Ashvini Narwade

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 8 OF 2024

NCDEX Markets Ltd. … Petitioner

Versus

Union of India & Ors. …Respondents

Mr. V. Sridharan, Sr. Advocate a/w. Mr. Rajesh Oswal, Mr. Shanmuga Dev i/b. Mr. Sriram Sridharan for the Petitioner.

Mr. Jitendra Mishra a/w. Ms. Maya Majumdar for Respondent Nos.1 to 3.

CORAM: G. S. KULKARNI & FIRDOSH P. POONIWALLA, JJ.

DATED: 26th MARCH 2024

P.C.

1. We have heard Mr. Sridharan, learned Senior Advocate for the Petitioner and Mr. Mishra for the Respondents. This Petition has been filed under Article 226 of the Constitution of India praying for the following reliefs:-

> a) That this Hon'ble Court be pleased to issue a Writ of Mandamus or a writ in the nature of Mandamus or any other writ, order or direction under Article 226 of the Constitution of India annulling and quashing the Show Cause Notice No. DGGI/MZU/I&IS'B'/12(4)16/2020 dated 27.9.2023(Exhibit "A") issued by the Respondent No. 2;
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> b) That this Hon'ble Court be pleased to issue a writ of Prohibition or a writ in the nature of Prohibition or any other appropriate writ or order or direction under Article 226 of the Constitution of India Prohibiting the Respondents themselves, their officers and subordinates to refrain from taking any steps or proceedings in pursuance of and/or in furtherance of and/or in adjudication of the impugned Show Cause Notice No. DGGI/MZU/I&IS'B'/12(4)16/2020 dated 27.9.2023 (Exhibit "A") issued by the Respondent No. 2;

> c) That pending the hearing and final disposal of this Petition, the Respondents by themselves, their officers, subordinates, servants and agents be restrained by an interim order and injunction of this Hon'ble Court from taking any steps or proceedings in pursuance of and/or in furtherance of and/or in adjudication of the impugned Show Cause Notice No.DGGI/MZU/I&IS'B'/12(4)16/2020 dated 27.9.2023 (Exhibit "A") issued by the Respondent No. 2;
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> d) for ad-interim reliefs in terms of the prayers above;
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> e) for costs of this Petition; &
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> f) for such further and other reliefs as the nature and circumstances of the case may require."

2. The Petitioner is engaged in the business of providing e-auction service which facilitates interface between buyers and sellers of various agricultural and non-agricultural commodities. It hosts e-auction software platform which substantially enables the price discovery of the agricultural commodities. It has been holding GST registration in 23 states of India. It is the case of the Petitioner that it neither displays nor delivers any commodity or product on the portal for buying or selling. Petitioner merely displays the tenders of the members (auctioneers) who wish to sell or buy such commodities through online bidding/e-auction facility. Consequent to entering into the contract, the dispatch and acceptance of goods by members/participants is an offline process and does not take place on the Petitioner's platform. It is contended that payment for the contract can either be settled through the Petitioner's platform, or it can be settled directly between the buyer and seller. The Petitioner does not guarantee settlement of transactions by way of delivery of goods or payment. The Petitioner merely charges transaction fees for providing

the platform to its members for the purpose of e-auction. Such platform is utilized for auctions of taxable as well as exempted goods.

3. It is contended by the Petitioner that, in February 2020, Respondent No.2 had initiated investigation and issued summons to the Petitioner for seeking certain data and explanation regarding its business model, which was furnished by the Petitioners from time to time. The Petitioner also furnished information in March 2020 September 2021, in response to summons issued to the Petitioner. An issue was raised in regard to the applicability of Section 52 of the Central Goods and Services Tax Act, 2017 (for short **"the CGST Act"**) in respect of the transactions carried out on the Petitioner's platform. On 14th October 2021, the Petitioner submitted its reply to the summons explaining that the provisions of Section 52 of the CGST Act are not applicable to the Petitioner and hence it was not liable to collect TCS.

4. In support of such contention that Section 52 of the CGST Act is not applicable, legal opinions from experts were obtained and were submitted for consultation of the concerned officer of the department. Such legal opinions, according to the Petitioner, categorically state that Section 52 of the CGST Act was not applicable on exempt supplies.

5. It is the case of the Petitioner that, from 17th March 2022 to 23rd August 2022, the Petitioner had submitted certificates obtained from suppliers stating

that applicable GST has already been discharged by the suppliers and hence the demand of TCS on same supply is incorrect and not maintainable.

6. Despite all such material being submitted by the Petitioner, the Deputy Commissioner, State Tax, Mumbai, issued a communication dated 5th July 2023 intimating the Petitioner about the unpaid TCS liability amounting to Rs. 380.69 crores. The Petitioner, in response to the same, submitted its reply dated 28th July 2023, stating that the Petitioner is not liable to pay any TCS under Section 52 of the CGST Act.

7. It is on such backdrop, on 21st August 2023, Respondent No.2, the Additional Director General of Goods and Service Tax Intelligence, Mumbai, issued an intimation in form DRC-01A to the Petitioner intimating that the Petitioner is liable to pay differential TCS liability amounting of Rs.376,33,56,706/-. The Petitioner filed its reply dated 28th August 2023 against DRC-01 stating that the Petitioner is not liable to discharge any TCS liability. It is in this conspectus that the impugned Show Cause Notice dated 27th September 2023 came to be issued to the Petitioner proposing to recover the said amount as intimated in DRC-01A, along with interest and penalty.

8. The primary contention, as urged by Mr. Sridharan, is that Section 73 of the CGST Act 2017 cannot be invoked for recovery of TCS under Section 52 of the CGST Act. It is submitted that Section 73 of the CGST Act does not provide for recovery of TCS not collected under Section 52(1) of the CGST

Act. It is also submitted that there is no explicit provision under Section 52 of the CGST Act which provides for recovery under Section 73 or Section 74, when the tax payers fails to deposit TCS unlike Section 51(7) of the CGST Act which provides for recovery of TDS under Section 73 or Section 74. In the absence of machinery production for recovery, the Department cannot recover such amounts. Thus it is contended that the Respondents are not correct in issuing the show cause notice in person as the very provisions of Section 52 of the CGST Act are not applicable to the Petitioner.

9. On the other hand, Mr. Mishra, learned Counsel for the Respondent, has opposed the contentions. Referring to the reply affidavit as filed, he submitted that the Respondents have appropriately invoked the provisions as set out in the show cause notice and that, in the facts and circumstances of the case, the Petitioner ought to participate in the adjudication of the show cause notice on all the issues.

10. Mr. Mishra has also made submissions to justify the applicability of the provisions, including Section 52 of the IGST.

11. Having heard learned Counsel for the parties and having perused the record, we are of the opinion that in the peculiar facts and circumstance of the case, when the Petitioner has raised an issue of the maintainability of the alleged demand on the ground that Section 52 of the CGST Act is not applicable, and more particularly considering the nature of the business and

transaction involved, it would be appropriate that the adjudicating officer considers the same as preliminary issues and decide the same first in accordance with law.

12. In this view of the matter, we propose to dispose of this Petition by permitting the Petitioner to raise such preliminary issues before the adjudicating officer and the same shall be taken into consideration and decided by him in accordance with law. Hence the following order:-

(i) The Petitioner shall raise all preliminary objections before the adjudicating officer in the context of the show cause notice in question.

(ii) Let such objections be placed in writing along with all supporting materials. The adjudicating officer shall hear the Petitioner on such preliminary objections and pass appropriate order on such preliminary objections before proceeding to adjudicate the show cause notice on the merits.

(iii) All contentions of the parties in that regard are expressly kept open.

(iv) In the event, if the order that is passed on the preliminary issues is adverse to the Petitioner, all remedies to the Petitioner are expressly kept open.

13. As we are informed that the show cause notice would be required to be adjudicated on or before 30th April 2024, let the Petitioner appear before the

adjudicating officer on 1st April 2024. The adjudicating officer shall make an endeavour to pass appropriate orders.

14. All contentions of the parties are expressly kept open.

15. Petition stands disposed of in the aforesaid terms. No costs.

(FIRDOSH P. POONIWALLA, J.) **(G. S. KULKARNI, J.)**