OD–8

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

APO/37/2023
IA NO: GA/1/2023
ANIL BHUSHAN MITRA AND BROTHERS
VS.
UNION OF INDIA AND ORS.

BEFORE :
THE HON'BLE T.S. SIVAGNANAM ACTING CHIEF JUSTICE
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 31st March, 2023

Appearance :
Mr. Aditya Dutta, Mr. Äkash Dutta, Advs.
…for appellant
Ms. Manashi Mukherjee, Adv.
…for CGST.
Mr. Sujit Mitra, Adv.
For UoI.

The Court : - We have heard learned Counsel on either side.

We have directed Ms. Manashi Mukherjee appearing for the respondent/department to accept notice. Let the department regularize her appearance.

This intra court appeal by the writ petitioner is directed against the order dated 7.2.2023 in WPO/92/2023. The appellant had challenged the order passed by the Joint Commissioner, Appeal-I, Kolkata under the provisions of the CGST Act. The learned single Bench by the impugned order dismissed the writ petition primarily on three grounds. Firstly, the order impugned in the writ petition is a eleven page order. Secondly, it contains elaborate reasons and discussions and thirdly merely on the ground that no further alternative remedy is available cannot be a ground to entertain the writ petition. So far as the first reason given by the learned Single Bench is concerned, we have a little different view on the said aspect as an order which is a lengthy order running to several pages may not always be an order with reasons. Secondly, we find that the primary contention raised in the writ petition was that the entire credit was legitimately availed by the appellant and the same was accepted by the second respondent, but on the contrary the said amount has been ordered to be recovered only for the reasons that the NCCD has not been subsumed in the GST and the same still exists as Central Excise Duty. Therefore, the appellant contended that in such a situation, dues/recovery of the entire credited amount under Section 73(1) of the Act does not/cannot arise. There were other grounds which were also raised with regard to the imposition of penalty and interest. Therefore, we are of the view that though the learned Writ Court was of the prima facie view that elaborate reasons have been given, the correctness of the order needs to be decided on the anvil of the grounds raised by the appellant and thereafter the Court has to come to a conclusion, as to whether the order was sustainable or otherwise. Admittedly as against the order impugned in the writ petition an appeal lies to the Appellate Tribunal under Section 112 of the Act. However, till date no Tribunal has been constituted. Therefore, the appellant cannot be left remediless and was fully justified in approaching this Court under Article 226 of the Constitution of India. Therefore, it becomes all the more necessary for the learned Writ Court to examine the correctness of the order impugned before it both on merits as well as on the legal aspects. Therefore, we are of the view, that this is a case where writ petition should be heard on merits for which affidavits are required to be filed by the proper respondent.

For the above reasons, the appeal is allowed and the order passed in the writ petition is set aside the writ petition is restored to the file of the learned Writ Court. The respondent is directed to file affidavit-in-opposition within four weeks from date; reply, if there be any, within two weeks thereafter.

Let the matter be listed before appropriate Bench after Seven weeks.

(T.S. SIVAGNANAM)
ACTING CHIEF JUSTICE)

(HIRANMAY BHATTACHARYYA, J.)

pkd/GH