

IN THE HIGH COURT OF DELHI AT NEW DELHI

**RESERVED ON: 18.09.2012
PRONOUNCED ON: 21.09.2012**

W.P.(C) 5621/2012

M/S. KWALITY RESTAURANT & ICE-CREAM CO..... Petitioner
Through: Mr. Randhir Chawla and Ms. Renu Sahgal,
Advocates.

versus

THE COMMISSIONER OF VAT, TRADE AND TAX
DEPARTMENT AND ORS. Respondents
Through: Mr. A.K. Babbar, Advocate, for Resp. Nos. 2
and 3.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT

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1. This writ petition challenges the functioning of the Appellate Tribunal, Value Added Tax (hereafter Tribunal) in respect of a part heard appeal pending before the Tribunal. The Tribunal consists of 3 members, i.e the Chairman, a Judicial Member and an Administrative Member. The petitioner's grievance is that after two members heard the case substantially (in the absence of the third member, who had proceeded on leave) and closed hearings on its behalf, the third member sought join the bench and participate in the proceedings. This procedure is challenged as improper and in denial of a fair hearing.

2. The petitioner is a registered dealer, under the Delhi Value Added Tax Act, 2004 and the Central Sales Tax Act, 1956; it had filed its return for the years 1988-89, 1989-90 and 1990-91. Its returns were reassessed and additional demands were made. The writ petitioner impugned that demand, before the Additional Commissioner, who confirmed the reassessment. Aggrieved by that order, the petitioner filed appeals before the Tribunal. The appeals were heard, on merits- though on a preliminary issue- by the Tribunal consisting of Mr. S.K. Kaushal (Chairman) and Mr. D.C. Anand (Judicial member) on various dates, viz. 03.05.2012, 20.06.2012, 31.07.2012, 09.08.2012, 22.08.2012 and 27.08.2012. The Tribunal comprises of three members; however, on the said six dates of hearing, the third member, Ms. Neeta Bali, was absent, and did not form part of the bench hearing the matter. She was on leave of absence. In this background, on the last date of hearing i.e. 27.8.2012 the appeals were part heard, and were adjourned to 29.08.2012. On that date, i.e. 29.08.2012, the petitioner's appeals were placed before a three member bench consisting of Ms. Nita Bali (Administrative Member) in addition to the original two members who had heard the appeals.

3. By that date, Counsel for the petitioner (appellant therein) Mr Randhir Chawla, had concluded his arguments as is apparent from the following extract of the order dated 27-8-2012:

“Original re-assessment files pertaining to the assessment year 1989-90, 1990-91 have been produced. These files be kept on record as Sh. Chawla has pointed out certain insertions, manipulations, interpolations and tempering of the record/order sheets in these files, which, according to Sh.

Chawla, have a significant bearing on the merits of these appeals.

Part arguments heard. Sh. Chawla has made his submission regarding the assumption/vesting of the jurisdiction to re-assess by the Ld. AA u/s 24 of the Delhi Sales Tax Act, 1975, without touching upon the merits of the reassessment orders.”

The order of that date also reflects that the members who heard the appeal were the Chairman, Mr. S.K. Kaushik, and Mr. D.C. Anand, member. In this background, when the appeals were taken up for hearing on 29-8-2012, the third member, Ms. Nita Bali, who had joined duties, after her leave of absence, also joined the bench which was hearing the petitioners’ appeals. At this, an objection was voiced on behalf of the petitioner, by its counsel that:

“..this is a part heard matter before the Tribunal presided over by the Chairman and therefore, these three appeals be heard today by the Chairman and Member (J) as it is a part heard matter inasmuch as in these appeals arguments have been advanced on more than one occasion before the Tribunal presided over by the Chairman and the Member (J). He submitted that today this Tribunal is being presided over by the Chairman, Member (J) and Member (A) but this part heard matter cannot be heard by the bench of three members consisting of Chairman, Member (J) and Member (A). Therefore, the case be heard by only two original members, i.e the Chairman and Member (J) and today the joining of the third member, i.e Member (A) is not in accordance with the practice of functioning of the Tribunal.

Shri. A.K. Babber, Adv, Ld. Govt Counsel raised a preliminary objection that the Member (A) can join and hear these appeals and this Tribunal cannot function with two members as the Tribunal consists of three members and

therefore only three members should hear all cases including the present case..”

4. The Tribunal adjourned the matter to 7-9-2012. The same day, the present writ petition was taken up for preliminary hearing. After considering the submissions on behalf of the Petitioner, and also submissions of the standing counsel for the department, the court directed stay of proceedings in the appeals, and also required production of the file. These orders were complied with. The file of the Tribunal, in respect of Appeal Nos. 81-83/ATVAT/11-12 were produced, and taken on record.

5. The Petitioner argues that the procedure adopted by the Tribunal is unsupported in law, and untenable. Counsel urges that there is no provision in the VAT Act, which authorizes the Tribunal to adopt the procedure whereby a member who has not heard a matter, can “join” and participate in the proceedings. Such a procedure, it is submitted, is unreasonable and unfair, since the party which concludes its submissions would have no opportunity to make its submissions to that member, who would be in the dark about its position, and yet, be able to decisively influence the outcome of the matter. It is submitted that the Tribunal has to act judicially, and the procedure adopted in this case, and impugned order passed by the petitioner is alien to known and acceptable standards of propriety and therefore, has to be interdicted before further harm or injury is caused.

6. Learned counsel for the respondents relied on the counter affidavit, and submitted that the Tribunal’s procedure – whereby the third member joined the proceeding, soon after she re-joined duties- cannot be faulted. It was submitted that the provisions of the Delhi VAT Act contemplates the

entire Tribunal (an expression which means all its members) sitting and hearing cases or appeals preferred to it together, and does not visualize a situation where the Chairman can constitute Benches. It was submitted that the provisions of Section 73 of the Act and Regulation 35 of the VAT Tribunal Regulations, 2005 (hereafter “the Regulations”) visualised situations where the Tribunal could only function with the participation of all members. The only exception, spelt out in Regulation 35, is when a member cannot hear the appeal or cause on account of conflict; in such case, the other members can hear the case. Barring this specific instance, it is not open to any litigant to insist that only a particular Bench composition is competent to hear its appeal.

7. Before proceeding further, it would be necessary to extract relevant provisions of the Delhi VAT Act and Regulations. They are as follows:

“DELHI VALUE ADDED TAX ACT, 2004

73. *Appellate Tribunal*

(1) The Government shall, as soon as may be after the commencement of this Act, constitute an Appellate Tribunal consisting of one or more members, as it thinks fit, to exercise the powers and discharge the functions conferred on the Appellate Tribunal by or under this Act:

PROVIDED that where the Appellate Tribunal consists of one member, that member shall be a person who has held a civil judicial post for at least ten years or who has been a member of the Indian Legal Service (not below Grade III) for at least three years or who has been in practice as an advocate for at least ten years, and where the Appellate Tribunal consists of more than one member, one such member shall be a person qualified as aforesaid.

(2) *Where the number of members of the Appellate Tribunal is more than one, the Government shall appoint one of those members to be the Chairperson of the Appellate Tribunal.*

(3) *Subject to the provisions of sub-section (1) of this section, the qualifications and other conditions of service of the member or members constituting the Appellate Tribunal and the period for which such member or members shall hold office, shall be such as may be determined by the Government.*

(4) *Any vacancy in the membership of the Appellate Tribunal shall be filled up by the Government as soon as practicable.*

(5) *Where the number of members of the Appellate Tribunal is more than one and if the members differ in opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority, but if the members are equally divided, the decision of the Chairperson of the Appellate Tribunal thereon shall be final.*

(6) *Subject to the previous sanction of the Government, the Appellate Tribunal shall, for the purpose of regulating its procedure and disposal of its business, make regulations consistent with the provisions of this Act and the rules made thereunder.*

(7) *The regulations made under sub-section (6) shall be published in the official Gazette.*

(8) *The Appellate Tribunal shall, for the purpose of discharging its functions, have all the powers which are vested in the Commissioner under section 75 of this Act and any proceeding before the Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code, 1860 (45 of 1860) and the Appellate Tribunal shall be deemed to be a Civil Court for all the purposes of section 195*

and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974). ”

“DELHI VALUE ADDED TAX (APPELLATE TRIBUNAL)
REGULATIONS, 2005

35. Chairman or Member not to hear a case in which he has personal interest

(1) The Chairman or Members of the Tribunal shall not hear any appeal or application in which he/she or any of his family members has any personal interest.

Note: ‘Family members’ includes grand-parents, parents, his/her spouse, son, daughter (married/unmarried), grandson or grand-daughter.

(2) Having any interest in the business of a dealer, or any past association with the subject matter of the appeal or application in any capacity, other than as Chairman or Member of the Tribunal, shall be deemed to be included in personal interest for the purpose of this regulation.

(3) The proceedings of the Tribunal shall not be invalid merely because the Chairman or Member of the Tribunal withdraws from hearing any such matter. ”

8. The Petitioner’s grievance is simple enough; it contends that once the Tribunal – which at the relevant time consisted of two functioning members, the third having gone on leave- heard its appeals, substantially and the arguments of the revenue were scheduled, it was not open, mid-stream, as it were, for a change in composition of that body. Its argument is of prejudice, since the third member joining the proceeding, does not have the benefit of hearing its submissions. The revenue’s argument is that the Tribunal is a composite body of three members; whatever its compulsions in hearing the

appeals during the absence of one member, the moment she returned, there is no irregularity in all the three members participating in the hearing, so long as the hearing has not concluded. It also argues that there is no power with the Chairman of the Tribunal to constitute benches, or hear appeals in composition of less than the full membership of that body.

9. Facially, the provisions of the Act and Regulations suggest that the Tribunal, whenever it consists of a plurality of members has to hold sittings *en-banc*. However, at the same time, Sections 73 (4) contemplates a situation where a vacancy might arise in the membership of the Tribunal. This is not perceived to be an impediment in its functioning or cause such a *hiatus* as to require a separate provision, to enable the existing members to continue with their functioning. Nor does the statute ordain a minimum quorum for the hearing of appeals. It, therefore, appears that the statute is neutral about the consequences which follow in the event of a member's absence from the Tribunal for a temporary period, as in this case. This aspect is important, because the absence of any prohibition either in the negative form, enjoining members from functioning and hearing appeals during the absence of one of them, or absence of a provision mandating a minimum quorum, implies that the Legislature did not contemplate a logjam, in the Tribunal's functioning. The argument of the revenue about a restrictive class of cases which deals with absence of a member, i.e. in terms of Regulation 35, is insubstantial. For one, that Regulation is not part of the statute; secondly, it states an obvious rule, which all members of judicial and quasi judicial bodies have to follow. Its absence would in no whit undermine the principle it gives shape to. It would be useful to recollect that every Tribunal is clothed with incidental and ancillary powers to effectuate its orders, and

carry out its functions effectively (Ref. *Union of India v Paras Laminates (P) Ltd* AIR 1991 SC 696). Thus, a temporary absence of one of the members of the VAT Tribunal can, by no stretch of the imagination, result in its becoming dysfunctional, or being unable to function.

10. Every Tribunal has to, in terms of the dispensation ordained by our Constitution, function judicially. The content of this duty was spelt out in *Kihoto Hollohan v. Zachillhu* 1992 Supp (2) SCC 651, by a Constitution Bench as follows:

“Where there is a lis - an affirmation by one party and denial by another - and the dispute necessarily involves a decision on the rights and obligations of the parties to it and the authority is called upon to decide it, there is an exercise of judicial power. That authority is called a Tribunal, if it does not have all the trappings of a court.”

Earlier, in *Harinagar Sugar Mills Ltd. v. Shyam Sundar Jhunjunwala* (1962) 2 SCR 339 the Supreme Court had succinctly explained the difference between Courts and Tribunals, thus:

“All Tribunals are not courts, though all courts are Tribunals”. The word "courts" is used to designate those Tribunals which are set up in an organized state for the administration of justice. By administration of justice is meant the exercise of juridical power of the state to maintain and uphold rights and to punish "wrongs". Whenever there is an infringement of a right or an injury, the courts are there to restore the vinculum juris, which is disturbed.....

When rights are infringed or invaded, the aggrieved party can go and commence a querela before the ordinary Civil Courts. These Courts which are instrumentalities of Government, are invested with the judicial power of the State, and their authority

is derived from the Constitution or some Act of Legislature constituting them. Their number is ordinarily fixed and they are ordinarily permanent, and can try any suit or cause within their jurisdiction. Their numbers may be increased or decreased, but they are almost always permanent and go under the compendious name of "Courts of Civil Judicature". There can thus be no doubt that the Central Government does not come within this class.

With the growth of civilization and the problems of modern life, a large number of administrative Tribunals have come into existence. These Tribunals have the authority of law to pronounce upon valuable rights; they act in a judicial manner and even on evidence on oath, but they are not part of the ordinary Courts of Civil Judicature. They share the exercise of the judicial power of the State, but they are brought into existence to implement some administrative policy or to determine controversies arising out of some administrative law. They are very similar to Courts, but are not Courts. When the Constitution speaks of 'Courts' in Article [136](#), [227](#), or [228](#) or in Articles 233 to 237 or in the Lists, it contemplates Courts of Civil Judicature but not Tribunals other than such Courts. This is the reason for using both the expressions in Articles [136](#) and [227](#).

By "Courts" is meant Courts of Civil Judicature and by "Tribunals", those bodies of men who are appointed to decide controversies arising under certain special laws. Among the powers of the State is included the power to decide such controversies. This is undoubtedly one of the attributes of the State, and is aptly called the judicial power of the State. In the exercise of this power, a clear division is thus noticeable. Broadly speaking, certain special matters go before Tribunals, and the residue goes before the ordinary Courts of Civil Judicature. Their procedures may differ, but the functions are not essentially different. What distinguishes them has never been successfully established.

In my opinion, a Court in the strict sense is a Tribunal which is a part of the ordinary hierarchy of Courts of Civil Judicature maintained by the State under its constitution to exercise the judicial power of the State. These Courts perform all the judicial functions of the State except those that are excluded by law from their jurisdiction. The word "judicial", be it noted, is itself capable of two meanings. They were admirably stated by Lopes, L.J. in Royal Aquarium and Summer and Winter Garden Society v. Parkinson [1892] 1 Q.B. 431, in these words:

The word 'judicial' has two meanings. It may refer to the discharge of duties exercisable by a judge or by justices in court, or to administrative duties which need not be performed in court, but in respect of which it is necessary to bring to bear a judicial mind - that is, a mind to determine what is fair and just in respect of the matters under consideration.

That an officer is required to decide matters before him "judicially" in the second sense does not make him a Court or even a Tribunal, because that only establishes that he is following a standard of conduct, and is free from bias or interest.

Courts and Tribunals act "judicially" in both senses, and in the term "Court" are included the ordinary and permanent Tribunals and in the term "Tribunal" are included all others, which are not so included".

11. There can be no two opinions about the nature of the VAT Tribunal in the present case; it is a statutory tribunal, tasked with deciding appeals preferred by aggrieved parties against decisions of VAT adjudicatory authorities. Its membership comprises of those who hold or are entitled to hold judicial office; there are Administrative members too. There is a certain formality in the procedure it has to adopt, or follow. Regulation 31A mandates that its orders are pronounced "in Court"; Regulation 37 directs

the Tribunal to hold open hearings. The procedure for filing appeals, granting stay or interim orders, issuance of summons, and review of orders, have been prescribed under the Regulations. All these underline that it carries out judicial functions.

12. A fundamental premise on which our legal system rests is that no one can suffer an adverse order unheard, or be subjected to an unfair procedure. Procedural safeguards have, over the years, through precedents and court judgments, been recognized as a bulwark against executive excesses or apathy. These rules apply with equal vigor in the case of Tribunals responsible for dispensing justice within their sphere of activity. The VAT Tribunal is one such. A basic component of fair hearing is that a man likely to be affected by a decision, should be heard by an unbiased or impartial tribunal or authority. The corollary to this – and perhaps equally so, is that the officer, or authority who hears the litigant or individual, should issue the order. This aspect was first stated in *G.Nageshwara Rao v APSRTC* AIR 1959 SC 308 in the following words:

“...This divided responsibility is destructive of the concept of judicial hearing. Such a procedure defeats the object of personal hearing. Personal hearing enables the authority to watch the demeanour of the witness and clear-up his doubts during the course of his arguments, and the party appearing to persuade the authority by reasoned argument to accept the point of view. If one person hears and another decides, then personal hearing becomes an empty formality.”

Earlier, in *Fulker v Fulker* (1936) 3 All ER 636 it was observed that:

“It was most important that all the justices adjudicating upon the evidence on which they were to make their findings should

hear that evidence and not have it communicated to them through the medium of justices' clerk's note."

Even more recently, in *Automotive Tyre Manufactureres ... vs The Designated Authority & Ors* (2011) 2 SCC 258 the same principle was restated as follows:

"In the present case, admittedly, the entire material had been collected by the predecessor of the DA; he had allowed the interested parties and/or their representatives to present the relevant information before him in terms of Rule 6(6) but the final findings in the form of an order were recorded by the successor DA, who had no occasion to hear the appellants herein. In our opinion, the final order passed by the new DA offends the basic principle of natural justice. Thus, the impugned notification having been issued on the basis of the final findings of the DA, who failed to follow the principles of natural justice, cannot be sustained. It is quashed accordingly."

13. Apart from the obvious anomalies which would occur if the course suggested by the revenue were to be followed in this case, there is a more fundamental fallacy in that approach. The efficacy and existence of every organ of the state – no less, Courts and Tribunals (as in this instance) rest on the public confidence they enjoy. Any act which tends to undermine that confidence has to be shunned, and wherever necessary, cured. To achieve this end, the Constitution makers envisioned a remedy under Article 226 of the Constitution. Any procedure or practice which suggests – even remotely, of unfairness, at one stroke undermines public confidence, and at the same time, sullies fair-play; here, there cannot be an overemphasis of the aphorism that justice must not only be done, but manifestly seen to be done.

14. In view of the above discussion, this Court hereby directs the Delhi VAT Tribunal to forbear hearing of Appeal Nos. 81-83/ATVAT/11-12 in the composition it had on 29-8-2012 and 7-9-2012, and continue the hearing with the two members (i.e. the Chairman and Mr. D.C. Anand) according to its previous composition, when the matter was part heard, and the petitioner's arguments had been concluded, on 27-8-2012. It is clarified that Ms. Nita Bali, Member (Administrative) shall not participate in the proceedings; she is however entitled to sit and hear all other cases in which she was a participant, either before her leave of absence, or after her re-joining the Tribunal, except in part heard cases or appeals, like in the present instance. The Tribunal shall take up the Petitioner's appeals, subject to the above directions, at its utmost expedience, and decide its merits, in accordance with law. The Petition is allowed in the above terms; the Tribunal's file shall be returned forthwith to it, by the Registry.

Order dasti under signatures of Court master.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

SEPTEMBER 21, 2012