

Form No.J(2)

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Raja Basu Chowdhury

WPA 13876 of 2024

Anis Patel

Versus

Assistant Commissioner, State Tax,
Strand Road Charge & Ors.

For the petitioner : Mr. Boudhayan Bhattacharyya
Mr. Himangshu Ray
Ms. Stuti Bansal
Mr. Binayak Gupta
Ms. Surabhi Khandelwal

For the State : Mr. Anirban Ray, Ld. GP,
Md. T. M. Siddiqui
Mr. Tanoy Chakraborty
Mr. Saptak Sanyal
Mr. Debraj Sahu

For CGST Authority : Mr. Kaushik Dey
Ms. Ekta Sinha

Heard on : 24th July, 2024

Judgment on : **24th July, 2024**

Raja Basu Chowdhury, J:

1. The present writ petition has been filed, inter alia, praying for the following reliefs:

- a) A writ/s of, order/s, direction/s in the nature of Prohibition restraining the respondents from giving effect to the impugned

order of appeal dated April 23, 2024 till of a period of 3 months after the setting up of GST Tribunal under Section 110 of the relevant GST Acts;

- b) A writ/s of, order/s, direction/s in the nature of Prohibition restraining the respondents from giving effect to the impugned notice of demand in FORM GST APL-04 dated April 23, 2024 till of a period of 3 months after the setting up of GST Tribunal under Section 110 of the relevant GST Acts;
- c) A writ/s of, order/s, direction/s in the nature of Prohibition restraining the respondents from realizing any amount pursuant to the order of appeal dated April 23, 2024 that of the adjudication date June 22, 2023 and/or any notices of demand arising thereof till 3 months from the setting up of GST Tribunal under Section 110 of the relevant GST Acts;
- d) An interim order restraining the respondents from realizing any amount pursuant to the order of appeal dated April 23, 2024 that of the adjudication dates June 22, 2023 and/or any notices of demand arising therefrom till the disposal of the instant;
- e) An order of injunction restraining the Respondents and each of them and/or their men and agents from taking any coercive action against the petitioner during the pendency of the instant application and/or any other action that may make this

application futile and/or infructuous, till the disposal of the instant application;

f) Costs of and incidental to this application be paid by the Respondents; and

g) Such further or other order or orders be made and/or direction or directions be given as to this Hon'ble Court may deem fit and proper, rendering complete justice to the Petitioner.

2. The petitioner insists that this Court without going into the merit of the controversy and without considering whether the petitioner is at all entitled to interim relief, in connection with its proposed challenge to the order passed by the appellate authority on 23rd April, 2024, before the appellate tribunal, by reasons of the appellate tribunal not being constituted under Section 112 of the WBGST/CGST Act, 2017 (hereinafter referred to as the "said Act") should indefinitely defer the recovery of the demand raised by the respondents in GST Form DRC -07 dated 22nd June, 2023 for the tax period April, 2018 to March 2019, for at least till such time the appellate tribunal is constituted.

3. At the very outset, Mr. Ray, learned Government Pleader, appearing on behalf of the State respondents has raised a preliminary objection as regards the maintainability of the writ petition. In such view of the matter, the Government pleader is permitted to place his arguments on the point of maintainability first. The learned

Government pleader argues that the writ petitioner without having his rights *qua* the controversy between the parties adjudicated and without, *inter alia*, contending that there has been infringement of his rights, cannot be permitted to simplicitor seeks a writ in the nature of prohibition. He submits that no interim relief can be granted which partakes a final character, without there being a challenge to order passed by the appellate authority, in the writ petition.

4. It is submitted that despite the fact that the powers under Article 226 of the Constitution of India are wide enough, however, ordinarily the same ought not to be used to grant a relief by way of interim measure, if no final relief can be granted. Since, the existence of a right is the very foundation for exercise of jurisdiction, it is in aid of the final relief while deciding the rights of the parties that the Court ordinarily grants interim relief and not otherwise. In support of his aforesaid contention, he has placed reliance on a judgment delivered by the Hon'ble Supreme Court in the case of ***State of Orissa v. Madan Gopal Rungta*** reported in **1951 SCC 1024**.
5. According to the Government pleader, a writ of prohibition is ordinarily issued to keep the Inferior Tribunal/Court within its bounds as such the exercise of such power is supervisory in character. In cases where a tribunal exceeds its jurisdiction or tribunal exercises jurisdiction in matters in which the tribunal does

not have the jurisdiction, the Court may, in a fit case, issue necessary writ in the nature of prohibition, thereby, forbidding a tribunal from proceeding in excess of its jurisdiction. But a writ of prohibition does not lie to correct the course, practice or procedure of any inferior tribunal or a wrong decision on the merits of the proceeding. In support of his aforesaid contention, he has placed reliance on a judgment delivered by the Hon'ble Supreme Court in the case of **S. Govinda Menon v. Union of India & Anr.**, reported in **AIR 1976 SC 1274**.

6. By bringing out the distinction between the scope for issuance of writ of prohibition and the writ of *certiorari* he submits that a writ of prohibition is issued when the tribunal is yet to conclude its proceeding, however, once, the tribunal concludes its proceeding, ordinarily the Court can correct the jurisdictional error by exercising its jurisdiction to issue writ of *certiorari*. In support of his aforesaid contention, he has placed reliance on a judgment delivered by the Hon'ble Supreme Court in the case of **General Manager, Electrical Rengali Hydro Electric Project, Orissa & Ors. v. Giridhari Sahu & Ors.**, reported in **(2019) 10 SCC 695**.
7. By drawing attention of this Court to the grounds made out in the writ petition, it is submitted that the writ petition proceeds on the basis of apprehension. The petitioner does not seek adjudication of his rights but is only interested in obtaining a prohibitory order which ordinarily ought not to be granted by this Court. In the facts,

it is submitted that the writ petition should not be entertained and should be dismissed.

8. *Per contra*, Mr. Bhattacharyya, learned advocate appearing on behalf of the petitioner has taken me to the order passed in Form GST DRC -07 dated 22nd June, 2023. He submits that such an order had been passed in connection with the proceeding under section 74 of the said Act. Challenging the aforesaid order, the petitioner had preferred an appeal by invoking the provisions of Section 107 of the said Act. The appellate authority had erroneously by its order dated 23rd April, 2024, by in effect observing that the order impugned to have been properly passed, thereby, without interfering with the order impugned had rejected the appeal. According to Mr. Bhattacharyya, the aforesaid finding is absolutely erroneous. However, the petitioner has been prevented from challenging the same, inasmuch as, the appellate tribunal under Section 112 of the said Act, is yet to be constituted.

9. By placing before this Court, the Notification dated 18th March, 2020, bearing Circular No. 132/2/2020-GST, it is submitted that the prescribed time limit for filing an appeal before the appellate tribunal under Section 112 of the said Act, has been extended in a manner that the same shall be computed from the date on which the President or the state President enters office of the appellate tribunal. Having regard to the aforesaid, it is submitted that since, the time to challenge the orders which are appealable before the

appellate tribunal have been extended, the order/s which are applicable before the tribunal should not be enforced till such time, the time to prefer the appeal in terms of the above Notification, expires. It is submitted that in similar set of facts the Hon'ble Division Bench of Bombay High Court in the case of ***Rochem India Pvt. Ltd. v. Union of India & Ors.***, in WP No. 10883 of 2019 reported in **(2023) 111 GSTR 218 (Bom) (DB)**, had been pleased to dispose of the writ petition by directing that the orders impugned shall not be given effect, until two weeks after the period prescribed for filing an appeal as under Clause 4.3 of the Circular dated 18th March, 2020 is over. He has also placed reliance on the judgment delivered by the Hon'ble Division Bench of this Court in the case of ***India Tyre & Rubber Company India Ltd. & Anr. v. State of West Bengal & Ors.*** in MAT 2527 of 2023 on 6th February, 2024 as also judgment delivered in the case of ***Jai Venktesh Concast Private Limited & Anr. v. The Deputy Commissioner of State Tax, ITC Investigation Unit & Ors.*** in MAT 720 of 2023 on 12th May, 2023. In both the aforesaid cases, the Hon'ble Division Bench while admitting the appeal had been pleased to stay the recovery proceeding without imposing any pre-condition.

10. Having regard thereto, he submits that there is no fetter in exercise of jurisdiction by this Court. The judgment relied by the respondents are distinguishable on facts and no reliance ought to be placed on the same. The objection as to maintainability should

fail. This Court considering the fact that the petitioner has been prevented from preferring the appeal before the appellate tribunal by reasons of the same not been constituted, may be pleased to grant appropriate relief to the petitioner.

11. Heard the learned advocates appearing for the respective parties and considered the materials on record. Taking note of the reliefs prayed for in the present writ petition, the primary issue that falls for consideration having regard to the argument advanced by Mr. Ray, the learned Government Pleader, is whether this Court can exercise its jurisdiction to grant relief to the petitioner by issuance of a writ in the nature of prohibition notwithstanding, the writ petitioner not challenging the orders which he claims to have been passed erroneously.

12. It is the writ petitioner's case that the determination made by the proper officer by issuing an order in Form GST DRC -07 dated 22nd June, 2023 thereby, determining the penalty payable by the petitioner, formed the subject matter of challenge in the appeal under Section 107 of the said Act. The appellate authority by its order dated 23rd April, 2024, while interfering with the order passed by the proper officer had modified quantum of the penalty leviable on the petitioner. According to the petitioner, the determination so made by the appellate authority is erroneous and that the petitioner is not liable to make payment of tax and penalty. Interestingly, however, the determination made by the appellate authority in its

order dated 23rd April, 2024 does not form subject matter of challenge in the writ petition. It is noticed that the writ petitioner has a statutory remedy in the form of an appeal under Section 112 of the said Act. Unfortunately, the appellate tribunal under Section 112 of the said Act, is yet to be constituted.

13. Mr. Bhattacharyya, has drawn the attention of this Court to the Notification dated 18th March, 2020, which in effect extends the period of limitation for challenging the orders which are appealable before the appellate tribunal under Section 112 of the said Act, so as to compute the period of limitation from the date when the President or the State President in the appellate tribunal enters office. To morefully appreciate the above, the relevant paragraph of the aforesaid Notification is extracted hereinbelow:-

“4.3. Hence, as of now, the prescribed time limit to make application to appellate tribunal will be counted from the date on which President or the State President enters office. The appellate authority while passing order may mention in the preamble that appeal may be made to the appellate tribunal whenever it is constituted within three months from the President or the State President enters office. Accordingly, it is advised that the appellate authorities may dispose all pending appeals expeditiously without waiting for the constitution of the appellate tribunal.”

14. From the above, it would be apparent and clear that the right of the petitioner to maintain an appeal under Section 112 of the said Act has been kept intact, at least, till such time the tribunal is

constituted. I find that Mr. Bhattacharyya by citing the above Notification and the judgment delivered by the Hon'ble Division Bench of the Bombay High Court in the case of ***Rochem India Pvt. Ltd.*** (supra), has tried to impress upon this Court that unless, the time to file the appeal before the appellate tribunal expires the orders which are appealable before the tribunal ought not to be enforced.

15. It, however, appears from the judgment delivered in ***Rochem India Pvt. Ltd.*** (supra) that challenging an appellate order the writ petition was filed before the Bombay High Court and it is in connection therewith, the Bombay High Court had granted such relief. Incidentally, in the present case, there is no such challenge to the appellate order.

16. Since, in the instant case maintainability of the writ petition having regard to issuance of a writ of prohibition is an issue, without the petitioner insisting for issuance of writ in the nature of *certiorari*, it would be relevant to note the observations made by the Hon'ble Supreme Court in the case of ***S. Govinda Menon*** (supra).

Paragraph 5 of the said judgment is extracted hereinbelow:

“5. The jurisdiction for grant of a writ of prohibition is primarily supervisory and the object of that writ is to restrain courts or inferior tribunals from exercising a jurisdiction which they do not possess at all or else to prevent them from exceeding the limits of their jurisdiction. In other words, the object is to confine courts or tribunals of inferior or limited jurisdiction

within their bounds. It is well settled that the writ of prohibition lies not only for excess of jurisdiction or for absence of jurisdiction but the writ also lies in a case of departure from the rules of natural justice (see Halsbury's Laws of England, 3rd Edn. Vol.11, p.114). It was held for instance by the Court of Appeal in Kina v. North that as the order of the Judge of the Consistory Court of July 24, 1925 was made without giving the vicar an opportunity of being heard in his defence, the order was made in violation of the principles of natural justice and was therefore an order made without jurisdiction and the writ of prohibition ought to issue. But the writ does not lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings. It is also well established that a writ of prohibition cannot be issued to a court or an inferior tribunal for an error of law unless the error makes it go outside its jurisdiction. A clear distinction must therefore be maintained between want of jurisdiction and the manner in which it is exercised. If there is want of jurisdiction then the matter is coram non judice and a writ of prohibition will lie to the court or inferior tribunal forbidding it to continue proceedings therein in excess of its jurisdiction".

17. From the above, it would transpire that ordinarily a writ of prohibition is issued for exercising supervisory jurisdiction with an object to restrain courts or inferior tribunal from exercising a jurisdiction which they do not possess at all or to prevent them from exceeding the limits of their jurisdiction. In other words, to keep such courts/tribunals within their bounds.

18. To emphasize the scope and jurisdiction as regards exercise of power to correct a final order passed by an inferior tribunal and the scope and exercise of jurisdiction to correct errors of jurisdiction committed by inferior courts and Tribunals, the learned Government pleader has placed reliance in the case of **General Manager, Electrical Rengali Hydro Electric Project, Orissa & Ors.** (supra). It appears that the Hon'ble Supreme Court after consideration of several authorities on the subject, including the case of **Yakub v. K. S. Radhakrishnan**, reported in **AIR 1964 SC 477**, had categorically identified the jurisdiction to issue a writ of certiorari and a writ of prohibition, and it is in that context the Hon'ble Supreme Court in paragraph 28 thereof was, *inter alia*, pleased to observed as follows:

“28. On the conspectus of the decisions and material, we would hold as follows: the jurisdiction to issue writ of certiorari is supervisory and not appellate. The Court considering a writ application of certiorari will not don the cap of an appellate court. It will not reappreciate evidence. The writ of certiorari is intended to correct jurisdictional excesses. A writ of prohibition would issue when a tribunal or authority has not yet concluded its proceedings. Once a decision is rendered by a body, it is amenable to certiorari jurisdiction, certiorari could be issued when a jurisdictional error is clearly established. The jurisdictional error may be from failure to observe the limits of its jurisdiction. It may arise from the procedure adopted by the body after validly assuming jurisdiction. It may act in violation of principles of

natural justice. The body whose decision which comes under attack may decide a collateral fact which is also a jurisdictional fact and assume jurisdiction. Such a finding of fact is not immune from being interfered with by a writ of certiorari. As far as the finding of fact which is one within the jurisdiction of the court, it is ordinarily a matter “off bounds” for the writ court. This is for the reason that a body which has jurisdiction to decide the matter has the jurisdiction to decide it correctly or wrongly. It would become a mere error and that too an error of fact. However, gross it may amount to, it does not amount to an error of law. An error of law which becomes vulnerable to judicial scrutiny by way of certiorari must also be one which is apparent on the face of the record. As held by this Court in Hari Vishnu Kamath [Hari Vishnu Kamath v. Ahmad Ishaque, AIR 1955 SC 233], as to what constitutes an error apparent on the face of the record, is a matter to be decided by the court on the facts of each case. A finding of fact which is not supported by any evidence would be perverse and in fact would constitute an error of law enabling the writ court to interfere. It is also to be noticed that if the overwhelming weight of the evidence does not support the finding, it would render the decision amenable to certiorari jurisdiction. This would be the same as a finding which is wholly unwarranted by the evidence which is what this Court has laid down (see Parry & Co. Ltd. [Parry & Co. Ltd. v. P.C. Pal, AIR 1970 SC 1334 : (1969) 2 SCR 976]).”

19. Having regard to the same, it would be explicitly clear that though, both the writ of certiorari and prohibition may be issued for

correcting errors of jurisdiction, however, a writ of *certiorari* is intended to correct a jurisdictional excess once, a decision is rendered, on the other hand a writ of prohibition could be issued while the Tribunal or Authority is yet to conclude the proceeding. Having regard thereto, it becomes explicitly clear that in the given facts wherein a determination has already been made by the appellate authority under Section 107 of the said Act, there may be little scope for exercise of jurisdiction by issuance of writ in the nature of prohibition.

20. Although, the matter may have rested here, however, as the petitioner contends that though its right to appeal is kept intact, yet by reasons of non-constitution of the tribunal, it has been prevented from preferring the appeal, this Court has proceeded to consider whether in the facts of the case grant of interim relief is permissible. On the issue that no writ should be issued only for the purpose of granting interim relief, reliance has been placed on the judgment delivered in the case of ***State of Orissa*** (supra). It is noticed that the Hon'ble Supreme Court has noted that if the Court is of the opinion that there was no other convenient or adequate remedy open to the petitioner, discretion lies with the Court to investigate the case on its merits and come to a decision as to whether the petitioner succeeds in establishing that there was an infringement of any legal right which entitled him to relief.

21. Although, Mr. Bhattacharyya has emphasized that the legal right of the petitioner to prefer the appeal before the appellate authority has been infringed, I find that the petitioner has not come forward to examine his rights *qua* the order passed either by the proper officer on 22nd June, 2023 or by the appellate authority on 23rd April, 2024.
22. Having regard thereto, I am of the view, that this is not a fit case for exercising discretion in favour of the petitioner, especially when the petitioner only insists for deferring the recovery proceeding without the petitioner seeking adjudication of its rights.
23. Although, Mr. Bhattacharyya, by placing reliance on the judgment delivered by the Hon'ble Division Bench of this Court in ***India Tyre & Rubber Company India Ltd.*** (supra) and ***Jai Venktesh Concast Pvt. Ltd.*** (supra) has tried to impress that the Hon'ble Division Bench had stayed the recovery proceeding, I find that the circumstances under which such stay had been granted is entirely different. In the case of ***Jai Venktesh Concast Pvt. Ltd.*** (supra) the challenge in the writ petition was with regard to the State and the Central authorities proceeding together and the effect of Section 6(2)(b) of the West Bengal Goods and Services Tax Act, 2017. Qua such challenge while admitting the writ petition, the Coordinate Bench had conditionally granted an interim order subject to the writ petitioner therein making payment of 20% of the disputed amount of tax. Consideration the peculiar facts therein, the Hon'ble

Division Bench of this Court presided over by the Hon'ble the Chief Justice in an intra Court appeal was, *inter alia*, pleased to stay the recovery proceeding without imposing any pre-condition. In the case of ***India Tyre & Rubber Company India Ltd.*** (supra), the order passed by the appellate authority formed the subject matter of challenge in the writ petition. The Coordinate Bench while entertaining the writ petition had passed a conditional order directing the petitioner to make payment of further sum of 20% of the disputed tax. In connection there with an intra-court appeal was preferred. In the given facts and taking note of the quantum of payment made by the petitioner which in such case exceeded 30% of the disputed tax and which constituted sufficient compliance of the requirement of Section 112 of the said Act that the Hon'ble Division Bench was, *inter alia*, pleased to restrain the authorities from initiating any coercive action against the petitioner.

24. In the aforesaid case the petitioners therein had come forward to examine their right and the Court in its discretion while examining such right as and by way of interim measure, pending final adjudication had granted interim relief. In view thereof, none of the judgments relied on by Mr. Bhattacharyya, learned advocate appearing on behalf of the petitioner comes in his aid as regards deferring recovery proceeding indefinitely till constitution of the tribunal by issuance of a writ in the nature of prohibition.

25. The petitioner having not come forward to examine his rights as noted above, the writ petition fails and is accordingly dismissed without any order as to costs.
26. Urgent Photostat certified copy of this order, if applied for, be made available to the parties upon compliance of requisite formalities.

(Raja Basu Chowdhury, J.)

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