IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2223 OF 2021
WITH
INTERIM APPLICATION NO. 1363 OF 2021

Hover Automotive India Private Limited	**}**	**Petitioner**
versus		
Union of India and Ors.	**}**	**Respondents**

Mr. Sandeep Chilana with Ms. Shahana Manjesh i/b. Mr. Prem Kumar Pandey for the petitioner.

Mr. J. B. Mishra with Mr. Ram Ochani for the respondents.

CORAM :- DIPANKAR DATTA, CJ &
M. S. KARNIK, J.

DATE :- OCTOBER 29, 2021

PC :-

1. An order-in-original dated 30th January 2021 passed by the Principal Commissioner, GST and Central Excise, Mumbai East Commissionerate assessing service tax dues of the petitioner is under challenge in this writ petition dated 29th June 2021. Such order was passed on a show-cause notice dated August 28, 2018, alleging non-payment/short payment of service tax amounting to prima facie breach of the Finance Act, 1994, the Service Tax Rules, 1994 and other provisions.

2. It is not disputed at the bar that an appeal lies against the impugned order to the Customs, Excise and Service Tax Appellate Tribunal (hereafter "the Tribunal", for short) and Mr. Mishra, learned advocate for the respondents has objected to the maintainability of this writ petition by urging that the petitioner should be relegated to the appellate forum. It is also the contention of Mr. Mishra that the provisions of the relevant law provide a final appeal to the Supreme Court and that decisions of such court are legion where it has been authoritatively held and which are binding on us as law laid down under Article 141 of the Constitution of India that, in case an appellate remedy is finally available to an aggrieved party before the Supreme Court, the writ court ought not to normally interfere. Reliance in this connection has been placed on a decision of the Supreme Court in **Union of India vs. Coastal Container Transporters Association**, reported in 2019 (22) G.S.T.L. 481 (S.C.).

3. Mr. Chilana, learned advocate for the petitioner, however, by referring to an unreported decision of the Supreme Court dated 3rd September 2021 rendered in Civil Appeal No. 5121 of 2021 [**The Assistant Commissioner of State Tax and Ors. vs. M/s. Commercial Steel Limited**] contends that mere availability of the statutory appellate remedy does not oust the jurisdiction of the Court exercising power of judicial review under Article 226 of the Constitution of India and that a writ petition could be entertained on any one of the exceptions carved out in previous decisions and reiterated in

Commercial Steel Limited (supra) being satisfied, viz. where breach of a fundamental right is complained of or the order under challenge suffers from violation of principles of natural justice or where the order has been passed in excess of jurisdiction or where a challenge to the vires of a statute or delegated legislation is involved. According to him, the present case is one where breach of natural justice is writ large on the face of the order under challenge in this writ petition and, thus, the same ought to be entertained.

4. Mr. Chilana, to buttress his contention of the order under challenge being vulnerable for breach of natural justice, has drawn our attention to paragraph 29 thereof, where it is recorded that the petitioner had quoted several case laws and submitted various international jurisprudence as well as paragraph 32 where the Commissioner recorded that on consideration of such case laws, he did not find the same to be applicable to the present case. According to Mr. Chilana, no other reason has been assigned why such case laws did not appeal to the Commissioner and this, according to Mr. Chilana, amounts to a clear violation of the principles of natural justice which ought to be a ground for entertaining the writ petition.

5. Our attention has also been drawn by Mr. Chilana to the decision of the Supreme Court in **Siemens Engineering and Manufacturing Co. of India Ltd. vs. Union of India and Anr.**, reported in (1976) 2 SCC 981, and in particular to paragraph 6, where the Court emphasized that an authority making an order in exercise of quasi-judicial function must record its reasons in support of the order.

6. Mr. Chilana sought to distinguish the decision in **Coastal Container Transporters Association** (supra) by submitting that the approach there was made at the stage of show-cause and not when the final order on the proceedings had been made.

7. Based on the aforesaid submissions, it is urged that the writ petition ought to be entertained, heard and decided as to whether the Commissioner was right in proceeding to hold that none of the case laws submitted by the petitioner had application in the case.

8. We have heard learned advocates for the parties.

9. There is nothing in Article 226 of the Constitution of India which refers to an alternative efficacious speedy remedy made available by a statute leading to ouster of jurisdiction of the writ court. By judicial pronouncements, certain restrictions have been imposed in the exercise of discretion bearing in mind that writ remedy is after all a discretionary remedy. One of these self-imposed restrictions is when an aggrieved party has a remedy under a statute, the writ court may in the judicious exercise of its discretion decline interference and relegate the party to avail such remedy. However, the decision in **Commercial Steel Limited** (supra) reiterates in paragraph 11 the exceptions on the existence of any one whereof the writ court may feel justified in entertaining a writ petition despite the availability of an alternative, efficacious and speedy remedy to the party aggrieved.

10. Before we proceed to examine Mr. Chilana's argument, we have noted that the Finance Act provides a complete machinery to challenge an order of assessment before the Tribunal. Also, an appeal from the appellate order would lie before the Supreme Court. The decision in **Titaghur Paper Mills Co. Ltd. vs State of Orissa**, reported in (1983) 2 SCC 433, may be referred to here where the Constitution Bench decision in **State of Uttar Pradesh vs Mohammad Nooh**, reported in AIR 1958 SC 86, was considered and the Court found no justification to extend the principles laid down therein to a case of the nature at hand where an order of assessment made by the sales tax officer was under challenge. It was held in paragraph 11 that "*where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of."* We need to keep this exposition of law in mind while considering the argument of Mr. Chilana.

11. Since violation of principles of natural justice is the point based whereon the writ court's jurisdiction has been invoked, we hold on the pleaded case in the writ petition that the petitioner has not asserted any of the fundamental principles of natural justice, as understood in the traditional and contemporary sense, viz. *audi alteram partem* or *nemo debet esse judex in propria causa*, to have been breached. It is true that by several decisions of the Supreme Court, natural justice has been held to be violated in cases where an action has been taken or an order has been passed without the party affected being given fair, adequate and reasonable opportunity to place his case/raise defence on proof of prejudice, as a facet of the *audi alteram partem* rule. This, as distinguished from a case of no notice/no opportunity/no hearing, where prejudice need not be proved. It has also been held to violate natural justice if the order that is ultimately passed in the proceedings, after extending due, adequate and reasonable opportunity of hearing, does not reveal the grounds in support of the conclusion reached by the decision maker. In other words, what has been emphasized by the law courts is that an order determining rights and liabilities of parties ought to meet the tests of "why" and "what", where the "what" (the conclusion) has the "why" (the reasons) to rest on. Should the reason(s) be absent in an order and the link between the materials on record and the conclusion not established, the order could be susceptible to a charge of being passed in violation of natural justice. This is what the decision in **Siemens Engineering and Manufacturing Co. of India Ltd.** (supra) has highlighted.

12. We have looked into the order-in-original and find that there are certain reasons for the conclusions reached. For the view we propose to take, the soundness of the reasons need not be examined. Suffice to record, it is not a case of the impugned order being unreasoned. However, in view of what has been urged before us, we need to consider whether omission on the part of the decision maker to give separate reasons as to why each case law cited before him by the petitioner (noticee) would not be applicable does amount to a violation of principles of natural justice, so as to persuade us to entertain the writ petition.

13. In this context, we consider it useful to also refer to paragraphs 11 and 12 of the decision in **Commercial Steel Limited** (supra) cited by the petitioner. Paragraphs 11 and 12 are quoted below: -

> "11. The respondent had a statutory remedy under section 107. Instead of availing of the remedy, the respondent instituted a petition under Article 226. The existence of an alternate remedy is not an absolute bar to the maintainability of a writ petition under Article 226 of the Constitution. But a writ petition can be entertained in exceptional circumstances where there is:
>
> (i) a breach of fundamental rights;
> (ii) a violation of the principles of natural justice;
> (iii) an excess of jurisdiction; or
> (iv) a challenge to the vires of the statute or delegated legislation.
>
> 12. In the present case, none of the above exceptions was established. There was, in fact, no violation of the principles of natural justice since a notice was served on the person in charge of the conveyance. In this backdrop, it was not appropriate for the High Court to entertain a writ petition. The assessment of facts would have to be carried out by the appellate authority. As a matter of fact, the High Court has while doing this exercise proceeded on the basis of surmises. However, since we are inclined to relegate the respondent to the pursuit of the alternate statutory remedy under Section 107, this Court makes no observation on the merits of the case of the respondent."

14. Even in **Commercial Steel Limited** (supra), the Supreme Court did not go beyond observing that the notice having been served on the person concerned, there was compliance with principles of natural justice; and, ultimately, upon setting aside of the order under appeal, the respondent (the writ petitioner) was relegated to the appellate forum.

15. While entertaining a complaint of natural justice, one has to keep in mind its different shades. The first and the most prominent shade is where an order is passed without notice/without opportunity/without hearing. In such a case, there is an obtrusive violation of the rule of *audi alteram partem* and the writ court may not labour much to decide on the entertainability of a writ petition even if an alternative efficacious speedy remedy were made available by a statute. Complaints of violation of natural justice, which fall in the second shade and may appear to be lighter than the first, are orders passed without reasons. Wholly unreasoned orders attract intrusive examination as compared to orders with some reasons, in which case, the writ courts are loath to interfere. When the complaint is that no fair, adequate and reasonable opportunity to place the case/defend the proposed action is extended, it pertains to the third shade which is again lighter than the second. The Court normally examines the complaint from the standpoint of prejudice and may entertain a writ petition if the prejudice suffered is such that the order terminating the proceedings is rendered unsustainable. The argument put forth before us is, however, different. It does not pertain to the aforesaid three shades. There is no complaint from the side of the petitioner that he was not heard by the Commissioner prior to the order-in-original being made or that fair, adequate and reasonable opportunity to place the case/defend the proposed action was not extended. It is also not the complaint that the order has not assigned reasons in support of the conclusion reached. The petitioner is left aggrieved because the impugned order does not say, in so many words, as to why the authorities cited by it were not considered to be applicable. This, according to Mr. Chilana, is a violation of natural justice.

16. We must remember that the Commissioner, while he passed the order-in-original holding that dues of service tax are payable by the petitioner, was acting in an administrative capacity. Although the order made by him might have certain attributes of a quasi-judicial act and he could even ostensibly be seen as wearing the hat of an adjudicator, who is required to act quasi-judicially, still the Commissioner in the due discharge of his functions is not expected to author an order of assessment as if he were writing a judgment. A judicial order is obviously required to deal with the authorities cited in a manner that reflects application of mind, but it is not always the case in respect of an order of the present nature. If at all, we would view the omission of the Commissioner not to separately deal with the authorities cited as something like an error committed within jurisdiction which is not the same as acting in excess of jurisdiction. Such error, if required, can be corrected by the Tribunal if at all the same is approached. We, therefore, do not propose to hold that the order impugned suffers from a violation of principles of natural justice. There is no ground of substance to entertain this writ petition despite the statutory remedy of appeal being available to the petitioner.

17. In such view of the matter, we decline interference. The writ petition stands dismissed, without costs.

18. This order shall not preclude the petitioner to pursue the appellate remedy in accordance with law. All contentions are left open to be urged before the appellate forum.

19. In view of the above order, nothing survives for decision in the interim application. The same too stands dismissed, without costs.

(M. S. KARNIK, J.) **(CHIEF JUSTICE)**