any such supply;*
>
> *(ii) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act or the rules made thereunder;*
>
> *(iii) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;*
>
> *(iv) collects any tax in contravention of the provisions of this Act but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;*
>
> *(v) fails to deduct the tax in accordance with the provisions of sub-section (1) of section 51, or deducts an amount which is*

less than the amount required to be deducted under the said sub-section, or where he fails to pay to the Government under sub-section (2) thereof, the amount deducted as tax;

(vi) fails to collect tax in accordance with the provisions of sub-section (1) of section 52, or collects an amount which is less than the amount required to be collected under the said sub-section or where he fails to pay to the Government the amount collected as tax under sub-section (3) of section 52;

(vii) takes or utilises input tax credit without actual receipt of goods or services or both either fully or partially, in contravention of the provisions of this Act or the rules made thereunder;

(viii) fraudulently obtains refund of tax under this Act;

(ix) takes or distributes input tax credit in contravention of section 20, or the rules made thereunder;

(x) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information or return with an intention to evade payment of tax due under this Act;

(xi) is liable to be registered under this Act but fails to obtain registration;

(xii) furnishes any false information with regard to registration particulars, either at the time of applying for registration, or subsequently;

(xiii) obstructs or prevents any officer in discharge of his duties under this Act;

(xiv) ***transports any taxable goods without the cover of documents as may be specified in this behalf;***

(xv) suppresses his turnover leading to evasion of tax under this Act;

(xvi) fails to keep, maintain or retain books of account and other documents in accordance with the provisions of this Act or the rules made thereunder;

(xvii) fails to furnish information or documents called for by an officer in accordance with the provisions of this Act or the rules made thereunder or furnishes false information or documents during any proceedings under this Act;

(xviii) supplies, transports or stores any goods which he has reasons to believe are liable to confiscation under this Act;

(xix) issues any invoice or document by using the registration number of another registered person;

(xx) tampers with, or destroys any material evidence or document;

(xxi) disposes off or tampers with any goods that have been detained, seized, or attached under this Act,

shall be liable to pay a penalty of ten thousand rupees, or an amount equivalent to the tax evaded or the tax not deducted under Section 51 or short deducted or deducted but not paid to the Government or tax not collected under Section 52 or short collected or collected but not paid to the Government or input tax credit availed of or passed on or distributed irregularly, or the refund claimed fraudulently, whichever is higher.''

A reading of Section 122 of the CGST/SGST Acts would indicate that there are several categories of offences for which a penalty is contemplated under that provision. Section 129 of the CGST/SGST Acts (prior to its amendment

w.e.f. 1.1.2022) reads as follows:-

> *"**Section 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;*
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> *(b) on payment of 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 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 such goods fails to pay the amount of tax and penalty as provided in sub-section (1) within fourteen 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."

This was the provision applicable in the facts of this case as the order under Section 129 of the CGST/SGST Acts was issued prior to 1.1.2022. However the position does not change even after the amendment of Section 129. The provisions of Section 129 of the CGST/SGST Acts, after its amendment w.e.f. 1.1.2022 read thus:-

*"**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 penalty equal to two 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 penalty:*

(b) on payment of penalty equal to fifty per cent. of the value of the goods or two hundred per cent. of the tax payable on such goods, whichever is higher, 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 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)*****

(3) The proper officer detaining or seizing goods or conveyance shall issue a notice within seven days of such detention or seizure, specifying the penalty payable, and thereafter, pass an order within a period of seven days from the date of service of such notice, for payment of penalty under clause (a) or clause (b) of sub-section (1).

(4) No 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 such goods fails to pay the amount of penalty under sub-section (1) within fifteen days from the date of receipt of the copy of the order passed under sub-section (3), the goods or conveyance so detained or seized shall be liable to be sold or disposed of otherwise, in such manner and within such time as may be prescribed, to recover the penalty payable under sub-section (3):

Provided that the conveyance shall be released on payment by the transporter of penalty under sub-section (3) or one lakh rupees, whichever is less:

Provided further 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 fifteen days may be reduced by the proper officer."

Section 126 of the CGST/SGST Acts reads thus:-

"126. Detention, seizure and release of goods and conveyances in transit.- *(1) No officer under this Act shall impose any penalty for minor breaches of tax regulations or*

procedural requirements and in particular, any omission or mistake in documentation which is easily rectifiable and made without fraudulent intent or gross negligence.

Explanation.--For the purpose of this sub-section,--

(a) a breach shall be considered a "minor breach" if the amount of tax involved is less than five thousand rupees;

(b) an omission or mistake in documentation shall be considered to be easily rectifiable if the same is an error apparent on the face of record.

(2) The penalty imposed under this Act shall depend on the facts and circumstances of each case and shall be commensurate with the degree and severity of the breach.

(3) No penalty shall be imposed on any person without giving him an opportunity of being heard.

(4) The officer under this Act shall while imposing penalty in an order for a breach of any law, regulation or procedural requirement, specify the nature of the breach and the applicable law, regulation or procedure under which the amount of penalty

for the breach has been specified.

(5) When a person voluntarily discloses to an officer under this Act the circumstances of a breach of the tax law, regulation or procedural requirement prior to the discovery of the breach by the officer under this Act, the proper officer may consider this fact as a mitigating factor when quantifying a penalty for that person.

(6) The provisions of this section shall not apply in such cases where the penalty specified under this Act is either a fixed sum or expressed as a fixed percentage."

7. No doubt, Section 129 of the CGST/SGST Acts begins with a *non-obstante* clause and provides that the provision will apply notwithstanding *'anything contained in this act'*. While it cannot be disputed that the effect of the *non-obstante* clause in Section 129 would be that the provision would apply even if there is any contrary provision in the CGST/SGST Acts, I am of the opinion that the provision must be read harmoniously with the other provisions referred to above. I find authority for this view from the judgment of the Supreme Court in ***A.G***

Varadarajulu & Anr v. State of T.N & Ors, (1998) 4 SCC 231. The Supreme Court while considering the effect of the *non-obstante* clause in Section 21-A of the ***Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961*** held thus:-

> *"16. It is well settled that while dealing with a non obstante clause under which the legislature wants to give overriding effect to a section, the court must try to find out the extent to which the legislature had intended to give one provision overriding effect over another provision. Such intention of the legislature in this behalf is to be gathered from the enacting part of the section. In Aswini Kumar Ghose v. Arabinda Bose [(1952) 2 SCC 237 : AIR 1952 SC 369 : 1953 SCR 1] Patanjali Sastri, J. observed:*
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> > *"The enacting part of a statute must, where it is clear, be taken to control the non obstante clause where both cannot be read harmoniously;"*
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> *In Madhav Rao Scindia v. Union of India [(1971) 1 SCC 85] (SCC at p. 139) Hidayatullah, C.J. observed that the non obstante clause is no doubt a very potent*

> *clause intended to exclude every consideration arising from other provisions of the same statute or other statute but "for that reason alone we must determine the scope" of that provision strictly. When the section containing the said clause does not refer to any particular provisions which it intends to override but refers to the provisions of the statute generally, it is not permissible to hold that it excludes the whole Act and stands all alone by itself. "A search has, therefore, to be made with a view to determining which provision answers the description and which does not."*

The only harmonious interpretation that can be given to the provisions of Section 122(1)(xiv); Section 126; and Section 129 of the CGST/SGST Acts is that once the procedure for detention, seizure and release of goods as contemplated by the provisions of Section 129 of the CGST/SGST Acts are initiated, the detaining authority or the competent officer must apply his mind to the explanation offered by the assessee and once it is found that there is no attempt to evade tax though there is a technical or procedural violation of the law then, only a minimum penalty, as contemplated by

the provisions of Section 122(1)(xiv) of the CGST/SGST Acts should be imposed. Otherwise, the order of the officer would be arbitrary, whimsical and capricious and would thus be violative of Article 14 of the Constitution of India. I find support for this view from the Judgment of the Supreme Court in ***Hindustan Steel Ltd. v. State of Orissa, (1972) 83 ITR 26*** where it was held:-

> *"8. Under the Act penalty may be imposed for failure to register as a dealer — Section 9(1) read with Section 25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so.*

Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out."

In ***Employees' State Insurance Corporation. v. HMT Ltd. and Anr, (2008) 3 SCC 35*** it was held:-

"21. A penal provision should be construed strictly. Only because a provision has been made for levy of penalty, the same by itself would not lead to the conclusion that penalty must be levied in all situations. Such an intention on the part of the legislature is not decipherable from Section 85-B of the Act. When a discretionary jurisdiction has been conferred on a statutory authority to levy penal damages by reason of an enabling provision, the same cannot be construed as imperative. Even otherwise, an endeavour should be made to construe such penal provisions as discretionary, unless the statute is held to be mandatory in character."

8. In ***Podaran Foods India Pvt. Ltd. (Supra)*** this Court held:-

"5. Tax legislations in our country, especially those dealing with indirect taxes, have always found the need to have provisions for detaining goods and vehicles while in transit to ensure that tax that is legitimately due to the State is not lost through deliberate evasion by unscrupulous assessees. It is therefore that such provisions have been incorporated as incidental machinery provisions for levying the tax as contemplated

in the statute concerned. The detection of evasion, and the consequential recovery of tax due to the State, are seen as acts that subserve larger public interest, and hence the restrictions to the exercise of the constitutional freedoms are seen as reasonable.

6. It follows, as a corollary to the above position, that unless there is a possibility of tax evasion, a detention of goods and vehicles cannot be justified, and that an authority vested with the powers of detention under a taxing statute has to bear in mind that the provisions authorizing detention have to be strictly construed for what is at stake is a constitutional right, fundamental or otherwise, of a citizen. *There is also the aspect of fairness in the levy and collection of taxes that must inform the authorities entrusted with the said task, for fair implementation of the law has been recognised as an essential attribute of the rule of law in a republic such as ours." (Emphasis is supplied)*

The Learned Judge also held as follows:-

> *"It has to be borne in mind that Section 129 forms part of the machinery provisions under the Act to check evasion of tax and a detention can be justified only if there is a contravention of the provisions of the Act in relation to transportation of goods or their storage while in transit."*

9. In ***Satyam Shivam Papers (supra)*** while considering a case of detention and imposition of tax and penalty under Section 129 of the CGST/SGST Acts, a Division Bench of the Telengana High Court held as follows:-

> *"42. How the second respondent could have drawn an inference that the petitioner is evading tax merely because the e-way bill has expired is also nowhere explained in the counter-affidavit. In our considered opinion, there was no material before the second respondent to come to the conclusion that there was evasion of tax by the petitioner merely on account of lapsing of time mentioned in the e-way bill because even the second respondent does not say that there was any evidence of attempt to sell the goods to somebody else on January 6, 2020. On account of non-extension of the validity of the e-way bill*

> *by the petitioner or the auto trolley driver, no presumption can be drawn that there was an intention to evade tax."*

I have considered a similar issue in ***Sanskruthi Motors (supra)*** where after referring to the judgments in ***Ranjilal Damodaran (supra)***; ***Satyam Shivam Papers (supra); Podaran Foods India Pvt. Ltd. (supra)*** and the judgment of this Court in ***Greenlights Power Solutions v. State Tax Officer, Squad No.III, State Goods and Services Tax Department and Ors; MANU/KE/1207/2022*** it was held:-

> *"The reason for invoking Section 129 of the CGST laws in this case, is only one - that the e-way bill has expired. A Division Bench of this Court in **Renjilal Damodaran's** case (supra), no doubt, observed that transport could continue only after e-way bill had been extended in the manner provided for in Rule 138(10) of the CGST Rules. However, the said finding does not compel me to take a view different from the view taken by the Telangana High Court in **Satyam Shivam's** case (supra) as the Division Bench has not considered the question as to whether the imposition of a major penalty along with a*

demand for IGST was justified for the reason that the e-way bill had expired. In the facts of the present case, it is clear from a reading of Ext.P3 that the vehicle (the goods) was accompanied by an invoice which showed the value of the vehicle to be Rs.23,96,505.64 including IGST at Rs.5,24,016.86. It was also accompanied by an e-way bill that was valid up to 8.7.2019. The only discrepancy noted was that the e-way bill had expired on 8.7.2019. The officer who issued Ext.P3 has not found that there was any attempt to evade any tax.

"....."

"I am of the view that this is a case where the aforesaid judgment of this Court squarely applies. Further, as noticed by the Division Bench of the Telangana High Court in ***Satyam Shivam's*** *case (supra), the officer was duty bound to consider the explanation offered by the petitioner for the expiry of the e-way bill. In Ext P.3 (the impugned order), the explanation offered by the petitioner has been rejected, stating that no evidence of repair being carried out has been produced. The further justification for imposing a penalty/tax is that the petitioner had ample*

> *time to revalidate the E-way bill. There is no finding in Ext P.3 that there was any attempt to evade tax. Further, the judgment of the Telangana High Court in* ***Satyam Shivam's*** *case (supra) was challenged before the Supreme Court and the Special Leave Petition was dismissed by a speaking order. There is clearly a merger of the judgment of the Division Bench of the Telangana High Court with the order of the Supreme Court in the Special Leave Petition mentioned above. Therefore, the view taken by the Telangana High Court as affirmed by the Supreme Court is a binding precedent as far as this Court is concerned."*

A Division Bench of this Court affirmed the judgment of ***Sanskruthi Motors (supra)*** in the judgment dated 19.12.2022 in W.A. No.1932 of 2022. Despite the considerable effort taken by the Learned Special Government Pleader (Taxes) to convince me that the observations/ findings in the judgment in ***Sanskruthi Motors (supra)*** has lost significance on account of its merger with the judgment of the Division Bench in the judgment dated 19.12.2022 in W.A. No.1932 of 2022 ***(2022:KER:77429),*** I do not read the said judgment of the Division Bench as

having interfered with any finding of this Court and, therefore, I see no reason to differ from the view taken in ***Sanskruthi Motors (supra)***.

10. There is yet another aspect of the matter. The scheme of Section 129 of the CGST/SGST Acts (both before and after the amendment w.e.f. 1.1.2022) appears to be that once the goods/conveyance are detained on a finding that the goods are being transported *'in contravention of the provisions of this Act or the rules made thereunder'* they shall be released on conditions incorporated in Section 129(1) (a), (b) or (c). Thereafter the matter has to be adjudicated by issuing a notice and after hearing the parties. If the contention of the State is to be accepted, there is no meaning in any adjudication as contemplated as even if a minor discrepancy were to be eventually noticed, an amount equivalent to 100% of the applicable tax+equal amount as penalty would be payable prior to 1.1.2022 and an amount equivalent to 200% of the tax payable would be payable as penalty after 1.1.2022. This obviously cannot be the intention of the legislature. If such interpretation were to be placed on the provisions of Section 129 of the CGST/SGST Acts the

provision would, as already noticed, be arbitrary, whimsical and capricious and would thus be violative of Article 14 of the Constitution of India.

11. The additional contentions raised on behalf of the Revenue by the learned Special Government Pleader (Tax) also do not lead me to conclude that a view different from the view I have already taken is required in the facts of this case. While the learned counsel may be right in contending that *mens rea* as applicable to penal statutes may not be required to be proved for imposition of penalty under Section 129 of the CGST/SGST Acts, one cannot lose sight of the fact that Section 129 forms part of the machinery provisions of the CGST/SGST Acts to check evasion of tax and unless there is a possibility of tax evasion a detention of goods and vehicles cannot be justified and the provisions authorising detention have to be strictly construed as held in ***Podaran Foods India Pvt. Ltd (supra)***. The conclusion that the learned Special Government Pleader (Tax) seeks to establish with reference to the judgment of a Division Bench of this Court in ***Indus Towers Ltd (supra)*** does not appeal to this Court. The facts considered by this Court in ***Indus Towers Ltd;***

(supra) are completely different from the facts arising for consideration in this case. The question in ***Indus Towers Ltd (supra)*** was whether the transport under the cover of a delivery challan without a declaration as contemplated by rule 138 of the Kerala State Goods & Service Tax Rules, 2017 could be justified even if the assessee had a case that there was no tax liability. That was a case of release of goods pending the adjudication under Section 129 of CGST/SGST Acts. In the facts of the present case, it is not disputed before me that there is no finding in any proceeding that the expiry of the e-way bill has resulted in the evasion of tax. Therefore, I am of the view that the decision in ***Indus Towers Ltd (supra)*** does not come to the aid of the Revenue in the facts and circumstances of this case. Coming to the judgment of a Division Bench of this Court in ***Daily Express (supra)*** it has to be held that the decision follows the view taken by the same bench in ***Indus Towers Ltd (supra)***. It no doubt takes the view that in a case covered by Section 129 and in view of the *non-obstante* clause neither the general discipline in the imposition of penalties in Section 126 nor the provisions of Section 122 would bar the

imposition of penalty under Section 129. However, the said decision was rendered prior to the decision of the Supreme Court in ***Satyam Shivam Papers (supra).*** The submission of the learned Special Government Pleader (Tax) on the findings in the judgment of this Court in ***Podaran Foods India Pvt. Ltd (supra)*** also does not appeal to this Court as a reading of the judgment in ***Podaran Foods India Pvt. Ltd (supra)*** would clearly indicate that the detention of goods while in transit cannot be justified unless there is a possibility of tax evasion. The contention that the petitioner should have approached the Appellate Authority is also not a submission that appeals to this Court as it is settled that the availability of an alternate remedy does not bar the jurisdiction of this Court under Art.226 of the Constitution of India and when the facts of any particular case compels the High Court to exercise discretion and entertain a Writ Petition notwithstanding any alternate remedy, the High Court is duty bound to exercise such discretion. This proposition is too well settled. A Constitution Bench of the Supreme Court in ***Calcutta Discount Co. Ltd. v. ITO,*** **(1961) 41 ITR 191** faced with a similar argument held:-

"27. Mr Sastri mentioned more than once the fact that the Company would have sufficient opportunity to raise this question viz. whether the Income Tax Officer had reason to believe that underassessment had resulted from non-disclosure of material facts, before the Income Tax Officer himself in the assessment proceedings and if unsuccessful there before the appellate officer or the Appellate Tribunal or in the High Court under Section 66(2) of the Indian Income Tax Act. The existence of such alternative remedy is not however always a sufficient reason for refusing a party quick relief by a writ or order prohibiting an authority acting without jurisdiction from continuing such action.

28. In the present case the Company contends that the conditions precedent for the assumption of jurisdiction under Section 34 were not satisfied and come to the court at the earliest opportunity. There is nothing in its conduct which would justify the refusal of proper relief under Article 226. When the Constitution confers on the High Courts the power to give relief it becomes the duty of the courts to give such relief in fit cases and the courts would be failing to perform their duty if relief is refused without adequate reasons.

In the present case we can find no reason for which relief should be refused."

12. For all the aforesaid reasons, this writ petition is allowed. Ext.P10 is quashed. It is declared that the provisions of Section 129 of the CGST/SGST Acts do not authorise the imposition of tax/penalty as contemplated by the provisions of Section 129(1)(a) or Section 129(1)(b) in cases where only minor discrepancies are noticed and such penalty can be imposed only for violations which may lead to evasion of tax or where the transport was with an intent to evade tax or in cases of repeated violations (even of a minor nature). In other cases, the authorities will impose penalties having due regard to the provisions of Sections 122 and 126 of the CGST/SGST Acts. In the facts of the present case, this Court is of the considered opinion that a penalty of Rs.10,000/- (Rupees Ten thousand only), as contemplated by the provisions of Section 122(1)(xiv) of the CGST/SGST Acts can be imposed. On payment of the penalty as directed above, the Ext.P7 bank guarantee produced by the petitioner shall be released to it. However, I clarify that this judgment should not be read as holding that every case of expiry of e-

way bill or other discrepancy cannot lead to the initiation and conclusion of proceedings under Section 129 of the CGST/SGST Acts. Where it is found that such act was with the intention to evade tax, the Revenue would be justified in initiating and concluding proceedings under Section 129 of the CGST/SGST Acts leading to imposition of penalty as contemplated by that provision.

The writ petition is ordered accordingly.

Sd/-
GOPINATH P.,
JUDGE

ajt/acd

APPENDIX OF WP(C) 26645/2021

PETITIONER EXHIBITS

Exhibit P1	**TRUE COPY OF THE FORM GST MOV -06 ORDER OF DETENTION HAVING REFERENCE NO.NIL DATED 27.10.2021 U/S 129(1) ISSUED BY THE 1ST RESPONDENT TO THE PETITIONER**
Exhibit P2	**TRUE COPY OF THE FORM ST MOV -07 NOTICE DATED 27.10.2021 HAVING REFERENCE NO NIL U/S129(3) ISSUED BY THE 1ST RESPONDENT TO THE PETITIONER**
Exhibit P3	**TRUE COPY OF THE REPLY DATED 01.11.2021 FILED BEFORE THE 1ST RESPONDENT**
Exhibit P4	**TRUE COPY OF THE NOTICE NO.GST/1/95/2021-22 DATED 03.11.2021 ISSUED BY THE 1ST RESPONDENT**
Exhibit P5	**TRUE COPY OF THE INTERIM ORDER DATED 12.11.2021 IN WPC 25000/2021 BY THIS COURT**
Exhibit P6	**TRUE COPY OF THE COMMUNICATIONS DATED 13.11.2021 FILED BEFORE THE 1ST RESPONDENT**
Exhibit P7	**TRUE COPY OF THE BANK GUARANTEE DATED 16.11.2021 SUBMITTED BY THE PETITIONER BEFORE THE 1ST RESPONDENT**
Exhibit P8	**TRUE COPY OF THE BOND IN GST MOV-08 DATED 16.11.2021 SUBMITTED BEFORE THE 1ST RESPONDENT**
Exhibit P9	**TRUE COPY OF THE GST MOV-O5 ORDER DATED 16.11.2021 ISSUED BY THE 1ST RESPONDENT WHEREBY THE VEHICLE WAS RELEASED ON BANK GUARANTEE**
Exhibit P10	**TRUE COPY OF THE GST MOV-O5 ORDER DATED 16.11.2021 ISSUED BY THE 1ST RESPONDENT WHEREBY THE VEHICLE WAS RELEASED ON BANK GUARANTEE**