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[2018] 96 taxmann.com 364 (Kerala)

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**GST: Goods of dealer detained by State Tax Officer could have been provisionally released only if he complied with statutory mandate i.e. he provided bank guarantee for tax and penalty and bond for value of goods, under rule 140 of KSGST Rules, even if default was technical**

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[2018] 96 taxmann.com 364 (Kerala)

**HIGH COURT OF KERALA**

**Garuda Timber Traders**

**v.**

**Assistant State Tax Officer, Malappuram**

DAMA SESHADRI NAIDU, J.

W.P. (C) NO. 26848 OF 2018

AUGUST 9, 2018

**Section [129](#) of the Central Goods and Services Tax Act, 2017/ Rule 140 of the Kerala Goods and Services Tax Rules, 2017 - Detention, seizure and release of goods and conveyances in transit (NR) - Assistant State Tax Officer detained goods of assessee a timber trader, during transit for its failure to upload Part B of e-way bill - A demand notice, demanding tax and penalty was issued - Assessee submitted that he could not upload Part B of e-way bill because of some technical glitches in GST network, but since he did not intend to violate law and that default was trivial and technical in nature, demand notice be quashed and detained goods be released - Whether assessee could have provisional release of goods, pending further adjudication under section 129(1), only if he complied with statutory mandate - Held, yes - Whether thus, even though default was technical, assessee could have goods provisionally released only on providing bank guarantee for tax and penalty and bond for value of goods, under rule 140 of KSGST Rules - Held, yes [Paras 52 and 58]**

## **FACTS**

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- The assessee a registered timber trader wanted to supply timber to its customer in Karnataka. So he prepared a taxable invoice with forest pass. He also uploaded the e-way bill in the official web-portal. But because of some technical glitches in the GST network, he could not upload part B of the e-way bill. However, he took a printout of the e-way bill and began its transportation.
- The Assistant State Tax Officer (ASO) intercepted the vehicle. The ASO obtained the driver's statements and besides passing detention order, alleged that the e-way bill accompanying the consignment was not fully filled in. On the same day the ASO also issued notice under section 129 (3) of the combined Acts (CGST and KSGST).
- After repeatedly failing to upload part B of the e-way bill, the assessee claims to have approached the Deputy Commissioner, SGST. Again, on advice, assessee tried once more and, at last, uploaded part B. Then he filed the reply along with the copy of the e-way bill, incorporating Part B as well. However, the ASO issued demand notice, demanding tax and penalty.

- On writ petition to the High Court the assessee sought to quash the demand notice, besides directing the ASO to release the detained goods and the vehicles. The assessee also wanted the Court to declare the provisions empowering the GST officials to demand tax and penalty and to detain goods and vehicles, as unconstitutional till the smooth, efficient and glitches free functioning of the GST network system is guaranteed to assessees.

## **HELD**

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### ***Documents to be carried along with goods***

- If the consignor or the consignee transports the goods, either in its own conveyance or a hired one, it may generate an e-way bill in FORM GST INS-01, after furnishing information about the transporter and the vehicle in Part B of that Form. If it does not generate the e-way bill but hands over the goods to a transporter, the registered person must furnish the information to the transporter. Then, the transporter will generate Part B, based on that information. If the value of goods sought to be transported exceeds Rs. 50,000, every supplier, recipient, and the transporter must generate the e-way bill. For the value below Rs. 50,000, e-way bill is optional. E-way bill, cannot be treated as complete unless both Part A and Part B get filled. [Para 27]
- Under rule 2 (1) of the Rules, the person in charge of a conveyance must carry—(a) the invoice or bill of supply or delivery challan; and (b) a copy of the e-way bill or the e-way bill number, either physically or mapped to Radio-frequency identification (RFID) embedded on to the conveyance. [Para 28]
- Here, assessee did not fill Part B of the e-way bill. It cited technical difficulties as the reason. On interception and after detention, it fulfilled that requirement. It has also pleaded that it approached the officials about the difficulties it faced, but was only advised that it must try again. Tried again, it succeeded; but by then, the authorities detained the goods. At least, thus goes the allegation. Assessee contends that its failure, if any, is trivial, technical. It has not tried to evade the tax, nor has the authorities, he also contends, accused it of tax evasion. [Para 29]

### ***Can Court exercise its discretion to dilute statutory rigour?***

- Discretion is the power given to a person with authority to choose between two or more alternatives, when each alternative is lawful. Justice Sussman defines the term discretion to mean the freedom to choose among different possible solutions. Judicial discretion, then, means the power the law gives the judge to choose among several alternatives, each of them being lawful. This definition assumes, of course, that the judge will not act mechanically, but will weigh, reflect, gain impressions, test, and study. [Para 31]
- The subject is not one, Barak cautions, in which we must create something out of nothing. Instead, it is necessary, at most, to reorganize the 'something' that already exists. Giving the court discretion to carry out the concretization of the law has, along with its advantages, several drawbacks. These stem primarily from the impossibility of foretelling the outcome of exercising discretion, and, as a result, judicial certainty and the ability to plan for the long term suffer. [Para 32]
- The language and the legislative intent clear, courts, in the name of discretion, cannot do violence to the statutory mandate. Discretion smooths the edges, but does not cut corners. Here, there is no interpretative ambiguity or legislative crevasses to be filled in. [Para 33]
- In *Gati Kintetsu Express (P.) Ltd. v. CCT* [2018] 95 taxmann.com 254 (HP), High Court of MP (DB), the authority, on inspection, found an irregularity in Part-B of the e-way accompanying the goods. The petitioner pleaded that when it generated the e-way bill, inadvertently it could not fill the vehicle number in the Part-B; it was a technical error. [Para 44]
- The High Court of Madhya Pradesh has, in the end, held that the petitioner admittedly violated the provisions of the Rules and Act of 2017 and, the Authority rightly imposed the penalty and directed the

petitioner to pay the same. The order is not in violation of any of the provisions of the Rules and Act of 2017. [Para 45]

- A Division Bench in *Commercial Tax Officer v. Madhu M.B.* [2017] 85 taxmann.com 172/64 GST 9 (Ker.) considered the scope and ambit of section 129 of the CGST Act read with rule 140 of the CGST Rules. To begin with, the Single Judge directed the release of detained goods on the petitioner's paying 50 per cent of the demanded tax, besides his executing a simple bond. The department appealed. The Division Bench analysed section 129 of the then simultaneous Ordinances. It also noted that rule 140 permits the authorities to release provisionally the seized goods on the person's executing 'a bond for the value of goods in FORM GST INS-04 and furnishing of security in the form of a Bank Guarantee equivalent to the amount of applicable tax, interest, and penalty payable.' After referring to both section 67 (6) and rule 140 of the KSGST Rules, the Division Bench observes that there is an effective mechanism for provisional release of goods; so the Courts cannot compel the authorities to stray from that mechanism. Then, it reversed the impugned judgment. [Para 46]
- In *Assistant State Tax Officer v. Indus Towers Ltd.* [2018] 95 taxmann.com 160 (Ker.), the question is whether there could be detention and seizure under section 129 of the Simultaneous Acts, when there is, obviously, no tax liability on the goods. Goods seized, the officer found only a delivery challan with the goods, as provided under rule 55 of the KSGST Rules. But the consignment contained no declaration in KER-I seen uploaded or physically carried, as rule 138 mandates. [Para 47]
- The Single Judge noted that the detaining officer did not dispute the delivery challan. Nor did the transaction amount to a taxable supply. So the finding goes thus: a mere infraction of the procedural Rules like rules 55 and 138 of the State GST Rules cannot cause the detention of goods, though they may cause the imposition of penalty. The goods were ordered to be released. The department assailed the direction. [Para 48]
- The Division Bench, after examining the statutory and the precedential positions, has observed that sub-section (3) of section 55 specifically speaks of a declaration as specified in rule 138. When goods are transported on a delivery challan, instead of an invoice; that violates the Act and Rules. The Division Bench did not agree with the Single Judge's view that the department accepted the genuineness of the delivery challan. A delivery challan under section 55, it observes, is not one issued by the department but is one prepared by the assessee, who is only obliged to maintain it serially numbered. It does not lie in the detaining officer's mouth to suspect the genuineness of the delivery challan when the consignor swears by it. The Division Bench, in fact, observed that non-taxable nature of the transaction would be justified under the rules only if the party declares according to section 138. [Para 49]
- On facts, the Division Bench has held that the transaction as projected, is non-taxable. The statutory rules prescribe certain documents to be accompanying the goods, even with a non-taxable transport. rule 55 and 138 are the prescriptions. Under the statutory rules, the consignor issues the delivery challan; the department has no say in it. Nor can it vouch for its genuineness. The Division Bench, then, felt unable to sustain the finding that mere infraction of the procedural rules cannot cause the detention of goods. Finally, the Division Bench has held that if the conditions under the Act and Rules are not complied with, definitely section 129 operates and confiscation would be attracted. The respondents are entitled to an adjudication, but they would have to prove that in fact there was a declaration made under rule 138 before the transport commenced. If they do prove that aspect, they would be absolved of the liability; otherwise, they would definitely be required to satisfy the tax and penalty as available under section 129. The vehicle and the goods having been already released unconditionally, further notice shall be issued and the adjudication under sub-section (3) completed; upon which if penalty is imposed, definitely the respondents would have to satisfy the same. [Para 50]
- In this series, finally the latest judgment in *Renji Lal Damodaran v. State Tax Officer* [W.A. No.1640 of 2018, dated 6-8-18] is referred to wherein the Division Bench of this Court has followed the same line of the other two judgments. On facts this case and *Renji Lal Damodaran (supra)* are identical; so are on law, too. Their Lordships have ordered the provisional release of the goods on the petitioner's furnishing a bank guarantee for the tax and the penalty; for the value of goods, a bond, under rule 140(1) of CGST

Rules. In other words, *Renji Lal Damodaran (supra)*, too, affirms that the statutory rigour on tax and penalty cannot be diluted. [Para 51]

- Under these circumstances, the conclusion is inescapable: assessee can have the provisional release of the goods, pending further adjudication under section 129(1), only if it complies with the statutory mandate. If it provides a bank guarantee for the tax and the penalty, besides executing a bond for the value of goods, as directed under rule 140 of the KSGST Rules, the authorities will provisionally release the goods. [Para 52]
- Therefore, it is held that, once the assessee provides the bank guarantee for the tax and penalty and bond for the value of goods, under rule 140 of the rules, it will have the goods provisionally released. Besides, the assessee can challenge the demand notice before the appellate authority under section 107. [Para 58]

## CASE REVIEW

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*Renji Lal Damodaran v. State Tax Officer* [W.A. No.1640 of 2018, dated 6-8-18] (para 51) *followed*.

## CASES REFERRED TO

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*Ashok Leyland Ltd. v. Asstt. State Tax Officer* [2018] [93 taxmann.com 68/53 GSTR 364 \(Ker.\)](#) (para 9), *Dhanswaroopdas v. Asstt. State Tax Officer* [2018] 53 GSTR 99 (Ker.) (para 9), *Age Industries (P.) Ltd. v. Asstt. State Tax Officer* [2018] [89 taxmann.com 276/66 GST 20/53 GSTR 113 \(Ker.\)](#) (para 9), *Ramesh Chand Kannu Mal v. State of U.P.* [2018] [94 taxmann.com 31/53 GSTR 270 \(All.\)](#) (para 9), *Raj Iron & Building Materials v. Union of India* [2018] [91 taxmann.com 212/66 GST 374/54 GSTR 127 \(All.\)](#) (para 9), *Rivigo Services (P.) Ltd. v. State of U.P.* [2018] [94 taxmann.com 8/67 GST 711/54 GSTR 147 \(All.\)](#) (para 9), *S.B.G.C. Logistic v. State of U.P.* [2018] [93 taxmann.com 422/67 GST 722/54 GSTR 154 \(All.\)](#) (para 9), *Commercial Tax Officer v. Madhu M.B.* [2017] [85 taxmann.com 172/64 GST 9 \(Ker.\)](#) (para 12), *Asstt. State Tax Officer v. Indus Towers Ltd.* [2018] [95 taxmann.com 160 \(Ker.\)](#) (para 12), *Renji Lal Damodaran v. State Tax Officer* [W.A. No.1640 of 2018, dated 6-8-18] (para 12), *Gati Kintetsu Express (P.) Ltd. v. CCT* [2018] [95 taxmann.com 254 \(MP.\)](#) (para 12), *Osborn v. Bank of the United States* 22 U.S. 738 (1824) (para 33) and *VSL Alloys (India) (P.) Ltd. v. State of U.P.* [2018] [93 taxmann.com 119/67 GST 688/67 NTNDX 1 \(All.\)](#) (para 44).

**K.S. Hariharan Nair**, Adv. for the Petitioner. **N. Nagaresh**, Asstt. Solicitor General and **Sreelal N. Warriar**, SC for the Respondent.

## JUDGMENT

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### Introduction:

1. A trader, an assessee under the new tax regime (GST), wants to carry goods (timber) inter-state. The vehicle intercepted on the route, it faces detention—and a possible confiscation—proceedings. It has not uploaded or carried with it a completed e-way bill: Part B is incomplete. After receiving a notice, the trader replied, and then received an order: the detaining officer demanded tax and penalty under the law. Aggrieved, the trader questioned the detention and the concomitant proceedings.

2. The questions are these: (1) What is the remedy available to the trader faced with detention proceedings under Section 129 of the Goods and Services Tax—of the Centre and of the State? (2) Can the Court exercise its discretion to dilute the statutory rigour?

### Facts in Brief:

3. A registered dealer under both the Central Goods and Services Tax Act (CGST) and Kerala State Goods and Services Act (KSGST), Petitioner Garuda Timber Traders deals in "trading." Garuda wanted to supply timber to its customer in Karnataka. So on 3rd August 2018, it prepared a taxable invoice with forest pass. It also uploaded the e-way bill in the official web-portal. But because of, what Garuda calls, some technical

glitches in the GST network, it could not upload part B of the e-way bill. But Garuda took a printout of the e-way bill and began its transportation.

4. On 4th August 2018, the Assistant State Tax Officer (Intelligence) [the ASO] intercepted the vehicle. The ASO obtained the driver's statements and issued Ext. P4, P4 (a) and P4 (B) besides passing the Ext.P5 detention order, alleging that the e-way bill accompanying the consignment was not fully filled in. On the same day, the ASO also issued the Ext. P6 notice under section 129 (3) of the combined Acts (CGST and KSGST).

5. After repeatedly failing to upload part B of the e-way bill, Garuda claims to have approached the Deputy Commissioner, SGST. Again, on advice, Garuda tried once more and, at last, uploaded part B. Then it filed the Ext. P8 reply along with the Ext.P7 copy of the e-way bill, incorporating Part B as well. Still, on 6th August 2018, the ASO issued the Ext. P9 demand notice, demanding tax and penalty, both amounting to Rs. 187,916/-.

6. Aggrieved, Garuda filed this writ petition: it wants the Court to quash the Ext. P9, besides directing the ASO to release the detained goods and the vehicles. Indeed, Garuda wants the Court to declare "the provisions empowering the GST officials" to demand tax and penalty and to detain goods and vehicles, as unconstitutional "till the smooth, efficient and glitches free functioning of the GST network system is guaranteed to assessees."

### **Submissions:**

#### **Petitioner's:**

7. Sri KS Hariharan Nair, the petitioner's counsel, contends that the Ext. P5 order of detention and the Ext. P9 notice demanding tax and penalty fail the scrutiny of law. According to him, the consignment contained every document the new tax regime requires, including the e-way bill. On the incomplete e-way bill, Sri Nair submits that Garuda had no intention to violate the law. To elaborate, he submits that it could only upload a part of the e-way bill. That is, despite its efforts, Garuda failed to upload part B.

8. Once the official web portal, Sri Nair continues, could not permit a consignor to upload any part of the e-way bill, then that consignor should not suffer the consequences. In other words, any technical glitches must not prejudice the assessee. Sri Nair has taken me through various statutory provisions, including section 129 and section 67 (6) of the Act. He strenuously contends that the officials cannot insist on the assessee's complying with the statutory rigour even for its technical, trivial omissions. More particularly, this triviality does not infringe the substantial statutory provisions or does not result in tax evasion.

9. Sri Nair also contends that Courts should adopt a pragmatic view of the nascent enactment which, according to him, has still been facing many teething troubles. Stressing the need to have the goods released immediately, pending further adjudication, Sri Nair relies on many decisions: *Ashok Leyland Ltd. v. Assistant State Tax Officer* [2018] 93 taxmann.com 68/53 GSTR 364 (Ker.), *Dhanswaroopdas v. Assistant State Tax Officer* [2018] 53 GSTR 99 (Ker.), *Age Industries (P) Ltd. v. Asstt. State Tax Officer* [2018] 89 taxmann.com 276/66 GST 20/53 GSTR 113 (Ker.), *Ramesh Chand Kannu Mal v. State of U.P.* [2018] 94 taxmann.com 31/53 GSTR 270 (All.), *Raj Iron & Building Materials v. Union of India* [2018] 91 taxmann.com 212/66 GST 374/54 GSTR 127 (All.), *Rivigo Services (P.) Ltd. v. State of U.P.* [2018] 94 taxmann.com 8/67 GST 711/54 GSTR 147 (All.), and *S.B.G.C. Logistics v. State of U.P.* [2018] 93 taxmann.com 422/ 67 GST 722/54 GSTR 154 (All.).

#### **Respondents':**

10. On the other hand, Dr. Thushara James, the learned Government Pleader, has submitted that Garuda risked violating the law and got caught. According to her, the statutory mandate is unmistakable. Unless the consignor or the transporter has all the documents accompanying the goods, it cannot afford to carry the goods. She has brushed aside as a web of lies the Garuda's defence that it could not upload part B of the e-way bill.

11. Dr. James has taken me through the statutory scheme to hammer home her contentions that under the new tax regime, there lies little discretion with either the authorities or the courts. She stresses that once the statutory mandate is clear, its effectiveness cannot be chipped away in the name of judicial review or judicial discretion. Judicial discretion, she continues, can only fill the statutory crevices, if any, but not to stultify the efficacy of the statutory mandate.

12. In the end, Dr. James has drawn my attention to the Division Bench decisions of this Court in *Commercial Tax Officer v. Madhu M.B.* [2017] 85 taxmann.com 172/64 GST 9 (Ker.), *Asstt. State Tax Officer v. Indus Towers Ltd.* [2018] 95 taxmann.com 160 (Ker.), *Renji Lal Damodaran v. State Tax Officer* W.A. No. 1640 of 2018, dated 6-8-2018 and *Gati Kintetsu Express (P.) Ltd. v. CCT* [2018] 95 taxmann.com 254 (MP).

### **Analysis:**

13. In a federal constitutional set up, coordination rather than subordination at its heart, the States and the Central as the constituents have demarcated spheres of legislation and governance. With clearly demarcated legislative fields, neither legislation can trespass upon the other—the residuary powers lying with the Centre, though. The division of powers is zealously guarded in no other sphere than fiscal. Taxation as the backbone of a welfare nation, which India is, the legislative fields are as distinct, yet interconnected, as the spinal segments.

14. That said, 101st Constitutional Amendment is the epoch-making federal feat unparalleled in constitutional democracies—almost. It is, I may say, a constitutional *coup de grâce* delivered against the fiscal confusion compounded by conflicting taxation regimes. This amendment, perhaps, marks the crest of cooperative federalism. It has given rise to even a constitutional institution—

### **GST Council.**

15. As the times pass by, utopian vision of justice has given way to a utilitarian view. Material comfort or upliftment has become the hallmark of good governance. So economic analysis of law substitutes the notion of justice with the notion of economic efficiency and wealth maximisation. True, nations like France successfully embraced GST regimes in the 1950s. Even federal polities like Canada replaced MST (Manufacturer's Sales Tax) with GST (Goods and Services Tax) in the 1980s. India joined the fiscal reform bandwagon a little late. Tentative it was to begin with, but determined it is in this new federal fiscal path.

16. To put the concept in perspective, GST is a single tax on the supply of goods and services, right from the manufacturer to the consumer. Credits of input taxes paid at each stage will be available in the later stage of value addition. This process makes GST a tax only on value addition at each stage. The consumer will thus bear only the GST charged by the last dealer in the supply chain, with set-off benefits at all the previous stages.

17. In other words, the focus was shifted from taxable event to destination-based taxation. It avoids the evil of cascading taxation or tax on tax trouble. So goes the motto: One Nation-One Market-One Tax.

18. A nascent enactment in a nebulous field of taxation will have many teething troubles. GST is no exception. In its path to perfection, GST has much dust to settle—legislatively and judicially. These are the days of confusion and cacophony: many views, many interpretations, and many jurisprudential mumblings.

19. The issue before us detention of goods and demand for tax and penalty. The consignor, however, wants interim custody of goods, before the proceedings reach their logical end. So we will examine the provisions that govern the issue.

### **Statutory Scheme:**

20. Chapter XVI of the Combined Acts deal with inspection, search, and seizure. Section 129 under Chapter XIX provides the mechanism for detention, seizure, and release of goods and conveyances in transit. It begins with a non-obstante clause and goes on to lay down the procedure. If any person transports or stores any goods contravening this Act or its rules, all those goods and means of transport and documents relating to those goods and conveyance will be detained or seized. They will, however, be released to the owner of the

goods (a) on its paying the applicable tax and penalty equal to one hundred percent of the tax payable on the goods. If the goods belong to an exempted category, a different rate applies, though.

**21.** If a person other than the owner—for example, a transporter—comes forward, it will have the goods released (b) on its paying the applicable tax and penalty equal to the fifty percent of the goods value reduced by the tax amount paid under each Act. Of course, the exempted goods do carry a different rate. Clause (c) of Section 129 permits the consignor or the other party to furnish a security equivalent to the amount payable under clause (a) or clause (b) "in such form and manner as may be prescribed." The proviso to Section 129 ensures the principles of natural justice: there will be no detention seizure without the officer's serving an order on the person transporting the goods.

**22.** And after considering the aggrieved person's objections under subsection (4), the officer passes another order, under subsection (3), specifying the tax and penalty payable under clauses (a), (b), or (c). Once the consignor or any other person pays the amount referred to in sub-section (1), all detention or seizure proceedings must stand concluded.

**23.** If the person concerned fails to pay to pay the tax and penalty under sub-section (1) within seven days from detention or seizure, the officer will initiate further proceedings under Section 130 of the Act.

**24.** For us, sub-section (2) is vital; it refers to sub-section (6) of Section 67. For interim custody, say, of goods and vehicle, the procedure laid down under Section 67 (6) will apply. So we will examine that provision.

**25.** Section 67 comes under Chapter XIV dealing with inspection, search, seizure, and arrest. Sub-section (6) mandates that the seized goods will be released, on a provisional basis, upon the person's executing a bond and furnishing a security, "in such manner and of such quantum, respectively, as may be prescribed or on payment of applicable tax, interest and penalty payable, as the case may be."

**26.** Now, we will examine the regnant rules. Rule 140 of the KSGST Rules deals with bond and security for release of seized goods. The consignor or another person may provisionally get the goods and vehicle released by executing a bond for the value of the goods in FORM GST INS-04 and by furnishing as security bank guarantee for the tax, interest, and penalty payable. Indeed, the Explanation to the Rule holds that "applicable tax" will include the Central Tax and State tax, or Central tax and the Union territory tax and the cess, if any, under GST (Compensation to States) Act, 2017.

### **What are the documents to be carried along with the goods?**

**27.** If the consignor or the consignee transports the goods, either in its own conveyance or a hired one, it may generate an e-way bill in FORM GST INS-01, after furnishing information about the transporter and the vehicle in Part B of that Form. If it does not generate the e-way bill but hands over the goods to a transporter, the registered person must furnish the information to the transporter. Then, the transporter will generate Part B, based on that information. If the value of goods sought to be transported exceeds Rs. 50,000/-, every supplier, recipient, and the transporter must generate the e-way bill. For the value below Rs. 50,000/-, e-way bill is optional. E-way bill, I reckon, cannot be treated as complete unless both Part A and Part B get filled.

**28.** Under Rule 2 (1) of the Rules, the person in charge of a conveyance must carry—(a) the invoice or bill of supply or delivery challan; and (b) a copy of the e-way bill or the e-way bill number, either physically or mapped to an RFID,<sup>1</sup> embedded on to the conveyance.

**29.** Here, Garuda did not fill Part B of the e-way bill. It cited technical difficulties as the reason. On interception and after detention, it fulfilled that requirement. It has also pleaded that it approached the officials about the difficulties it faced, but was only advised that it must try again. Tried again, it succeeded; but by then, the authorities detained the goods. At least, thus goes the allegation. Garuda contends that its failure, if any, is trivial, technical. It has not tried to evade the tax, nor has the authorities, he also contends, accused it of tax evasion.

**30.** Before moving ahead, I may address one issue; that is, about the judicial discretion. Sri Hariharan has persistently pleaded that the officers cannot blindly insist that the consignor or the transporter must follow the

provisions without exception. There can be, he argues, situations where the Court may have to exercise its judicial discretion and dilute the provisions, as the situation demands.

### **Can the Court exercise its discretion to dilute the statutory rigour?**

**31.** Discretion is the power, observes Aharon Barak in his *Judicial Discretion*,<sup>2</sup> given to a person with authority to choose between two or more alternatives, when each alternative is lawful. He quotes Justice Sussman to define the term: "Discretion means the freedom to choose among different possible solutions." Hart and Sacks offered, Barak goes on to observe, a similar definition: "Discretion means the power to choose between two or more courses of action each of which is thought of as permissible." Judicial discretion, then, means the power the law gives the judge to choose among several alternatives, each of them being lawful. This definition assumes, of course, that the judge will not act mechanically, but will weigh, reflect, gain impressions, test, and study.

**32.** The subject is not one, Barak cautions, in which we must create something out of nothing. Instead, it is necessary, at most, to reorganize the "something" that already exists.<sup>3</sup> Giving the court discretion to carry out the concretization of the law has, along with its advantages, several drawbacks. These stem primarily from the impossibility of foretelling the outcome of exercising discretion, and, as a result, judicial certainty and the ability to plan for the long term suffer.<sup>4</sup>

**33.** To put the concept of judicial discretion in perspective, I may quote who else than the irrepressible, inimitable Chief Justice John Marshall. He observed in *Osborn v. Bank of the United States* 22 U.S. 738 (1824) about the discretion enjoyed by judges thus:

When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discovering the course prescribed by law; and when that is discovered, it is the duty of the Court to follow it. Judicial Power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.<sup>5</sup>

**34.** From the unsettling days of John Marshall, CJ., to the tumultuous times of Antonin Scalia, the US Supreme Court espoused the same view. I reckon the Indian judicial view is no different. The language and the legislative intent clear, courts, in the name of discretion, cannot do violence to the statutory mandate. Discretion smooths the edges, but does not cut corners. Here, I see no interpretative ambiguity or legislative crevasses to be filled in.

### **Precedential Analysis:**

**35.** Garuda has relied on a plethora of precedents to drive home its contention that this Court can dilute statutory rigour and order interim release of the detained goods. We will examine them.

**36.** In *Ashok Leyland Ltd.'s case (supra)*, a consignment of motor vehicle chassis were transported. During transit, the respondent authorities detained the goods because the transporter was not carrying a copy of the stock transfer invoice/delivery challan. The transport violated Rule 55 of the CGST Rules. In that context, the petitioner challenged the demand notice, which insisted that the petitioner must make the security deposit, for the release of the goods and the vehicle.

**37.** A learned Single Judge of this Court has held that the petitioner has made necessary declarations under the CGST Rules. The authorities also have not disputed the genuineness of the invoices, a copy of which accompanied the goods. So *Ashok Leyland* set aside the demand for security deposit.

**38.** In *Dhanswaroopdas's case (supra)*, the petitioner failed to carry the documents prescribed. When the goods were intercepted and detained, the consigner took the plea that the prescribed declaration form could not be generated from the Department's website. The Court has also found that the dealer produced enough other material about the transaction. *Dhanswaroopdas's case (supra)* has thus held that the detention cannot be sustained.



**39.** In the *Age Industries (P.) Ltd.'s* case (*supra*), the petitioner sent a consignment of surgical gloves to three parties for quality appraisal 'on job work basis,' against delivery challans. The goods were detained in transit. Faced with the proceedings under Section 129, the petitioner raised two objections against the detention of goods: The department cannot support detention on the grounds not mentioned in the notice; goods cannot be detained merely for the party's failure to carry the declarations in specified forms. The Court accepted the petitioner's both contentions.

**40.** In *Ramesh Chand Kannu Mal's* case (*supra*), the Division Bench of Allahabad High Court has examined the issue of detention under Section 138 of the CGST Act. It has found on facts that on the date of interception, the e-way bill system had not been developed. Besides, neither the State of U.P nor the Government of India brought on record, the Court found, any notification prescribing the relevant documents to be carried with the goods. Under those circumstances, the Allahabad High Court set aside the detention.

**41.** In *Raj Iron & Building Materials's* case (*supra*), another Division Bench of the Allahabad High Court has found no allegation of evasion of tax; none of the documents—the show cause notice, the seizure order, or the penalty order—referred to any tax evasion. The Court, then, has also found there were admittedly some difficulties about downloading the e-way bill and that doubts remained on the requirement and submission of the e-way bill. So it quashed the detention order.

**42.** In *Rivigo Services's* case (*supra*), again the Allahabad High Court has examined, I reckon, an identical issue as we have now faced. It concerns incomplete Part B of the e-way bill. In fact, the Division Bench has relied on the UP Government's clarification: when the goods were re-loaded in a vehicle, meant for delivery to the consignee, the transporter' or the dealer's failure to fill the Part B is not fatal. On that concession, the Division Bench allowed the writ petition.

**43.** In *SBGC Logistics's* case (*supra*), the Government decided to exempt the consignor or the transporter from filling up Part B of the e-way Bill if the goods are transported within 50 km. The petitioner could show that the consignment was meant to be transported within that distance. So the Allahabad High Court held that the detention could not be sustained.

**44.** In *Gati Kintetsu Express (P.) Ltd.'s* case (*supra*), too, the authority, on inspection, found an irregularity in Part-B of the e-way accompanying the goods. The petitioner pleaded that when it generated the e-way bill, inadvertently it could not fill the vehicle number in the Part-B; it was a technical error. The Division Bench of Madhya Pradesh High Court distinguished a judgment of Allahabad High Court on that point *VSL Alloys (India)(P.) Ltd. v. State of UP* [2018] 93 taxmann.com 119/67 GST 688/67 NTN DX 1 on the distance norm. Incidentally, *S.B.G.C. Logistics's* case (*supra*), discussed above, is another judgment of Allahabad High Court on the same point, with the same conclusion.

**45.** The High Court of Madhya Pradesh has, in the end, held that the petitioner "admittedly violated the provisions of the Rules and Act of 2017 and, learned Authority rightly imposed the penalty and directed the petitioner to pay the same. The order is not in violation of any of the provisions of the Rules and Act of 2017."

**46.** Now, let me examine the precedential position at the home front: this very Court. A Division Bench in *Madhu M.B.'s* case (*supra*) considered the scope and ambit of section 129 of the CGST Act read with Rule 140 of the CGST Rules. To begin with, a learned Single Judge directed the release of detained goods on the petitioner's paying of 50% of the demanded tax, besides his executing a simple bond. The Department appealed. The Division Bench analysed Section 129 of the then Simultaneous Ordinances. It also noted that Rule 140 permits the authorities to release provisionally the seized goods on the person's executing "a bond for the value of goods in FORM GST INS-04 and furnishing of security in the form of a Bank Guarantee equivalent to the amount of applicable tax, interest, and penalty payable." After referring to both Section 67 (6) of the Act and Rule 140 of the KSGST Rules, the Division Bench observes that there is an effective mechanism for provisional release of goods; so the Courts cannot compel the authorities to stray from that mechanism. Then, it reversed the impugned judgment.

**47.** In *Indus Towers Ltd.'s* case (*supra*), the question is whether there could be detention and seizure under Section 129 of the Simultaneous Acts, when there is, obviously, no tax liability on the goods. Goods seized,

the officer found only a delivery challan with the goods, as provided under Rule 55 of the KSGST Rules. But the consignment contained no declaration in KER-I seen uploaded or physically carried, as Rule 138 mandates.

**48.** The learned Single Judge noted that the detaining officer did not dispute the delivery challan. Nor did the transaction amount to a taxable supply. So the finding goes thus: a mere infraction of the procedural Rules like Rules 55 and 138 of the State GST Rules cannot cause the detention of goods, though they may cause the imposition of penalty. The goods were ordered to be released. The Department assailed the direction.

**49.** The learned Division Bench, after examining the statutory and the precedential positions, has observed that sub-section (3) of section 55 specifically speaks of a declaration as specified in Rule 138. When goods are transported on a delivery challan, instead of an invoice; that violates the Act and Rules. The Division Bench did not agree with the learned Single Judge's view that the Department accepted the genuineness of the delivery challan. A delivery challan under section 55, it observes, is not one issued by the Department but is one "prepared by the assessee, who is only obliged to maintain it serially numbered. It does not lie in the detaining officer's mouth to suspect the genuineness of the delivery challan when the consignor swears by it." The Division Bench, in fact, observed that non-taxable nature of the transaction would be justified under the Rules only if the party declares according to Section 138. It held:

"[o]nly when there is a declaration uploaded in Form KER-1 the transaction, which is non-taxable, would be intimated to the Department and available in its site. If not, there could definitely be a sale effected without an invoice; if the delivery challan goes undetected, resulting in evasion of tax."

**50.** On facts, the Division Bench has held that the transaction as projected, is non-taxable. The statutory rules prescribe certain documents to be accompanying the goods, even with a non-taxable transport. Rule 55 and 138 are the prescriptions. Under the statutory rules, the consignor issues the delivery challan; the Department has no say in it. Nor can it vouch for its genuineness. The Division Bench, then, felt unable to sustain the finding that mere infraction of the procedural rules cannot cause the detention of goods. Finally, the learned Division Bench has held:

If the conditions under the Act and Rules are not complied with, definitely Section 129 operates and confiscation would be attracted. The respondents are entitled to an adjudication, but they would have to prove that in fact there was a declaration made under Rule 138 before the transport commenced. If they do prove that aspect, they would be absolved of the liability; otherwise, they would definitely be required to satisfy the tax and penalty as available under Section 129. We, hence, vacate the judgment of the learned Single Judge and allow the appeal. The vehicle and the goods having been already released unconditionally, further notice shall be issued and the adjudication under sub-section (3) completed; upon which if penalty is imposed, definitely the respondents would have to satisfy the same.

**51.** In this series, I may finally refer to the latest judgment rendered on 06.08.2018. A learned Division Bench of this Court in *Renji Lal Damodaran's* case (*supra*) has followed the same line of the other two judgments. On facts this case and *Renji Lal Damodaran (supra)* identical; so are on law, too. Their Lordships have ordered the provisional release of the goods on the petitioner's furnishing a bank guarantee for the tax and the penalty; for the value of goods, a bond, under Rule 140(1) of CGST Rules. In other words, *Renji Lal Damodaran's* case (*supra*), too, affirms that the statutory rigour on tax and penalty cannot be diluted.

**52.** Under these circumstances, the conclusion is inescapable: Garuda can have the provisional release of the goods, pending further adjudication under Section 129(1) of the Act, only if it complies with the statutory mandate. If it provides a bank guarantee for the tax and the penalty, besides executing a bond for the value of goods, as directed under Rule 140 of the KSGST Rules, the authorities will provisionally release the goods.

### **Does any more adjudication remain under Section 129 (1) of the Act?**

**53.** When I dictated the judgment affirming the Department's stand, then, Sri Hariharan has submitted that the Act itself contemplates expeditious disposal of the entire inquiry under Section 129—in seven days. So he wants this Court to direct the authorities to complete the inquiry and pass orders in one week from today. He has also expressed an apprehension: unless an authority superior to the inspecting authority undertakes the inquiry under section 129, prejudice may creep into the proceedings.

**54.** Yet Dr. Thushara James, the Government Pleader, has submitted that the goods detained, notice issued under Section 129(1), and the Garuda's reply received, the Assistant State Tax Officer completed the adjudication. To elaborate, Dr. James contends that, in the name of an interim release of the goods, Garuda actually challenged the Ext.P9 final orders passed under Section 129(3) of the Act. According to her, Garuda can invoke section 107 of the Act to assail the Ext.P9 in an appeal.

**55.** Indeed, before passing the Ext.P9, the Assistant State Tax Officer ought to have heard Garuda. That is what Section 129 (4) mandates: No tax, interest, or penalty shall be determined under sub-section (3) without giving the person concerned an opportunity of being heard. But the fact remains that an order was passed, and it needs to be challenged. Besides, I have not been called upon to decide the invalidity of the Ext.P9 for violating the principles of natural justice.

**56.** To address the issue of prejudice or bias in adjudication, I may observe that Section 129 (3) of the Act refers to "proper officer" detaining the goods is the adjudicating authority. It reads:

(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).

**57.** Dr. James has drawn my attention to the proceedings of the Commissioner of Sales Tax, Kerala, in Order No.GSTC 24614/201/CT dated 06.07.2017. At item 89, it clarifies that the Assistant Commissioner of State Tax or the Assistant State Tax Officer is the adjudicating authority under Section 129(3) of the Act. So she contends that unless there is a specific challenge to Section 129 (3) and the Government Order, dt.06.07.2017, Garuda's plea of prejudice or bias cannot be accepted. Indeed, the power of detaining and that of adjudicating vest in the same authority. The advisability of the arrangement or the legality of adjudicatory machinery is not in the challenge before me. I leave the issue untouched, for this Court will not indulge in a collateral adjudication of a vital issue having wide ramifications.

**Conclusion:**

**58.** I, therefore, hold that, once the petitioner provides the bank guarantee for the tax and penalty and bond for the value of goods, under Rule 140 of the Rules, it will have the goods provisionally released. Besides, the petitioner can challenge the Ext.P9 before the appellate authority under Section 107 of the Act.

With these directions and observations, I dispose of the writ petition.

JYOTI

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- [1.](#) Radio-frequency identification (RFID) uses electromagnetic fields to automatically identify and track tags attached to objects. The tags contain electronically-stored information.
  - [2.](#) Judicial Discretion, Aharon Barak, translated from Hebrew by Yadin Kaufmann, Yale University Press, Ed.1987.
  - [3.](#) Id., p.6
  - [4.](#) Id., p.15
  - [5.](#) As quoted in Aharon Barak's *Judicial Discretion*, p.21