IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 24.07.2023

\+ **W.P.(C) 6673/2021 & CM APPL. 21011/2021**

M/S JUPITER EXPORTS **..... Petitioner**

versus

COMMISSIONER OF GST **..... Respondent**

Advocates who appeared in this case:

For the Petitioner : Mr. Chinmaya Seth & Mr. A.K. Seth, Advs.

For the Respondent : Mr. Sameer Vashisht, ASC Civil, GNCTD

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HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

AMIT MAHAJAN, J

1. The present petition has been filed, *inter alia*, seeking setting aside of the demand order dated 25.03.2021, passed by the respondent under Section 74(9) of the Central Goods and Services Tax, 2017 (hereafter '**the CGST Act**'), raising a total demand of ₹6,67,74,062/-, which includes the tax amount of ₹2,88,90,416/-, interest for a sum of ₹89,93,230/-, and penalty to the tune of ₹2,88,90,416/- for the tax

period of April 2018 to March 2019 (hereafter '**the impugned order**').

2. The petitioner has challenged the impugned order principally on the ground that the same has been passed in gross violation of the principles of natural justice as the petitioner was not afforded an opportunity of personal hearing before passing of the impugned order by the respondent.

3. The matter was listed for the first time before this Court on 19.07.2021. This Court on the said date had directed the respondent to place on record the photocopy of the proceeding sheets of the file within a period of two weeks from the date and the matter was adjourned to 09.08.2021.

4. The matter on 09.08.2021 was adjourned to 31.08.2021 and on the said date the counsel appearing for the respondent stated that the counter affidavit has been filed but the same was not on record. The respondent was directed to place the counter affidavit on record and the matter was adjourned to 07.12.2021. On 07.12.2021, the matter was adjourned to 05.05.2022 due to paucity of time. On 05.05.2022, none appeared for the respondent. Thus, the Court issued a notice to the respondent through the Standing Counsel and adjourned the hearing of this petition to 16.11.2022.

5. On 16.11.2022, a fresh notice was issued to the respondent and the matter was directed to be listed before the learned Registrar for completion of service and pleadings on 16.12.2022. On 16.12.2022, learned counsel for the respondent appeared and once again stated that the counter affidavit has already been filed but the same was not on

record. The learned Registrar then directed the respondent to take up the matter with the Registry and get the counter affidavit placed on record within a period of four weeks from the date and adjourned the matter to 29.03.2023. On 29.03.2023, a request was made by the learned counsel appearing for the respondent seeking six weeks' time to file a counter affidavit. The learned Registrar, in view of the request made, adjourned the matter to 03.07.2023. On 03.07.2023, surprisingly, the learned counsel for respondent stated that they do not wish to file any counter affidavit and will rely on the documents already filed. Thereafter, the matter was directed to be listed before this Court on 11.07.2023.

6. Learned counsel appearing for the respondent submits that the matter can be argued without the counter affidavit by relying on the documents already filed before this court.

Arguments

7. Learned counsel for the petitioner submits that the impugned order has been admittedly passed without granting any personal hearing to the petitioner. He states that the petitioner has been mulcted with a huge demand of tax along with the penalty, without affording the petitioner any opportunity of hearing. He relies upon the judgment passed by the High Court of Madras in ***Amman Match Company v. Assistant Commissioner of GST & C. Ex. Madurai*** **: 2018 (363) E.L.T. 120 (Mad.)**; judgments passed by the Bombay High Court in ***BA Continuum India Pvt. Ltd. v. Union of India and Others*** **: W.P (L) No. 3264/2020** on **08.03.2021** and ***DBOI Global***

***Service Pvt. Ltd. v. Union of India* : 2013 (29) S.T.R 117 (Bom.)** in support of his contention that the orders passed without affording any opportunity of personal hearing are liable to be set aside.

8. He further relies on the circular dated 10.03.2017 issued by the Government of India through the Ministry of Finance, which was addressed to all Principal Chief Commissioners. The said circular specifically instructs that at least three opportunities of personal hearing should be given with sufficient interval of time so that Noticee may avail the opportunity of being heard. A separate communication is required to be made to the Noticee for each opportunity of personal hearing. Learned counsel, thus, submitted that the impugned order has been passed without adhering to the procedure prescribed by the authorities. He further submits that the impugned order, even otherwise, is a non-speaking order and has failed to take into consideration the written reply to the Show Cause Notice filed on behalf of the petitioner.

9. Learned counsel for the respondent had taken this Court through the record of the proceedings held before the Adjudicating Authority. He submits that the applicability of principles of natural justice is not a rule of thumb or a straightjacket formula. He further submits that the present case is an admitted case where the petitioner has violated the provisions of the CGST Act. The petitioner had nothing more to argue than what was contended in the reply to the Show Cause Notice. The reply was considered by the Adjudicating Authority and a reasoned order had been passed and therefore, the petitioner cannot be allowed to contend that by not being granted an opportunity of personal

hearing, the respondent has caused any prejudice to the rights of the petitioner, and same does not vitiate the principles of natural justice. Learned Counsel also relies upon the judgments passed by the Hon'ble Apex Court in the case of ***National Highways Authority of India & Ors. v. Madhukar Kumar & Ors.*: 2021 SCC OnLine SC 791; *A.S. Motors Pvt. Ltd. v. Union of India Ors.*: (2013) 10 SCC 114** and ***Maharashtra State Board of Secondary & Higher Secondary Education v. K.S. Gandhi & Ors.*: (1991) 2 SCC 716**, in support of his contention that the petitioner has to show the real prejudice being occasioned due to not following the principles of natural justice.

10. He further relies on the contents of the impugned order wherein it is noted that the proprietor of the petitioner had admitted the guilt and had stated that he was be-fooled by some people in a bogus transaction. The impugned order also notes that several representatives of the petitioner appeared with a request of dropping of the proceedings and the same is being considered as a personal hearing. It is further contended that the Adjudicating Authority rightly recorded that the telephonic conversation with the proprietor of the petitioner was equivalent to a personal hearing and any further personal hearings would amount to dilatory tactics on the part of the petitioner. He further submits that the circular dated 10.03.2017 is not binding.

11. It is lastly contended by the learned counsel for the respondent that the petitioner has an alternate remedy to challenge the impugned order by filing an appeal and the writ petition ought not to be entertained in this case.

Reasoning

12. It is an admitted case that neither the petitioner nor any legal representative on its behalf had been granted any personal hearing so as to explain or canvas its case before the Adjudicating Authority. The respondent despite being afforded several opportunities to file the counter affidavit, has not denied the allegations or the contentions raised by the petitioner. Thus, the averments made in the petition stand admitted by the respondent, as the same have not been traversed.

13. Notice under Section 74(3) of the CGST Act was issued to the petitioner by the respondent on 23.02.2021. It was directed that the reply be filed within 15 days of receipt of the said notice. The petitioner thereafter appeared before the respondent on 10.03.2021 and sought time to file reply to the notice. On 10.03.2021, an email purportedly to be the record of the proceedings was sent by the respondent to the petitioner which stated that "*date of personal hearing has been adjourned against notice issued vide reference no. ZDO70221026078S. Please appear on NA, at NA, at NA*".

14. Concededly, no date was fixed by the respondent on 10.03.2021 and the email at the very best, was vague. The record of handwritten proceedings before the Adjudicating Authority, however, shows that the case was adjourned to 24.03.2022. On 24.03.2022, the petitioner appeared and submitted its reply. The petitioner on the said date was asked to file its reply on the GST portal. The petitioner is stated to have filed the said reply on the GST portal on the said date.

15. It is significant that the petitioner in its reply dated 24.03.2021

also stated that "*it is submitted that any clarifications if required vis-a-vis aforementioned consultative Show Cause Notice dated 02.02.2021 will be appreciated. We also seek personal hearing in the matter*". Surprisingly, the impugned order was passed the very next day and in relation to the request for personal hearing it was stated as under:

> "*Several representatives of the TP appeared in office of the undersigned for dropping of the proceedings. The same is being considered as Personal hearing as sought by the Noticee in last line of the reply dated 24.03.2021. Even the telephonic conversation with Mr. Virender Singh, Prop. Of the firm are equivalent to PH. Asking for more PH hearing at this stage is construed as dilatory tactics on part of the taxpayer for the reasons best known to the Proprietor.*"

16. It is a settled law that the applicability of principles of natural justice is not a straightjacket formula and the same are amenable to being moulded depending upon the facts and circumstances peculiar to each case. At the same time, the Courts have generally read into the provisions, a requirement of giving a reasonable opportunity of being heard before making any order that would have adverse consequences on the parties. A fair opportunity being given to a party also excludes the risk of arbitrariness and the allegations of whimsical approach in the process of decision making.

17. The present case relates to determination of tax under Section 74 of the CGST Act. The provisions relating to such determination are provided in Section 75 of the CGST Act. Section 75(4) and 75(5) of the CGST Act reads as under:

> ***"75. General provisions relating to determination of tax.—***
> *(4) An opportunity of hearing shall be granted where a request is received in writing from the person chargeable with tax or penalty, or where any adverse decision is contemplated against such person.*
> *(5) The proper officer shall, if sufficient cause is shown by the person chargeable with tax, grant time to the said person and adjourn the hearing for reasons to be recorded in writing:*
> *Provided that no such adjournment shall be granted for more than three times to a person during the proceedings."*

18. In terms of the provisions of the CGST Act as stated above, the concerned Officer is statutorily required to grant an opportunity of hearing in case the request is received in writing from the person chargeable with tax or penalty. It further provides that such hearing has to be given when the Officer contemplates any adverse decisions against such person. Therefore, the principles of natural justice have been incorporated by the Legislature in the statute itself in the form of Section 75 of the CGST Act.

19. Thus, when the statute itself provides that a hearing is required to be given to the person against whom an adverse decision is contemplated, it cannot be contended on behalf of the authorities that the same is not mandatory. The Hon'ble Apex Court way back in the case of ***Rao Shiv Bahadur Singh and Another v. The State of Vindhya Pradesh* : AIR 1954 SC 322**, had held that the thing which is required to be done in a particular manner has to be done in that manner alone. When the legislature mandates that an opportunity of a personal hearing is to be given to a party, the authorities cannot be allowed to contend to the contrary. The respondents' contention that no personal hearing is required to be given to the party, is contrary to

the statute. This Court is of the opinion that the department could not have taken such stand contrary to statutory framework. This is also because no affidavit has been filed by the respondent taking such stand.

20. Be that as it may, we also fail to understand the reason for the Adjudicating Officer to observe that the visit of the representatives of the petitioners in the office of the Officer and the telephonic conversation, the Officer had with the proprietor of the petitioner, could be termed as equivalent to personal hearing. It is not the respondent's case that hearings were conducted in a virtual mode and, therefore, the personal hearing was granted over the telephone.

21. It is also not a case that due to onset of the COVID-19 pandemic, it was not possible for the authorities to give a personal hearing. The petitioner disputes that any personal hearing was afforded through the telephonic conversation with the Officer. Despite opportunities, the respondent has failed to file any affidavit controverting the said statement of the petitioner. The stand of the petitioner, in such circumstances, has to be accepted.

22. Moreover, the telephonic conversations for a brief period cannot, in our opinion, be a substitute for a personal hearing or for that matter, be construed as a hearing at all. The opportunity of hearing, which the Officer is statutorily required to give to the person against whom an adverse decision is contemplated, is not an empty formality, and is a well-recognised principle of *audi alteram partem*, which has rightly been incorporated in Section 75(3) and 75(4) of the CGST Act. The principle being that no one should be condemned without the

opportunity of hearing.

23. The Hon'ble High Court of Bombay had an occasion to decide a case in somewhat similar circumstances. The petitioner in that case had alleged that the Show Cause Notice was adjudicated without affording any opportunity of personal hearing. The respondent had relied upon the trade notice issued by the department pursuant to the outbreak of the Corona Virus and had contended that the personal hearings were granted through telephone. The Hon'ble High Court in the case of ***BA Continuum India Pvt. Ltd.*** (supra) negated the said contention, and held as under :

> "*31. It may be mentioned that there were some telephonic conversations between officials working under respondent No.4 and the tax consultants of the petitioner. While respondents would like to contend that such telephonic conversations can be construed to be an extension of hearing, the same has been disputed by the petitioner by contending that those conversations were for very brief periods lasting for about a minute or so in which subordinate officials working under respondent No.4 sought for documents etc. In any event, no record of such telephonic conversations have been maintained. What transpired in such conversations is also not known. Therefore, such telephonic conversations cannot be a substitute for a hearing in person or cannot be construed to be a hearing."*

24. We concur with the view taken by the Hon'ble High Court of Bombay. The expression personal hearing or the opportunity of being heard is not a mere empty formality. The same also has to be a meaningful hearing. Moreover, when the law requires that the provisions of Section 75(4) and 75(5) of the CGST Act specifically require that an opportunity of hearing "shall" be granted where the

request is received in writing, the same cannot be denied or be substituted by a telephonic conversation. It is also not a case of Revenue that the multiple adjournments were taken by the petitioner in order to delay the adjudication.

25. There is no cavil with the principles laid down by the Hon'ble Apex Court in the judgments relied upon by the respondent. In the decisions cited by the learned Counsel for the respondents, the Hon'ble Apex Court, had in the facts of those cases, concluded that the principles of natural justice were substantially complied with. It is also relevant to note that the decisions were not rendered in the context of statutes that expressly obliged the authorities to do a particular act in a particular manner. In these cases, the parties had complained about the violation of principles of natural justice in administrative decision making of the authorities and not about the decision been taken in violation of terms of a statute where the law specifically required a particular procedure to be followed.

26. Therefore, in the facts of the present case, there is a clear violation of the principles of natural justice. The order has been passed disregarding the specific provisions incorporated by the Legislature in consonance with the well-settled principles of *audi alteram partem.* We also fail to understand why and how any person with a reasonable understanding of the law could observe that a telephonic conversation and the visit of the representative of a party can be considered as a personal hearing.

27. The impugned order, therefore, has been passed in clear violation of the provisions of Section 75(4) and Section 75(5) of the

CGST Act and is also in clear violation of principles of natural justice.

28. The argument raised by the learned Counsel for the respondent that the grounds raised by the petitioner in its reply filed before the Adjudicating Authority were duly considered and, hence, no prejudice is caused on account of personal hearing, is also meritless. The dispute relates to the alleged fraudulent business transactions, the petitioner had with some traders whose names have been referred in the Show Cause Notice. It was alleged that these traders were found to be non-existent. The petitioner had claimed the supply of goods by these traders during the relevant period in dispute. The petitioner, in its reply, had pleaded that the goods purchased on which ITC was availed, have already been exported or have been sold domestically. The petitioner, in its reply, relied upon copies of GSTR-I and GSTR-IIA. The petitioner also claimed that the mis-match in the HSN of the suppliers cannot be attributed to him. It was also claimed that all the payments were made through the valid banking channels. The petitioner, in its reply, also relied upon the purchase invoices and the party-wise ledger accounts. It was also submitted that, at the time of purchase, the suppliers 'GSTIN was active'. The petitioner also produced the Foreign Remittance Receipts (BRCs) to co-relate the purchases from these alleged non-existent buyers, with the exports made. It is apparent that the Adjudicating Officer, in the impugned order has, firstly, reproduced the content of the notice and has, clearly, not considered various documents relied upon by the petitioner.

29. We are unable to appreciate the procedure adopted by the concerned Officer in the present case. The purpose of personal

hearing is to enable the noticee to address its arguments after the reply is filed, whereas, in the present case, the telephonic conversation which the Officer had with the proprietor of the petitioner, even before the final reply was filed, has been construed as personal hearings, such behaviour is clearly not acceptable. The Officer seems to be in some sort of hurry to conclude adjudication prior to the end of Financial Year on 31.03.2021 and passed the order, the very next day of filing of the reply. As discussed above, the same is clearly not only in violation of statutory principles of the Act but also is clear violation of the principles of natural justice.

Alternate remedy

30. Even though no reply has been filed and the matter has been dragged for almost two years on account of the respondent taking time to file the counter affidavit, it was contended by the learned Counsel for the respondent that the present writ petition ought not to be entertained on account of an alternate remedy being available to challenge the impugned order.

31. The Constitution Bench of the Hon'ble Apex Court way back in the year 1958 in ***State of Uttar Pradesh v. Mohd. Nooh*: 1958 SCR 595** had held as under:

> ***"10.*** *In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute, (Halsbury's Laws of England, 3rd Edn., Vol. 11, p. 130*

*and the cases cited there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies***"*

32. In the case of ***Whirlpool Corporation v. Registrar of Trademarks, Mumbai*: 1998 8 SCC 1**, the Hon'ble Apex Court had reiterated that the High Court would be justified in entertaining a writ petition despite the existence of alternate remedy where a party seeks enforcement of any Fundamental Right; where there is a violation of principles of natural justice; where the order or the proceedings are wholly without jurisdiction or where the vires of the Act is challenged.

33. Thus, where the controversy is purely legal and does not involve disputed questions of fact, the High Court ought not to dismiss the writ petition on the ground of availability of alternate remedy. The power to issue prerogative writs under Article 226 of the Constitution of India is plenary in nature. The Constitution does not impose any limitation or restraint on the exercise of power under Article 226. However, the power is discretionary and ought not to be exercised in a routine manner. It is a self-imposed restriction on the exercise of power under Article 226 that the petitions are normally not entertained where the alternate remedy is effective and efficacious.

The mere availability of alternate remedy, however, does not oust the jurisdiction of the High Court and will not make the writ petition as not maintainable. The availability of alternate remedy does not operate as a bar on the power of the High Court to exercise jurisdiction under Article 226 of Constitution of India.

34. The Hon'ble Apex Court in the recent decision in the case of ***Godrej Sara Lee Ltd. v. Excise and Taxation Officer-cum-Assessing Authority and Others*****: 2023 SCC Online SC 95** held as under:

> ***"4.*** *Before answering the questions, we feel the urge to say a few words on the exercise of writ powers conferred by Article 226 of the Constitution having come across certain orders passed by the high courts holding writ petitions as "not maintainable" merely because the alternative remedy provided by the relevant statutes has not been pursued by the parties desirous of invocation of the writ jurisdiction. The power to issue prerogative writs under Article 226 is plenary in nature. Any limitation on the exercise of such power must be traceable in the Constitution itself. Profitable reference in this regard may be made to Article 329 and ordainments of other similarly worded articles in the Constitution. Article 226 does not, in terms, impose any limitation or restraint on the exercise of power to issue writs. While it is true that exercise of writ powers despite availability of a remedy under the very statute which has been invoked and has given rise to the action impugned in the writ petition ought not to be made in a routine manner, yet, the mere fact that the petitioner before the high court, in a given case, has not pursued the alternative remedy available to him/it cannot mechanically be construed as a ground for its dismissal. It is axiomatic that the high courts (bearing in mind the facts of each particular case) have a discretion whether to entertain a writ petition or not. One of the self-imposed restrictions on the exercise of power under Article 226 that has evolved through judicial precedents is that the high courts should normally not entertain a writ petition, where an effective and efficacious alternative remedy is available. At the same time, it must be remembered that mere availability of an alternative remedy of appeal or revision, which the party invoking the jurisdiction of*

> *the high court under Article 226 has not pursued, would not oust the jurisdiction of the high court and render a writ petition "not maintainable". In a long line of decisions, this Court has made it clear that availability of an alternative remedy does not operate as an absolute bar to the "maintainability" of a writ petition and that the rule, which requires a party to pursue the alternative remedy provided by a statute, is a rule of policy, convenience and discretion rather than a rule of law. Though elementary, it needs to be restated that "entertainability" and "maintainability" of a writ petition are distinct concepts. The fine but real distinction between the two ought not to be lost sight of. The objection as to "maintainability" goes to the root of the matter and if such objection were found to be of substance, the courts would be rendered incapable of even receiving the lis for adjudication. On the other hand, the question of "entertainability" is entirely within the realm of discretion of the high courts, writ remedy being discretionary. A writ petition despite being maintainable may not be entertained by a high court for very many reasons or relief could even be refused to the petitioner, despite setting up a sound legal point, if grant of the claimed relief would not further public interest. Hence, dismissal of a writ petition by a high court on the ground that the petitioner has not availed the alternative remedy without, however, examining whether an exceptional case has been made out for such entertainment would not be proper."*

35. Another aspect which is to be kept in mind is that the present writ petition was listed before this Court way back on 19.07.2021. No such objection seems to have been taken by the respondent pursuant to the direction to produce the record. The respondent, in order to justify its stand had also filed the record of the proceedings before this Court. The respondent, therefore, wasted almost two years of the judicial time in, firstly, on the pretext of seeking to place the Counter Affidavit, which was incorrectly claimed as filed on record, and secondly, by taking further time to file the said counter affidavit. The respondent, at this stage, after two years of the writ petition being

filed, cannot be allowed to take such stand.

36. As discussed above, it is the respondent who has in fact admitted to the nature of hearing being given to the petitioner. In fact, no affidavit has been filed by the respondent to raise a plea that the present case involved disputed questions of fact. Despite the period of two years having elapsed, the objection as to availability of alternate remedy is taken for the first time while arguing and that too in the absence of any affidavit. The present case is a clear case of violation of the provisions of the Act as well as the violation of principles of natural justice and is a fit case for exercise of discretionary jurisdiction of the High Court under Article 226 of the Constitution of India.

37. The conduct of the respondent, as discussed above, is highly improper. Almost two years of the judicial time has been wasted only for the reason that respondent at first wanted to place the counter affidavit on record and then sought further time to file counter affidavit. The matter in the meantime was listed before this Court as well as before the learned Registrar on various occasions. The respondent in utter disregard to the judicial time and to the statement made before the Court as well as before the learned Registrar then decided to contest the present writ petition without filing any affidavit of the concerned officer. These kind of practices cannot be countenanced. The same has the effect of not only causing harassment to the litigants but also wasting the precious judicial time of the Court. This Court, therefore, considers it apposite to impose a cost of ₹5,000/- on the respondent. The cost is directed to be deposited with the Delhi State Legal Services Authority within a period of four

weeks. The order be also sent to the Commissioner of GST, Department of Trade and Taxes, Vyapar Bhawan, IP Estate, New Delhi for necessary information and compliance and if it is found that there is dereliction of duties on the part of the concerned officer, appropriate action for recovery of the amount from the salary of the officer be taken.

38. In view of the above, we set aside the impugned demand notice dated 25.03.2021 and remand the matter to enable the respondent to pass a fresh order after affording the petitioner a due opportunity to be heard.

AMIT MAHAJAN, J

VIBHU BAKHRU, J

JULY 24, 2023
SK / *SS / KDK / RS*