Form No. J.(2)
Item No.3

IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

HEARD ON: 08.12.2023

DELIVERED ON: 08.12.2023

CORAM:
THE HON'BLE CHIEF JUSTICE T.S. SIVAGNANAM
AND

THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

F.M.A. 890 of 2023
With
I.A. No. CAN 1 of 2023

M/s. Central Arya Road Transport & Anr.
Vs.
Union of India & Ors.

Appearance:-

Mr. Saurabh Bagaria
Mr. Indranil Banerjee
Mr. Subrata Mukherjee ....**for the appellants**

Mr. Debasish Chaudhuri
Ms. Sanjukta Gupta
.........**for the respondent no.1/U.O.I.**

Mr. Tapan Bhanja
Mr. K. K. Maiti
........**for the CGST & CX Authority**

JUDGMENT

(Judgment of the Court was delivered by T.S. SIVAGNANAM, C.J.)

1. This intra-Court appeal filed by the writ petitioners is directed against the order dated 26th July, 2023 passed in W.P.A. No.16171 of 2023. In the said writ petition, the appellants had challenged the order in original dated 31st March, 2023 passed by the Principal Commissioner of CGST & CX, Kolkata, South. By the said order, the adjudicating authority demanded

service tax including cess of Rs.9,88,29,246/- under Section 73(2) of the Finance Act, 1994 read with Section 174 of the CGST Act, 2017 and an equal amount of penalty was also imposed on the appellants/noticees under Section 78 of the Finance Act, 1994 read with Section 174 of the CGST Act primarily on three grounds. The order in original was challenged before the learned writ court, firstly; on the ground that there is a procedural irregularity inasmuch as the pre-show-cause notice was not issued as per the relevant circular issued by the Board. This point was not seriously canvassed by the learned advocate appearing for the appellants on the ground that the appellants had submitted their reply to the show-cause notice.

2. The second ground of challenge was to the correctness of invoking the extended period of limitation for initiation of the proceedings as the proceedings covered the period from April, 2014 to June, 2017 and show-cause notice was issued on 11th November, 2019 prior to which there were two audits, which were conducted by the department during January, 2015 and January, 2017. Therefore, it is submitted that the extended period of limitation could not have been invoked as there can be no allegation of wilful misstatement or suppression of facts or fraud or collusion. In support of such contention reliance has been placed on the decision of this Court in ***Commissioner of Service Tax Vs. Naresh Kumar & Company Pvt. Ltd.*** reported in ***2022 (67) G.S.T.L. 324 (Cal.)***.

3. Thirdly, it is submitted that the order in original suffers from perversity on the face of it inasmuch as the documents, which have been placed before

the adjudicating authority were not considered and some of them have been rejected on the flimsy reasons of being illegible etc.

4. The learned Single Bench by the impugned order had dismissed the writ petition on the ground that the order in original is an appealable order under the statute; the writ court cannot scrutinise the facts on the basis of which the adjudicating authority has come to the conclusion that the case of the appellants falls within the exceptions under Section 73(1) of the Finance Act; that the appellants have not approached the writ court immediately after receiving the show-cause notice alleging procedural irregularity and the appellants are precluded from challenging the order of adjudication on the ground that pre-show-cause notice was not issued after having submitted the jurisdiction by submitting reply to the show-cause notice. It may be true that in several cases, the Court has held that extended period of limitation cannot be invoked in the absence of a factual finding and there should be clear allegations of wilful misstatement or suppression of fact or fraud or collusion committed by the assessee. In the instant case, we have carefully gone through the show-cause notice dated 11th November, 2019 as well as the order in original dated 31st March, 2023. Prima facie, we are of the view that while issuing the show-cause notice dated 11th November, 2019, the adjudicating authority in paragraph 9 has set out certain reasons as to why the extended period of limitation is invokable against the appellants. The appellants have contested the show-cause notice by submitting the reply and the adjudicating authority has sustained the allegations in the show-cause notice and justified invocation of the extended period of limitation. Thus, the case on hand appears to be

not a simple case of going through the show-cause notice and examining as to whether there is any factual finding with regard to wilful misstatement or suppression or fraud but to consider the said aspect, facts have to be gone into, much of which has been seriously disputed by the appellants in their reply to the show-cause notice.

5. Therefore, we are of the view that in the instant case, the issue as to whether extended period of limitation could be invoked is not purely a question of law but a mixed question of fact and law and necessarily, disputed questions of fact have to be gone, which cannot be adjudicated in a writ petition.

6. With regard to the allegation that the order in original suffers from perversity inasmuch as it has ignored vital facts rejected the documents filed by the appellants on flimsy grounds etc., are also matters involving adjudication into facts. Admittedly, the appellate remedy available to the appellants is before the Central Excise and Service Tax Appellate Tribunal. We have no doubt in our mind to observe that such an appellate remedy is not only an efficacious remedy but an effective remedy as well. The learned Tribunal has got sufficient jurisdiction to re-appreciate the facts and come to an independent conclusion.

7. Therefore, we are of the view that in the facts and circumstances of this case, the appellants should not be permitted to bypass the appellate remedy available under the Act and for such reason, the appellants have to necessarily file an appeal before the learned Tribunal challenging the order in original dated 31st March, 2023.

8. Therefore, we are not inclined to interfere with the order in original for the reasons set out in the preceding paragraphs. We make it clear that whatever observations, which have been made in this order are only prima facie observations, which will not, in any manner, prejudice the rights of the appellants in canvassing all issues on facts as well as all questions of law before the learned Tribunal in the appeal, which the appellants have to file.

9. In the result, the appeal is dismissed by giving liberty to the appellants to file an appeal before the learned Tribunal against the order in original dated 31st March, 2023. If such appeal is filed by the appellants within a period of 90 days from the date of receipt of server copy of this judgement and order, the learned Tribunal shall entertain the appeal without reference to limitation.

10. As observed earlier, all questions of law and facts and points of law are left open.

11. No costs.

12. Urgent photostat certified copy of this order, if applied for, be furnished to the parties expeditiously upon compliance of all legal formalities.

(T.S. SIVAGNANAM)
CHIEF JUSTICE

I agree.

(HIRANMAY BHATTACHARYYA, J.)

Pallab/KS AR(Ct.)