IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.13714 of 2024

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M/s The Freyssinet Prestressed Concrete Co. Ltd. a Company incorporated under the Provisions of the Companies Act, 1956 Having its Registered Office Situated at 6/B, 6th Floor, Sterling Centre, Dr. Annie Besant Road, Worli, Mumbai-400018 through its Managing Director, Sanjay Harbanslal Kapoor, Male aged about 64 Years, Son of Late Harbanslal Kapoor, Resident of 2010, Angle Land, CHS, 8th Floor, Flat No. 8, Naigaon Cross Road, Wadala, P.S. R.A. Kidwai Marg, District-Mumbai (Maharashtra).

... ... Petitioner

Versus

1. The Union of India through the Secretary, Ministry of Finance, Department of Central Excise, New Delhi.
2. The Commissioner of Central Excise and Service Tax, 3rd Floor, Central Revenue Building (Annexe), Bir Chand Patel Path, Patna.
3. The Joint Commissioner (AE), Central Excise and Service Tax, 3rd Floor, Central Revenue Building (Annexe), Bir Chand Patel Path, Patna.
4. The Superintendent of Central Excise (AE) Hqrs.), 3rd Floor, Central Revenue Building (Annexe), Bir Chand Patel Path, Patna.

... ... Respondents

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Appearance :

For the Petitioner/s : Mr. Gautam Kejriwal, Advocate
Mr. Mohit Agrawal, Advocate
Mr. Lokesh Kumar, Advocate

For the Respondent/s : Mr. K.N. Singh, Additional Solicitor General
Mr. Anshuman Singh, Senior SC

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
and
HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA

ORAL ORDER

(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

6 13-02-2025 Heard Mr. Gautam Kejriwal, learned counsel for the petitioner and Dr. K.N. Singh, learned ASG assisted by Mr. Anshuman Singh, learned Senior Standing Counsel for the CGST and CX.

2. This writ application has been preferred seeking the following reliefs:-

> "(i) For quashing of the ex parte order dated

13.03.2024 passed by Sri. P.K. Katiyar, the Learned Principal Commissioner, Central GST and Central Excise, Patna – 1 communicated vide letter No. 1683 dated 13.03.2024 by which the Respondent has unauthorizedly and arbitrarily passed an order in respect of the periods 2006-07 to 2009-10 declaring that the Petitioner is liable to pay Service Tax under Section 73(1) of the Finance Act, 1994 read with Section 174 of the CGST Act, 2017 to the tune of Rs.4,57,41,043/-, Interest under section 75 of the Finance Act read with Section 174 of the CGST Act and Penalty under section 78 of the Finance Act, 1994 read with Section 174 of the CGST Act for a sum of Rs.4,57,41,043/-, and further Penalty under Section 77(1)(a) of the Finance Act read with Section 174 of the CGST Act to the tune of Rs.10,000/- and has accordingly created the demand as being wholly illegal and without any sanction of law;

(ii) For a declaration that the entire proceeding initiated against the Petitioner right from issuance of Summons for making the enquiry is fully without jurisdiction and contrary to the provisions of Finance Act, 1994 in respect of Service Tax;

(iii) For a declaration that in view of the definition of taxable service under section 65(105)(zzzza) of the Finance Act, 1994 (Service Tax) the works contract for the construction/repair of bridge has been excluded from the purview of Service Tax;

(iv) For a declaration that the Government of India issued a Clarificatory Notification vide Notification No. 24/2009 dated 27.07.2009 to the effect that the Management Maintenance for repair of roads was exempted from the provisions of the Service Tax Act;

(v) For a declaration that proceeding under section 73 of the Finance Act, 1994 (Service Tax) in the facts of the presence case has become hopelessly time barred as no notice

> was issued and/or served on the Petitioner within a period of one year in terms of Section 73(1) of the Finance Act, 1994;
> (vi) For a declaration that in the facts of the present case the period of issuance of notice would have been one year only and not the period of five years of extended notice as there was no question of any element of fraud, collusion or willful mis-statement or suppression of fact or contravention of any provisions of Chapter I of the Finance Act, 1994; and for any other relief[s] for which the Petitioner may legally be found entitled to in the facts and circumstances of the present case."

3. In the earlier round of litigation, the petitioner challenged the show cause notice dated 24.12.2009 and the demand-cum-show cause notice vide Letter No. 2794 dated 18.03.2010 giving rise to CWJC No. 9292 of 2010. The said writ application was admitted vide order dated 29.11.2010.

4. In the order dated 29.11.2010, the Hon'ble Division Bench recorded the statement of learned counsel for the Department in the following words:- "… She states that until further order is made on this petition in respect of interim arrangement pending the petition, the respondents will not take coercive steps against the petitioner pursuant to the impugned demand-cum-show cause notice."

5. The said writ application came to be disposed of vide order dated 25.11.2021. While disposing of the said writ application, this Hon’ble Court granted liberty to the petitioner to take the recourse to such alternative remedies as are otherwise available in accordance with law.

Submissions on behalf of the Petitioner

6. The grievance of the petitioner is that after disposal of CWJC No. 9292 of 2010, the Respondent Authorities were sitting idle over the matter and all of a sudden, a notice for personal hearing with respect to the show cause-cum-demand notice dated 18.03.2010 was served on 07.02.2024 in the Mumbai office of the petitioner.

7. It is submitted that apparently, the notice was sent after about two years two months from the date of disposal of CWJC No. 9292 of 2010. It is submitted that in such circumstance, the period of limitation prescribed under sub-section (4B) of Section 73 of the Finance Act, 1994 (hereinafter referred to as the ‘Act of 1994’) elapsed. It is also submitted that in absence of any explanation showing that the determination could not have taken place possibly within the prescribed period of limitation of one year, the impugned order is liable to be held bad in law. Reliance in this regard has been placed on the judgment of this Court in **CWJC No. 18398 of 2023 (M/s Kanak Automobiles Private Limited vs. the Union of India**

and Others).

8. Learned counsel has also submitted that the work undertaken by the petitioner would come within the meaning of exempted service. He relies upon Section 65 (105(zzzza) to submit that it excludes works contract for roads and bridges.

<u>Submissions on behalf of the Respondents</u>

9. Per contra, the submission of learned ASG is that this writ application is not fit to be entertained as the petitioner has not availed an alternative equally efficacious remedy of appeal before the Tribunal within a period of three months from the date of communication of the order. It is submitted that in fact, from the averments made in the writ application itself, it would appear that the petitioner was advised to prefer an appeal and for this purpose, the petitioner deposited 7 ½ percent of the pre-requisite amount for filing statutory appeal on 31.07.2024.

10. It is submitted that prior to passing of the impugned order, the adjudicating authority served two notices upon the petitioner but the petitioner did not submit his response as a result whereof the adjudicating authority had no option but to proceed with the adjudication process and pass a final order. Attention of this Court has been drawn towards the fag end of paragraph '23' of the impugned order wherein it is categorically recorded as under:-

> "Accordingly, letters C. No. 621 dated 19.01.2024 and 1351 dated 07.02.2024 were issued to the said noticee for appearing in personal hearing of the case on 06.02.2024 and 22.02.2024 respectively. But, the said noticee did not appear for personal hearing and also did not reply to the said letters in any manner."

11. This assertion of the adjudicating authority in the impugned order has not been controverted by the petitioner in the writ application.

Consideration

12. Having heard learned counsel for the petitioner and learned ASG for the CGST and CX, in the facts of the present case, what is evident to this Court is that learned counsel for the petitioner had withdrawn CWJC No. 9292 of 2010 with liberty to take recourse to such alternative remedies as are otherwise available in accordance with law. No doubt, this Court granted liberty to the petitioner to file a fresh writ petition on the same and subsequent cause of action if the need so arise, that would not have any bearing on the present case where admittedly the petitioner has got an alternative remedy of appeal and in fact, in order to avail that remedy, the petitioner had already deposited 7 ½ percent of the pre-deposit requisite amount.

13. Learned counsel for the petitioner does not dispute that the questions which are being raised before this Court may be raised before the Appellate Authority as well and a decision on all those issues may be invited from the Appellate Authority.

14. Learned counsel has raised an apprehension that perhaps the Appellate Authority may not allow the petitioner to place on record the relevant documents/materials which they could not place before the adjudicating authority but this apprehension of learned counsel for the petitioner has been contested by learned ASG who has submitted that there is no such embargo in the statute which prohibits the Appellate Authority from taking into consideration the relevant materials.

15. In the case of **Godrej Sara Lee Ltd. vs. Excise and Taxation Officer-cum-Assessing Authority and Others** reported in **2023 SCC OnLineSC 95 (para '4'),** the Hon'ble Supreme Court has taken a view as to the circumstances under which the petitioner may be relegated to the alternative remedy of appeal. In the case of **Godrej Sara Lee Ltd.** (supra) the Hon'ble Supreme Court observed *inter alia* in paragraph '4' as under:-:-

> "**4.** ……….. It is axiomatic that the High Courts (bearing in mind the facts of each particular case) have a discretion whether to entertain a

writ petition or not. One of the self-imposed restrictions on the exercise of power under article 226 that has evolved through judicial precedents is that the High Courts should normally not entertain a writ petition, where an effective and efficacious alternative remedy is available. At the same time, it must be remembered that mere availability of an alternative remedy of appeal or revision, which the party invoking the jurisdiction of the High Court under article 226 has not pursued, would not oust the jurisdiction of the High Court and render a writ petition "not maintainable". In a long line of decisions, this court has made it clear that availability of an alternative remedy does not operate as an absolute bar to the "maintainability" of a writ petition and that the rule, which requires a party to pursue the alternative remedy provided by a statute, is a rule of policy, convenience and discretion rather than a rule of law. Though elementary, it needs to be restated that "entertainability" and "maintainability" of a writ petition are distinct concepts. The fine but real distinction between the two ought not to be lost sight of. The objection as to "maintainability" goes to the root of the matter and if such objection were found to be of substance, the courts would be rendered incapable of even receiving the lis for adjudication. On the other hand, the question of "entertainability" is entirely within the realm of discretion of the High Courts, writ remedy being discretionary. A writ petition despite being maintainable may not be entertained by a High Court for very many reasons or relief could even be refused to the petitioner, despite setting up a sound legal point, if grant of the claimed relief would not further public interest. Hence, dismissal of a writ petition by a High Court on the ground that the petitioner has not availed the alternative remedy without, however, examining whether an exceptional case has been made out for such entertainment would not be proper."

16. In the totality of the facts and circumstances, we refrain from entertaining the writ application at this stage and relegate the petitioner to statutory remedy of appeal, if so advised.

17. If a duly constituted appeal is preferred by the petitioner within a period of eight weeks from today, the same shall be considered by the Appellate Authority and in case, a question of limitation arises for consideration, the Appellate Authority shall consider the same keeping in view the fact that the petitioner was pursuing this writ application since the date of its presentation in the Registry on 19.08.2024. The period spent before this Court would be liable to be excluded.

18. This writ application stands disposed of with aforesaid observations.

19. For a period of eight weeks from today, no coercive action shall be taken against the petitioner.

(Rajeev Ranjan Prasad, J)

(Ramesh Chand Malviya, J)

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