

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

INTERIM APPLICATION NO.1779 OF 2021
IN
REVIEW PETITION (STAMP) NO.98390 OF 2020
IN
WRIT PETITION NO.6968 OF 2019
WITH
REVIEW PETITION (STAMP) NO.98390 OF 2020
IN
WRIT PETITION NO.6968 OF 2019

State of Maharashtra and Ors.

..Review Petitioners/Applicants
(Org. Respondents)

Versus

Ld. Wind Power Blades P. Ltd.
and Ors.

..Respondents
(Org. Petitioners)

Ms. Neha Bhide, “B” Panel Counsel a/w Mr. Vinay Sonpal, Special Counsel
for the Review Petitioners/Applicants.

Mr. Anurag Soan a/w Mr. Aniket Nimbalkar i/by DMD Advocates, for
Respondent No.1.

Mr. Jitendra B. Mishra, Advocate for Respondent No.3.

CORAM : UJJAL BHUYAN &
ABHAY AHUJA, JJ.
DATE : 4th OCTOBER, 2021

P.C.

Heard Mr. Sonpal, learned special counsel for the review
petitioners and Mr. Anurag Soan, learned counsel for respondent No.1
(original petitioner). We have also heard Mr. Jitendra Mishra, learned
counsel for respondent No.3.

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2. This petition seeks review of judgment and order dated 16.09.2020 passed by the writ court in Writ Petition No.6968 of 2019.

3. Since there is delay of 50 days in filing the review petition, review applicants have filed interim application for condonation of delay.

4. Upon hearing learned counsel for the parties and considering the averments made in the interim application, delay in filing review petition is condoned.

5. Insofar the review petition is concerned, we may note that the related writ petition was filed seeking the following reliefs :-

“2. By filing this petition under Articles 226/227 of the Constitution of India, petitioner seeks a direction to the respondents to refund an amount of Rs.4,73,26,512.00 alongwith appropriate interest following encashment of eight bank guarantees dated 26th October, 2018 bearing Nos.0005BG00008819, 0005BG00008919, 0005BG00009019, 0005BG00009119, 0005BG00009219, 0005BG00009319, 0005BG00009419 and 0005BG00009519 of ICICI Bank by respondent No.4.”

6. During the pendency of writ proceedings, the writ court had summed up the grievance of the petitioner vide order dated 10.07.2019 which reads as under :-

“1) This petition under Article 226 of the Constitution of India challenges the action of the respondents in encashing 8 bank guarantees on 29th March 2019 aggregating to Rs.4.72 crores. This encashment of bank guarantee was done

consequent to the order dated 26th March 2019 of the Appellate Authority under Section 21 of the Integrated Goods and Services Tax Act read with Section 107 of the Maharashtra Goods and Service Tax Act, 2017.

2) The grievance of the petitioner is that the order dated 26th March 2019 passed by the Dy. Commissioner of Sales Tax is subject to further appeal to the Goods Service Tax Appellate Tribunal (Tribunal). The statute provide a period of three months to the aggrieved party to file an appeal to the Tribunal. In spite of the above and the petitioners specific request not to encash the bank guarantee as they are in process of preparing the appeal from the order dated 26th March 2019 of the Appellate Authority, the 8 Bank Guarantee have been encashed.

3) This action of the respondents is *prima facie* contrary to the decision of this Court in Mahindra and Mahindra Ltd. vs. Union of India – 59 ELT 505.

4) Mr. Sonpal, learned Special Counsel for the respondents – State, seeks time to take instructions and file an affidavit, if so required. At his request, the petition is adjourned to 19th July 2019 at 3.00 p.m. Parties are put to notice that the petition is likely to be disposed of finally on the next date.”

7. This was reiterated in the order dated 10.01.2020 which is extracted hereunder :-

“Heard learned Counsel for the parties.

2. The learned counsel for the Petitioner submitted that according to the Petitioner the amounts now lying with the Government by encashment or bank guarantee, tax paid voluntarily and pre-deposit for statutory appeals, is far in

excess than the amount the Petitioner is liable to pay if he fails in all his challenges. According to the Petitioner, the amount with the Government is Rs.7,80,88,745/- but the amount payable to the Respondent-authorities is Rs.1,65,64,279/- assuming the Petitioner fails in his challenges. He submits that the Petitioner is willing to secure the Respondent-authorities for this amount. He submits that he has to make this request in the peculiar facts and circumstances that there is no appellate Tribunal currently functioning which can take up the grievance of the Petitioner on merits. *Prima facie*, we find request made by the Petitioner as fair.

3. Considering the fact that the matter has been pending for some time and orders have been passed by this Court, we direct Respondents to place on record the amount which according to the Respondents is payable by the Petitioner in case the Petitioner fails in his challenge, after deducting the amounts paid by the Petitioner and after encashment of bank guarantee.

4. Place the Petition on board under the caption, 'For Directions' on 21 January, 2020. By this date we expect a positive statement from the Respondents regarding the above aspect. The Petitioner has produced a calculation sheet and states the same will be furnished to the Respondent-authorities for their reference."

8. Finally, by the judgment and order dated 15.09.2020, the writ petition was allowed. Relevant portion of the judgment and order dated 15.09.2020 reads as under :-

"22. From the pleadings and the orders passed by this court the controversy in this case has narrowed down considerably; rather it now lies within a narrow compass.

23. Admittedly, there is IGST demand of Rs.2,36,63,256.00 with equal amount of penalty imposed, together the total dues comes to Rs.4,73,26,512.00.

24. As against this, petitioner had paid IGST of Rs.2,36,63,256.00. At the stage of preferring the first appeals petitioner had deposited 10% of the IGST dues amounting to Rs.23,66,326.00. Thereafter while filing the second appeals under section 112 of the CGST Act petitioner deposited Rs.47,32,651.00 being 20% of the IGST dues. Thus, petitioner had deposited an amount of Rs.70,98,977.00 (Rs.23,66,326.00 + Rs.47,32,651.00) in addition to IGST dues already deposited. In all petitioner has deposited Rs.3,07,62,233.00, the break-up of which is as follows:-

- | | | | |
|-------|--|---|-------------------|
| (I) | IGST dues paid | – | Rs.2,36,63,256.00 |
| (ii) | 10% of IGST dues paid
at the time of filing
first appeals | - | Rs. 23,66,326.00 |
| (iii) | 20% of IGST dues paid
at the time of filing second
appeals | - | Rs. 47,32,651.00 |

Total -	Rs.3,07,62,233.00
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25. The amount covered by the eight bank guarantees is Rs.4,73,26,512.00. If both the figures are added i.e., the amount covered by the bank guarantees and the dues paid by the petitioner, the amount would be Rs.7,80,88,745.00 (Rs.4,73,26,512.00 + Rs.3,07,62,233.00) which amount is now with the respondents as against demand and penalty of Rs.4,73,26,512.00. From the above, it is evident that an amount of Rs.3,07,62,233.00 (Rs.7,80,88,745.00 - Rs.4,73,26,512.00) is lying in excess with the respondents. Even if the appeals filed by the petitioner under section 112 of the CGST Act are dismissed, petitioner would be required to pay a further amount of Rs.1,65,64,279.00 only whereas respondents are holding onto an amount of

Rs.3,07,62,233.00 of the petitioner much in excess of the dues.

26. Section 107 of the CGST Act provides for appeals to appellate authority. Sub-section (1) says that any person who is aggrieved by any decision or order passed under the CGST Act may appeal to the prescribed authority within three months from the date on which the impugned decision or order is communicated. Sub-section (6)(b) provides that no such appeal shall be filed unless appellant has paid a sum equal to 10% of the remaining amount of tax in dispute arising from the impugned decision or order. There is provision for filing further appeal to the appellate tribunal under Section 112. As per sub-section (1), any person who is aggrieved by an order passed against him under Section 107 or by the revisional authority under Section 108 may prefer appeal to the appellate tribunal against such order within three months from the date on which the order sought to be appealed against is communicated to the aggrieved person. As per sub-section 8(b), no appeal shall be filed under sub-section (1) unless the appellant has paid a sum equal to 20% of the remaining amount of tax in dispute, in addition to the amount paid under sub-section (6) of Section 107. Sub-section (9) clarifies that when the appellant pays the pre-deposit as per sub-section (8), recovery proceedings for the balance amount shall be deemed to be stayed till disposal of the appeal.

27. Section 115 provides for payment of interest on refund of amount paid for admission of appeal. It says that where an amount paid by the appellant under sub-section (6) of Section 107 or sub-section (8) of Section 112 is required to be refunded consequent to any order of the appellate authority or of the appellate tribunal, interest at the rate specified under Section 56 shall be payable in respect of such refund from the date of payment of the amount till the date of refund of such amount. Reverting to Section 56, we find that this section deals with interest on delayed refunds. Section 54, more particularly sub-section (5) thereof, deals with refund of tax. Section 56 says that if any tax is

ordered to be refunded under sub-section (5) of Section 54, interest at such rate not exceeding six percent as may be specified shall be payable in respect of such refund.

28. Though we have briefly referred to the relevant provisions, it may not be necessary to dilate further on the provisions as the contours of the *lis* has narrowed down considerably.

29. That being the position and without entering into the controversy as to whether respondent No.4 received request of the petitioner for extension of the bank guarantees before encashment, we are of the view that having regard to the facts and circumstances of the case, the following directions will meet the ends of justice.

30. Accordingly, we direct as under :-

- a. Respondent Nos.3 and 4 shall refund the amount of Rs.4,73,26,512.00 covered by the eight encashed bank guarantees with applicable statutory interest thereon to the petitioner within a period of four weeks from the date of receipt of a copy of this order;
- b. Petitioner to furnish fresh bank guarantee(s) from nationalized bank to respondent No.4 for an amount of Rs.1,65,64,279.00 covering the balance amount of penalty imposed on the petitioner within a period of four weeks from the date of receipt of a copy of this order.

31. With the above directions, writ petition is disposed of. However, there shall be no order as to cost.”

9. The review petition has been filed seeking review of the aforesaid judgment and order on the following grounds :-

“A) The Hon’ble Court ought to have appreciated that the Bank Guarantees were unconditional and has no relation to

payment with Form 3B for Oct 2018. The payment in Form 3B were with regard to intestate supply of the product and the bank guarantees were in relation to the contravention of the provision of Section 129 of the CGST Act and they are not related and are altogether different events.

B) Section 129 of the CGST Act is as under :-

“Detention, seizure and release of goods and conveyances in transit

(1) Notwithstanding anything contained in this Act, where any person transports any goods or stores any goods while they are in transit in contravention of the provisions of this Act or the rules made thereunder, all such goods and conveyance used as a means of transport for carrying the said goods and documents relating to such goods and conveyance shall be liable to detention or seizure and after detention or seizure, shall be released,—

(a) on payment of penalty applicable tax and penalty equal to two hundred per cent. of the tax payable on such goods and, in case of exempted goods, on payment of an amount equal to two per cent. of the value of goods or twenty-five thousand rupees, whichever is less, where the owner of the goods comes forward for payment of such penalty;

(b) on payment of penalty equal to fifty per cent. of the value of the goods or two hundred per cent. of the tax payable on such goods, whichever is higher, and in case of exempted goods, on payment of an amount equal to five per cent. of the value of goods or twenty-five thousand rupees, whichever is less, where the owner of the goods does not come forward for payment of such penalty;

(c) upon furnishing a security equivalent to the amount payable under clause (a) or clause (b) in such form and manner as may be prescribed:

Provided that no such goods or conveyance shall be detained

or seized without serving an order of detention or seizure on the person transporting the goods.

(2) The provision of sub section (6) of section 67 shall, mutatis mutandis, apply for detention and seizure of goods and conveyances.

(3) The proper officer detaining or seizing goods or conveyance shall issue a notice within seven days of such detention or seizure, specifying the penalty payable, and thereafter, pass an order for payment of tax and penalty under clause (a) or clause (b) or clause (c).

(4) No tax, interest or penalty shall be determined under sub-section (3) without giving the person concerned an opportunity of being heard.

(5) On payment of amount referred in sub-section (1), all proceedings in respect of the notice specified in sub-section (3) shall be deemed to be concluded.

(6) Where the person transporting any goods or the owner of such goods fails to pay the amount of penalty under sub-section (1) within fifteen days from the date of receipt of the copy of the order passed under sub-section (3), the goods or conveyance so detained or seized shall be liable to be sold or disposed of otherwise, in such manner and within such time as may be prescribed, to recover the penalty payable under sub-section (3):

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

Provided further that where the detained or seized goods are perishable or hazardous in nature or are likely to depreciate in value with passage of time, the said period of seven days may be reduced by the proper officer.

The section begins with a non-obstante clause and the tax and penalty under it is independent of the tax paid by the taxpayer under other provisions of the Act.

C) The Hon'ble Court ought to have appreciated that part payment to be made for first appeal and second appeals has no bearing on the unconditional bank guarantees for discharge of liabilities at the time of detention of vehicles. Generally, the tax payer raises the invoice and immediately dispatches the goods to his customer. When the tax payer dispatches the goods without following the provisions relating to Section 129 and the vehicle is intercepted, he becomes liable to pay the tax/penalty as laid down in the Section 129. The tax and penalty payable by him under Section 129 has no relation whatsoever with the tax payment with return in Form GSTR 3-B because the Form GSTR 3-B becomes payable only later and the interception happens immediately as the goods are dispatched, much before the payment relating to the supply of goods in the vehicle.

D) At any rate the refund is governed by section 54 of Central Goods and Services Tax Act 2017 read with Integrated Goods And Service Tax 2017 and the person who claims refund of any sum paid in excess has to follow in first place procedure as per Section 54. The Hon'ble Court ought to have directed the Petitioner in the Writ Petition to follow due procedure laid down in law instead of invoking provisions of Article 226. The amount paid by the taxpayer is credited to the cash ledger and in order to refund the same, it needs to be debited to the cash ledger of the tax payer and the process can be initiated only by the refund application under Section 54 of the CGST Act.

E) At any rate if at all Petitioner is entitled to refund, it is entitled to refund of only Rs.70,98,977.00 and not Rs.4,73,26,512.00. If the refund of Rs.4,73,26,512.00 is to be granted, the dealer needs to submit fresh bank guarantee of Rs.4,02,27,535.00 (Rs.4,73,26,512.00 minus Rs.70,98,977.00).

F) As per Section 17 of the Integrated Goods and Service Tax Act 2017 (IGST Act), the revenue of IGST is for Central

Government and upon recovery of the sums of Rs.4,73,26,512.00 in totality goes to the Treasury of the Central Government. The Petitioners are neither beneficiary or entitled appropriate this Rs.4,73,26,512.00 for their treasury or consolidated fund. In the circumstances and in law, there can not be question of Petitioners being liable to refund any amount whatsoever to respondent No.1 which credited to Central Government at threshold on recovery and therefore Respondent No.2 and 3 are in fact liable to refund any sum that may be determined to be refunded and not the present Petitioners. It is respectively submitted that this contention though advanced by Petitioners at the time hearing through advocate, that petitioners are not liable but Respondent No.2 and 3 are liable is not reflected nor dealt with in the impugned order by this Hon'ble Court.

G) The Petitioners crave leave to add, alter or amend any other or further grounds at the time of hearing.”

10. In the hearing today, Mr. Sonpal, learned special counsel has placed before us a synopsis of the grounds urged by the review petitioners which we have duly considered.

11. In our view, the grounds urged by the review petitioners may be grounds of appeal but would not be grounds for review within the ambit and meaning of section 114 read with Order 47 Rule 1 of the Code of Civil Procedure, 1908. No rehearing of a concluded matter is permissible while seeking review. We neither find any error apparent on the face of the record nor any documents which the review petitioners could not present at the time of hearing despite due diligence. We also do not find any sufficient cause to rehear the concluded matter.

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12. That being the position, we do not find the present to be a fit case for review.

13. Review petition is accordingly dismissed.

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signed by
BALAJI
GOVINDRAO
PANCHAL
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ABHAY AHUJA, J

UJJAL BHUYAN, J